



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

To: Parliament of Victoria, Family and Community Development Committee

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1. Introduction

The Law Institute of Victoria (LIV) is the peak body for lawyers in Victoria, with over 14,500 members.

Our role is to champion law reform and access to justice for all on behalf of our members. Key concerns for our members include protecting rights and supporting access to justice.¹

Access to justice is a central tenet of democracy and depends on the maintenance and promotion of the rule of law. Access to justice includes access to competent and independent legal representation to establish and defend one's rights. It relies on access to a fair hearing by an independent and impartial tribunal. It also includes access to appropriate remedies.²

This submission has been prepared by members of the LIV's Administrative Law and Human Rights Section committees with input from committee members of the Litigation, Criminal Law and Family Law Sections. The legal experience of our members includes acting as representatives in matters relating to criminal abuse of children by personnel in religious and other non-government organisations. We have drawn on this experience in preparing this submission.

We record, however, that LIV members might be constrained from providing details relevant to the terms of reference due to strict confidentiality agreements they have been required to sign when settlement has been obtained through an internal complaints process of a given religious organisation or in a civil law action. This hampers the ability of the LIV to make submissions on systemic issues and has also prevented legal practitioners sharing their professional expertise among themselves or with the LIV for the benefit of victims of criminal abuse.³

¹ In recent years, the LIV has campaigned for successive state governments to commit to supporting access to justice in a number of important areas relevant to this inquiry, including: reforming civil justice; funding legal aid; advocating restorative justice; promoting appropriate dispute resolution; and reforming tort law. Measures sought include law reform, justice program enhancements and funding commitments. See LIV publication, *Advocating Justice for All*, (2010) available at <http://www.liv.asn.au/About-LIV/Advocacy-and-Projects/Advocating-Justice-For-All>.

² Law Council of Australia Policy Statement *Rule of Law Principles* (March 2011) available at http://www.lawcouncil.asn.au/library/policies-&-guidelines/policies-guidelines_home.cfm. As noted by the Access to Justice Taskforce reporting to the Commonwealth Attorney-General's Department in 2009 '[t]he rule of law is the fundamental protection that gives people and organisations confidence that the society's rules (laws) will be respected and upheld' and '[a]ccess to justice is an essential element of the rule of law and supports democracy.' A Strategic Framework for Access to Justice in the Federal Civil Justice System, Report by the Access to Justice Taskforce, Attorney-General's Department, Australia, September 2009, p 1-2.

³ References to 'victims' refer to victims of criminal abuse or alleged criminal abuse by personnel of religious or other organisations unless otherwise stated.

2. Executive Summary

2.1. Process and powers of the Inquiry

In January 2012, the Protecting Victoria's Vulnerable Children Inquiry (the Cummins Inquiry) recommended that a formal investigation should be conducted into the processes by which religious organisations respond to the criminal abuse of children by religious personnel within their organisations.⁴ The Cummins Inquiry noted that 'the community is all too aware of the numerous cases of child abuse that have occurred within religious organisations or associations [...] Public commentary on past incidents of child abuse within such organisations and the perceived inadequacies with organisational responses is frequent and often damning.'⁵

In mid-April 2012, high rates of suicides among victims of abuse by the Catholic clergy were reported in the media, leading to renewed pressure on the Victorian Government from abuse victims' advocates and others to conduct an inquiry into clergy sexual abuse.⁶ On 17 April 2012, the Premier the Hon. Ted Baillieu made a referral to the Victorian Parliament Family and Community Development Committee (the Parliamentary Committee). The Parliamentary Committee has been requested to inquire into, consider and report to the Victorian Parliament on the processes by which religious and other non-government organisations respond to the criminal abuse of children by personnel within their organisations, including:

1. the practices, policies and protocols in such organisations for the handling of allegations of criminal abuse of children, including measures put in place by various organisations in response to concerns about such abuse within the organisation or the potential for such abuse to occur;
2. whether there are systemic practices in such organisations that operate to preclude or discourage the reporting of suspected criminal abuse of children to State authorities; and
3. whether changes to law or to practices, policies and protocols in such organisations are required to help prevent criminal abuse of children by personnel in such organisations and to deal with allegations of such abuse.

The Parliamentary Committee has issued a Submissions Guide, which outlines a series of topics and questions on which the Committee is seeking submissions.⁷ We note that the Parliamentary Committee is seeking specific submissions on law and legal processes, including (but not limited to) religious laws and practices, mandatory reporting, working with children checks and potential new laws. In this submission, the LIV provides a response on select questions from the Submission Guide or addresses issues otherwise relevant to the Inquiry terms of reference.

⁴ 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), (the Cummins inquiry), recommendation 48.

⁵ *Ibid.*, 352.

⁶ See e.g. 'Church's suicide victims' Nick McKenzie, Richard Baker and Jane Lee, *The Age*, 13 April 2012 and 'Inquiry looms as more suicides linked to sexual abuse by Catholic priests' Nick McKenzie, Richard Baker and Josh Gordon, *The Age*, 14 April 2012. Note also the claims against David Cyprus, a security guard at the Yeshivah College in Melbourne. See <http://www.haaretz.com/jewish-world/jewish-world-news/australian-sex-abuse-scandal-tars-name-of-venerated-chabad-rabbi-1.431373>; <http://www.theaustralian.com.au/news/nation/yeshiva-turned-blind-eye-to-sex-abuse-claims/story-e6frq6nf-1226130935332>.

⁷ Available at

http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Final_FCDC_CAIinROs_Submission_Guide.pdf.

The LIV welcomes the Inquiry but considers it highly regrettable that a royal commission, or board of inquiry with commensurate powers to a royal commission, was not called in Victoria. A royal commission would have been better equipped to address the serious nature of criminal abuse committed over many years and the lasting consequences faced by victims of criminal abuse in religious and other non-government organisations.

1. The LIV submits that the Parliamentary Committee should consider whether limitations on its powers have impeded its Inquiry, particularly with respect to receiving evidence from victims, and whether a royal commission should be recommended at the conclusion of the Inquiry.

We are concerned about the lack of privilege for any submissions not accepted at the discretion of the Parliamentary Committee. We are also concerned that victims of abuse will feel constrained by any confidentiality agreements they might have reached in settling a claim: in our view, the response to that concern in the Parliamentary Committee's Information Sheet on Parliamentary Privilege is not clear.

2. The LIV urges the Parliamentary Committee to make a more comprehensive and clearer public statement explaining the rules on privilege with respect to information that is the subject of a confidentiality agreement so as to ensure that religious personnel and victims understand their rights and obligations in making submissions or giving evidence during the course of the Inquiry.

2.2. Legal Issues

In this submission, we have examined the barriers to criminal and civil justice as well as legal issues arising from internal complaints processes, and we make recommendations aimed at improving the administration of justice with respect to the criminal abuse of children by religious organisations. Our recommendations are summarised below.

Upholding the rule of law: criminal justice and child protection laws

- ***State responsibility to investigate and prosecute crime***

The role of the State in investigating and prosecuting crime is an integral part of the responsibility of the State to protect children from crimes being committed against them. It is crucial that any deficiencies in Victoria's criminal justice system with respect to sex offence matters are addressed.

3. The LIV agrees with the Cummins Inquiry that the investigation and prosecution of crimes is properly a matter for the State and that any private system of investigation and compensation cannot fulfil the responsibility of the State to investigate and prosecute crime.

- ***Mandatory reporting of crimes***

We agree with the comments of the Cummins Inquiry that a mandatory obligation on religious personnel to report reasonable suspicions of child abuse to *police* should be contained in the *Crimes Act 1958* (Vic) rather than the *Children, Youth and Families Act 2005* (Vic) which is concerned with reports to the Department of Human Services under the child protection regime.

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4. The LIV supports recommendation 47 of the Cummins Inquiry, to the extent that it proposes requirements in the *Crimes Act 1958* (Vic) for mandatory reporting to police, extended to ministers of religion and personnel of religious organisations, where there is a reasonable suspicion a child or young person who is under 18 is being, or has been, physically or sexually abused by an individual within a religious or spiritual organisation.

The purpose of mandatory reporting in this context is not solely to protect the interests of the individual child being abused but to apprehend and deter perpetrators of these crimes and overcome systemic abuse. In the LIV's view, appropriate limitations on the scope of a non-reporting offence, and the inclusion of appropriate defences, could alleviate concerns expressed by the Cummins Inquiry that a mandatory reporting requirement where a victim is no longer a child would result in victims not being able to choose whether to report allegations once an adult. Section 2(1) of the *Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012* (Ireland) might be an appropriate model for an equivalent offence in Victoria.

5. Contrary to relevant findings of the Cummins Inquiry, the LIV urges this Inquiry to consider recommending that the mandatory reporting requirements extend to situations in which a child victim is an adult at the time that a reasonable suspicion of abuse arises.

A number of schemes protecting people who make complaints or disclosures in specific contexts are currently in place in Victoria, including the victimisation provisions under the *Equal Opportunity Act 2010* (Vic) and whistleblower protections under the *Whistleblower Protection Act 2011* (Vic).

6. The LIV recommends that a legislative regime be established to encourage or facilitate reporting to police by adult victims and other people with information about the commission of criminal abuse of children by providing protections from reprisals and defamation actions, for example, for any disclosures made pursuant to the proposed mandatory reporting requirements, or in the context of the independent oversight mechanism that we propose in recommendation 22 below.

7. The LIV also recommends that, for the avoidance of doubt, legislation should clarify that, in reporting criminal abuse to police, victims will not breach any confidentiality provision or release in a settlement agreement reached with a religious or other non-government organisation or with an individual.

In Victoria, section 127(1) of the *Evidence Act 2008* (Vic) provides that a person who is or was a member of the clergy of any church or religious denomination is entitled in any court proceeding to refuse to divulge that a religious confession was made, or the contents of a religious confession made, to the person when a member of the clergy. Section 127 applies to the admissibility of evidence in proceedings and, as it would appear that there is no privilege for religious confessions in common law in Victoria, such communications might not be protected in Victoria at pre-trial stages of proceedings.

8. The LIV suggests that, in adopting Recommendation 47 from the Cummins Inquiry, consideration should be given as to whether any ‘exemption for information received during the rite of confession’ should be worded in terms of a balancing test as proposed by the Australian Law Reform Commission and the Victorian Law Reform Commission when they considered the matter in the broader context of uniform evidence rules.

○ ***Compensation and financial assistance for victims of crime***

Victims of criminal abuse might be eligible for compensation orders made in the context of criminal proceedings under section 85B of the *Sentencing Act 1991* (Vic) and assistance before the Victims of Crime Assistance Tribunal (VOCAT).

9. The LIV recommends that the Committee seeks information on the extent to which the requirement to bring claims to VOCAT within two years of a criminal act occurring is having a significant impact in terms of excluding claims from victims of criminal abuse where abuse occurred as a child and they report it as adults.

10. The LIV also recommends that the Committee considers any possible amendments to the factors to be considered in providing an extension of the two-year requirement under section 29(3) of the *Victims of Crime Assistance Act 1996* (Vic) to provide expressly for the circumstances of victims of criminal abuse where abuse occurred as a child and they report it as adults.

Barriers to civil justice: facilitating redress

○ ***Limitations periods***

Our members report that many formal complaints or claims concerning criminal abuse of children are not commenced until years or decades have passed since the abuse occurred. In Victoria, statutory time limits operate to restrict the period within which civil law claims for compensation can be commenced.

11. The LIV recommends that the Victorian government legislate from a future date for a three year moratorium on limitation periods for people to bring forward claims in cases of criminal abuse in religious organisations. This will allow past victims of abuse to consider bringing an action where they would otherwise have been statute barred.

12. The LIV also recommends 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.

13. The LIV also recommends that where a victim makes a complaint directly to a religious organisation about criminal abuse, the ‘clock’ should stop for the purposes of calculating time under any applicable limitation periods, while any internal complaints handling or investigations process is being undertaken.

- **Corporate and organisational structure of religious orders and entities**

The organisational and corporate structure of most religious organisations poses a significant barrier to civil law claims. Religious organisations are typically unincorporated associations which cannot sue or be sued. Office-holders within a religious organisation might exist as corporations sole (a corporate structure effectively reduced to a single office-holder who can be liable for his or her predecessor's actions) or might have liability only as specific individuals. In addition, statutory corporations (known as 'trustee corporations') are created in some instances for the express purpose of holding property on trust for such religious entities.

14. The LIV recommends that where religious organisations have received complaints of criminal abuse of children by religious personnel, they be required by legislation to establish compensation funds for victims of abuse sufficient to meet the claims of victims, having regard to awards made at the conclusion of relevant civil proceedings.

15. 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.

16. The LIV also 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.

- **Vicarious liability**

Vicarious liability is the concept that liability for a wrongdoer's actions can attach to a third party who has an ability or duty to control the wrongdoer's conduct in certain circumstances. The extent to which a religious organisation can be vicariously liable in civil law for the criminal acts of its personnel is unclear.

We note that some statutory regimes provide for vicarious liability, such as the provisions in the Equal Opportunity Act 2010 (Vic) (s.109). We also note that recent decisions in the UK (e.g. *JGE v The English Province of Our Lady of Charity and The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2011] EWHC 2871 and [2012] EWCA Civ 938) have altered the standard for vicarious liability sufficiently for a lack of an employment relationship to not be an impediment to imposing vicarious liability on a church for a priest's actions.

17. The LIV recommends 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.

- **Access to evidence**

Another difficulty facing claimants relates to the state of evidence available concerning their claims. Particularly in cases where there has been a substantial gap between the alleged abuse and the time claimants first raise their experiences with others, our members report that it is not uncommon for documents to be lost, and witnesses to have either passed away or to have imperfect memories. Considering the onus of proof is on the claimant in a civil claim, this can often represent a very substantial obstacle to redress for legitimate claims.

18. The LIV recommends 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.

Internal complaints processes

o Procedural fairness and preserving rights

In addition to the state systems of criminal and civil justice, some religious organisations have established private internal complaints processes (see examples in Appendix 2).

A party to a civil or criminal proceeding has the right to have the proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing. A fair hearing includes adherence to the rules of procedural fairness.

Although internal complaint processes have the potential to settle claims without the need for civil litigation, they should not undermine the fundamental rights to which victims would be entitled, were they to pursue their claims through civil litigation or if criminal proceedings were initiated. We note in this regard the potential for evidence, information, and documents gathered through internal complaints processes to be used by the organisation or alleged perpetrator in subsequent proceedings and the potential unfairness that could arise if such evidence, information and documents were gathered in circumstances where procedural fairness was not afforded.

To ensure that a victim's right to a fair hearing is maintained, and having regard to the rights of children, the State should ensure that any internal process established by an organisation, at a minimum, affords victims appropriate aspects of procedural fairness.

There are examples of private organisations being required by legislation to comply with aspects of procedural fairness obligations, including:

- under the National Privacy Principles, organisations must give reasons for denying access to person information or refusing to amend personal information;
- employers are required to follow concepts of procedural fairness when taking disciplinary action and might otherwise face a claim for unfair dismissal; and
- private education providers are required to have an internal complaints handling and appeals process for overseas students.

19. The LIV recommends that the Committee should assess the extent to which the practices, policies and protocols in religious and other non-government organisations meet the requirements of procedural fairness, specifically for victims.

20. The LIV also recommends that, to assist religious and other non-government organisations to identify what the rules of procedural fairness require, guidance on procedural fairness could be provided by an appropriate statutory body (such as the oversight body suggested below in recommendation 22) with power to issue best practice guidelines.

21. The LIV also recommends that religious organisations should be required to disclose any relevant information to complainants during an internal complaint process.

- **Accountability and independent oversight**

In 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. Access to an external review increases accountability of private organisations and facilitates adherence to procedural fairness principles.

22. The LIV recommends that an independent statutory body should be established to provide an external review mechanism for internal response processes of religious and other non-government organisations based on principles of restorative justice.

23. The LIV also recommends that consideration be given as to whether the independent statutory body should also be able to receive complaints directly.

24. The LIV also recommends that powers of the independent body could include the issuing of guidelines for preventing abuse.

We note the following parameters to our submission.

We have not specifically addressed issues concerning criminal abuse of children by other non-government organisations, although our recommendations could be extended to non-government organisations where relevant. Moreover, any recommendation of the LIV should not be considered as being limited to criminal abuse of children by religious personnel if it could properly be applied in all cases of criminal abuse of children – whether by religious personnel, personnel in non-government organisations, personnel in government organisations or where there is no institutional involvement.

We have considered ‘criminal’ abuse largely in terms of sexual abuse of children, but note that it includes physical and other abuse of children. We describe the person who physically engages in the criminal abuse as the ‘perpetrator’, whether the abuse is alleged or proven, and the person against whom the abuse is committed or alleged to have been committed as the ‘victim’. Our understanding of ‘religious organisations’ is considered in general and broad terms but we have not defined it: our understanding of the term is not confined to any one religion and includes ‘organisations’ which do not have any legal personality, and organisations with a religious affiliation. We have taken ‘personnel’ to include people holding a formal position or role in the religious organisation and understand that it is not limited to ‘employees’ in any strict legal sense of that term.

2.3. Inquiry Hearings

The LIV urges the Inquiry to endeavour to identify systemic issues for reform and to make recommendations to improve access to justice for victims of criminal abuse. We would welcome an opportunity to give evidence at any hearings of the Inquiry.

3. Process and powers of the Inquiry

The LIV welcomes the Inquiry but considers it highly regrettable that a royal commission, or commission of inquiry with commensurate powers to a royal commission, was not called in Victoria.⁸ A royal commission would have been better equipped to address the serious nature of criminal abuse committed over many years and the lasting consequences faced by victims of criminal abuse in religious and other non-government organisations.⁹ A royal commission in Victoria could have been headed by a person with relevant experience, such as a retired judge,¹⁰ and would have been independent of any political process. It would have had the power to summon any person whose evidence is material to the inquiry, the power to examine a person under oath, the power to exclude the public from hearings in certain circumstances and powers of entry, inspection and possession of documents.¹¹

We note that, internationally, governments have provided significant scope and resources for the investigation of the handling of allegations of child sexual abuse. One example is the Irish Commission to Inquire into Child Abuse (commonly known as the Ryan Commission).¹² The Ryan Commission, established by an Act of Parliament, investigated child abuse in Irish institutions for children, the majority relating to residential schools operated by Catholic Church orders. It reported its findings in 2009. Numerous instances of abuse, and systemic problems were uncovered during the course of its investigation. Other reports from inquiries in Ireland include Murphy and Cloyne reports.¹³

The Parliamentary Committee has been given broad terms of reference to be fulfilled in a short period of time (1 year) with limited resources.¹⁴ The LIV is concerned that the Parliamentary Committee does not have sufficient powers and protections to undertake an investigation comparable to those conducted in other jurisdictions (see further in Appendix 1).

In particular, the LIV is concerned that, even though the *Parliamentary Committees Act 2003* (Vic) gives the Committee the legal power to send for persons, documents and other things,¹⁵ it is not clear under what circumstances the Committee could or would compel

⁸ The Governor in Council (acting on the advice of the executive) has the power to establish a royal commission under section 88B of the Victorian *Constitution Act 1975*, with powers contained in Division 5, Part 1 of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic). See further Adam Delacorn, *Royal Commissions in Victoria: 1854-2009*, Research Paper, No. 2, July 2011 Research Service, Parliamentary Library, Department of Parliamentary Services, Victoria. Note also Jason Gregory 'Parliament to Investigate Church' *Law Institute Journal*, June 2012, where LIV President Michael Holcroft is quoted in support of calls for a royal commission.

⁹ For more information on royal commissions, see Australian Law Reform Commission Discussion Paper, *Royal Commissions and Official Inquiries*, 15 August 2009.

¹⁰ 'Almost all royal commissions in Victoria established after 1930 were chaired by members of the judiciary.' Adam Delacorn above n.8, p54.

¹¹ See e.g. sections 18, 19B and 19E of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic). It is an offence not to attend without reasonable excuse or produce documents within the person's custody, possession or control following the issue of a summons for attendance / such production: s 19(1) or to refuse to be sworn or without lawful excuse fail to answer any question touching on the subject-matter of inquiry or produce any document: s 19(2). Such an offence is reported to a law officer for prosecution: s 20. The Commission's powers on evidence gathering are also importantly strengthened by ss 19C and 19D of the Act which abrogate the privilege from self-incrimination (in part) and legal professional privilege.

¹² The Commission to Inquire into Child Abuse, *Final Report* (May 2009). Available at <http://www.childabusecommission.ie/index.html> ('the Ryan Commission').

¹³ Commission of Investigation: Report into the Catholic Archdiocese of Dublin (July 2009), p 1, <http://www.dacoi.ie/> ('the Murphy Report'); Commission of Investigation: Report into the Catholic Diocese of Cloyne (December 2010), p 1, <http://www.dacoi.ie/> ('the Cloyne Report'). See also Francis D. Murphy, Helen Buckley, and Larain Joyce, *The Ferns Report*, presented by the Ferns Inquiry to the Minister for Health and Children (Dublin: Government Publications, October 2005).

¹⁴ We welcome the government statement of 13 August 2012 that additional resources have been provided to the Inquiry, with the appointment of the Hon Frank Vincent, AO, QC as Senior Legal Adviser to the Inquiry and Mr Mal Hyde, AO, APM as Senior Adviser to the Inquiry on investigation and policing-related matters. Despite these appointments, however, we remain concerned to ensure that the Inquiry is able to provide adequate scrutiny of this important public interest issue: resources cannot overcome inherent limits to the powers and jurisdiction of the Committee.

¹⁵ *Parliamentary Committees Act 2003* (Vic) s 28.

witnesses to answer questions.¹⁶ Adequate processes and powers for the collection of evidence are crucial to the Inquiry, to ensure that sufficient information is available to the Committee. They are also critical so that victims of past abuse can make submissions without legal consequences. For this particular Inquiry, the absence of an effective power to compel answers is important because victims who might have obtained settlements for past abuse from religious and other non-government organisations are likely to have been required to sign a confidentiality agreement precluding them from talking about the settled claim.

The LIV submits that the Parliamentary Committee should consider whether limitations on its powers have impeded its Inquiry, particularly with respect to receiving evidence from victims, and whether a royal commission should be recommended at the conclusion of the Inquiry.

The Submission Guide on the Inquiry website notes (at p10) that parliamentary privilege means that submissions cannot be used in court against the author of the submission or anyone else; that parliamentary privilege extends only to submissions that are accepted by the Committee; and that it is against parliamentary rules for anyone to try to stop the author of the submission from making a submission by threats or intimidation. An information sheet on 'Parliamentary Privilege and the Child Abuse Inquiry' has also been produced (Information Sheet).¹⁷ We are concerned about the lack of privilege for any submissions not accepted at the discretion of the Parliamentary Committee. We are also concerned that victims of abuse will feel constrained by any confidentiality agreements they might have reached in settling a claim: in our view, the response to that concern in the Information Sheet is not clear.

The LIV urges the Parliamentary Committee to make a more comprehensive and clearer public statement explaining the rules on privilege with respect to information that is the subject of a confidentiality agreement so as to ensure that religious personnel and victims understand their rights and obligations in making submissions or giving evidence during the course of the Inquiry.

¹⁶ Parliament of Victoria 'Appearing Before a Parliamentary Committee: Guidelines for the Rights and Responsibilities of Witnesses' provides that 'In general, a witness must answer all questions put as fully and frankly as before a court, inquest, royal commission or board of inquiry. Any person giving false evidence may be found guilty of contempt.' The authority for this statement is not clear. See further 'Research paper: An Introduction to Parliamentary Privilege', Parliament of Victoria (2010) which states (p26) 'The Victorian Parliament's contempt powers are based on those of the House of Commons, and thus include the power to reprimand Members or non-Members, to suspend or expel a Member, and to imprison. However, the power to impose a financial penalty, as can occur in the Commonwealth Parliament (and in Queensland and Western Australia, also by statute) is less certain, given that the House of Commons has not imposed fines since 1666.'

¹⁷ Parliament of Victoria: Family and Community Development Committee, *Parliamentary Privilege and Child Abuse Inquiry* (August 2012). Available at <http://www.parliament.vic.gov.au/fcdc/article/1915>.

4. Legal issues

Different avenues for legal redress, under both criminal and civil law, exist for people who have been criminally abused as children by personnel in religious organisations.¹⁸ These avenues are not mutually exclusive and criminal prosecutions brought on behalf of the state for offences against the criminal law are independent from claims for compensation that may be brought by individuals in civil proceedings against those personnel or their organisation. Another avenue for redress that is sometimes available for victims is private internal complaints processes established by religious or other organisations. However, the availability of redress under this process may be circumscribed by a requirement that the complaint or any settlement of the complaint be kept confidential or that, as a condition of any settlement of the complaint, the people concerned not to pursue other avenues of redress.¹⁹

There are many reasons why criminal and civil law actions might not be pursued or might prove unsuccessful.

Some of the barriers to criminal and civil justice are common to all cases of criminal abuse of children. For example, victims of sexual abuse might be reluctant to report the crimes for any number of reasons, including shame or a mistrust of the criminal justice system.²⁰ Another significant factor is that complaints of sexual abuse of children are often pursued long after the time of the abuse when the victim is an adult and psychologically capable of processing and acting on the past experiences.²¹ The delay could lead to problems in terms of proving the abuse either to a criminal or civil standard, particularly where the perpetrator is deceased and proceedings are brought against the deceased's estate or another person implicated in the abusive act. In the case of civil claims, statutory time limitations might bar a delayed claim.²²

Some of the barriers to criminal and civil justice are *specific* to cases of sexual abuse of children by personnel in religious organisations. It is for this reason that our submission is focused on religious organisations. For example, abused children and their families might subscribe to the faith of the religious organization and might not want to question or compromise people or organisations that are representative of their faith. They might fear alienation from their faith community. Where the perpetrator has taken a vow of poverty,²³ there might be no funds with which to pay damages and proving that an organisation or body is legally responsible for the acts of the perpetrator of the abuse might be a further obstacle. Additionally, religious organisations are sometimes treated differently in law from other organisations – for example, they might not have legal personality in some instances; they or

¹⁸ Note extensive list of cases compiled by Broken Rites Australia at <http://brokenrites.alphalink.com.au/>.

¹⁹ Such agreements might, for example, seek to release the parties to the settlement, and their staff or other personnel, from civil liability. There are, however, legal impediments to agreements seeking to release parties from criminal liability or requiring or asking people to enter into an agreement not to complain to prosecutorial authorities which raise serious issues and concerns as being contrary to public policy or amounting to suppression of evidence or interference with the administration of criminal justice or aiding and abetting, and potentially a crime itself. There are also legal impediments associated with requiring a person to do something that lawfully cannot be demanded in return for a settlement of a legitimate claim. Criminal contempt is an indictable offence at common law: *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 364; [1955] ALR 265. In *A v Hayden (No 2)* (1984) 156 CLR 532, Mason J said (at 556): "It is obvious that the public interest in the enforcement of the criminal law as an element in the administration of justice would be seriously impaired if the citizen were at liberty to assume in return for a benefit an obligation not to disclose information concerning the commission of a criminal offence". See also *Callaghan v O'Sullivan* [1925] VLR 664. Note, however, *Kerridge v Simmonds* (1906) 4 CLR 253, suggesting that a contract which compromises a private right (e.g. assault) could be effective.

²⁰ See eg 'Sex victims fear law: Lack of trust in system keeps sufferers silent' Katie Bice, Sunday Herald Sun, Melbourne 9 September 2012 citing a study by Professor Caroline Taylor, Edith Cowan University WA to say that '[m]ore than half of sex assault victims in Victoria don't report the crime because they fear the legal system'.

²¹ See, e.g., Mathews B, 'Judicial Considerations of Reasonable Conduct by Survivors of Child Sexual Abuse' (2004) 27(3) UNSWLawJl 631.

²² Discussed further below.

²³ See e.g. Vatican II, Code of Canon Law, Can. 573§2.

their personnel might enjoy special privileges (e.g. religious communications); they might benefit from legal protections (e.g. property trusts).²⁴

We examine these legal barriers to criminal and civil justice in detail below (sections 4.1 and 4.2). Separately (section 4.3), the submission addresses specific legal issues arising from internal complaints processes and the potential for internal complaints processes to impede or harm the future prosecution of a civil or criminal cases against perpetrators of sexual abuse against children.

In dealing with these matters the LIV makes recommendations aimed at improving the administration of justice with respect to the criminal abuse of children by religious or other organisations.

4.1. Upholding the rule of law: criminal justice and child protection laws

Recommendations made by the LIV in this section address issues relevant to the following questions in the Submission Guide:

13.6 Should mandatory reporting of cases of alleged criminal abuse be extended to ministers of religion?

13.7 To what extent should the reporting of suspicions of abuse be circumscribed by laws, customs and ethical codes of religions? (For example, should the sacrament of the Catholic confessional remain sacrosanct in these circumstances?)

The criminal justice system plays an important role in child protection, which includes:²⁵

- General and specific deterrence of future commission of crimes;²⁶
- Punishing offenders following a rigorous and impartial trial of the evidence;²⁷
- Rehabilitation for sexual offenders²⁸
- Protection of the community from such offenders²⁹ and
- Triggering other protective mechanisms such as a criminal record that will prevent the offender from working with children (where a 'Working with Children Check' is required)³⁰ and monitoring and other conditions under the Sex Offenders Register³¹ and possible detention and supervision.³²

Several crimes in the *Crimes Act 1958* (Vic) specifically concern sexual offences against children.³³ Other crimes against the person might also be relevant.³⁴ Some of these crimes relate to the person who physically engages in the abuse while others apply to any person who, with certain knowledge of the abuse, acts or fails to act in a manner that facilitates the abuse or perverts the course of justice.³⁵ For example, it is an offence under section 49A of

²⁴ Discussed further below.

²⁵ Australian Law Reform Commission, *Family Violence – A National Legal Response* (ALRC Report 114, 11 November 2010). Available at <http://www.alrc.gov.au/publications/family-violence-national-legal-response-alrc-report-114>.

²⁶ *Sentencing Act 1991* (Vic) s 5(1)(b).

²⁷ *Sentencing Act 1991* (Vic) s 5(1)(a).

²⁸ *Sentencing Act 1991* (Vic) s 5(1)(c).

²⁹ *Sentencing Act 1991* (Vic) s 5(1)(e).

³⁰ See *Working with Children Act 2005* (Vic).

³¹ See *Sex Offenders Registration Act 2004* (Vic).

³² See *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic)

³³ See *Crimes Act 1958* (Vic) Part 1, Division 1, Subdivisions 8C and 8D.

³⁴ See e.g. *Crimes Act 1958* (Vic) s 323 (aiding and abetting). It is also a crime to pervert, or to attempt to pervert, the course of justice.

³⁵ See eg s49A and s326 of the *Crimes Act 1958* (Vic); compare with other jurisdictions, such as NSW, where reportedly the first Australian Catholic priest has been charged with concealing the alleged sex crimes of another, under the offence of misprision of a felony <http://www.theage.com.au/national/priest-charged-with-abuse-coverup-20120830-253q3.html>.

the *Crimes Act 1958* (Vic) to do or omit to do an act that aids, facilitates or contributes to in any way whatever the commission by another person of a sexual offence against a child. Under section 326 of the *Crimes Act 1958* (Vic), it is an offence where a person, knowing of the commission of a serious indictable offence and has information that might procure a prosecution or conviction, accepts any benefit for not disclosing that information. The circumstances in which an organisation can be held criminally liable are limited.³⁶

In Victoria, there are no mandatory reporting obligations to *police* where a person believes or suspects that there has been criminal abuse of a child by personnel of a religious or other non-governmental organisation. Separate from the criminal justice system, some people are required under Victoria's child protection regime to report knowledge of sexual abuse of children to the Department of Human Services, and they face a current penalty of a little over \$1400 for failing to report.³⁷

In terms of criminal procedure, a person who has suffered criminal abuse as a child can make a complaint to police, either when they are still a child or later as an adult. Following an investigation by police a criminal prosecution might follow. The decision to prosecute is in the discretion of the prosecutorial authority charged with that responsibility. In Victoria, that executive power is vested in the Director of Public Prosecutions³⁸ and this repository of this discretion is independent from the political branch of government.

To obtain a conviction in court, there must be sufficient evidence to satisfy the criminal burden of proof, namely, the facts must be proven 'beyond reasonable doubt'.³⁹ Once convicted, a person in Victoria can be imprisoned⁴⁰ and placed on the Sex Offenders Register, with requisite reporting and monitoring requirements and the possibility of detention following release from prison,⁴¹ and the sex offender will not be permitted to work with children in Victoria.⁴²

Separately from the ability to bring a civil claim (see section 4.2 of this submission), victims of criminal abuse might be able to pursue limited statutory claims for compensation where a criminal conviction is obtained against the offender or assistance where they complain of criminal abuse.⁴³

Set out below are our submissions with respect to the criminal justice system and the prosecution of criminal abuse by personnel in religious organisations.

4. 1.1. State responsibility to investigate and prosecute crime

In 2004, the Victorian Law Reform Commission (VLRC) reported that 'guilty pleas and conviction rates are lower [for sexual assault] than for other criminal offences'.⁴⁴ The VLRC findings of low reporting, prosecution and conviction rates in sex offence matters were

³⁶ Note for example that s.181 of the *Crimes Act 1958* (Vic) expressly provides for the penalty to apply to a corporation. Even if criminal liability under sections 49A and 327 could be attributed to a corporation (by way e.g. of "directing mind"), church organisations that are unincorporated associations might not be so liable (see Lawbook, *The Laws of Australia* (at 19 August 2012) 9 Criminal Law Principles, '2 Ancillary Liability' [9.2.1680], [9.2.1650]).

³⁷ *Children, Youth and Families Act 2005* (Vic) Part 4.4.

³⁸ See eg *Public Prosecutions Act 1994* (Vic) s 22.

³⁹ *Evidence Act 2008* (Vic), s 141.

⁴⁰ See generally *Crimes Act 1958* (Vic) and *Sentencing Act 1991* (Vic).

⁴¹ *Sex Offenders Registration Act 2004* (Vic); see also *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) Schedule 1 has the offences that trigger potential detention / supervision under the Act.

⁴² *Working with Children Act 2005* (Vic) s 39A. Note that the consequences of being registered as a sex offender in Australia and the working with children requirements might not, as a practical matter, formally follow a person who leaves Australia to live in another country.

⁴³ *Sentencing Act 1991* (Vic) s 85B and *Victims of Crime Assistance Act 1996* (Vic) ss 8-8A.

⁴⁴ Victorian Law Reform Commission, *Sexual Offences: Final Report*, Final Report (7 January 2004). Available at <http://www.lawreform.vic.gov.au/projects/sexual-offences/sexual-offences-final-report>.

confirmed in analysis undertaken for the Victorian Department of Justice in January 2011.⁴⁵ The Department of Justice analysis states that ‘the 2009/10 financial year reveals a substantial decline in [Victoria in] the conviction rate [in sex offence matters] to 38%; indicating that defendants were almost twice as likely to be acquitted than convicted, compared with the approximate one to one ratio which existed across the previous five years. Reasons for this decline in the conviction rate are not immediately evident.’⁴⁶

The LIV agrees with the Cummins Inquiry that the investigation and prosecution of crimes is properly a matter for the State and that any private system of investigation and compensation cannot fulfil the responsibility of the State to investigate and prosecute crime.⁴⁷

The role of the State in investigating and prosecuting crime is an integral part of the responsibility of the State to protect children from crimes being committed against them. It is crucial that any deficiencies in Victoria’s criminal justice system with respect to sex offence matters are addressed.⁴⁸

4. 1.2. Mandatory reporting of crimes

It is frequently alleged that personnel in a position of authority within religious organisations are involved in ‘covering-up’ abuse by colleagues – namely, they are made aware of the criminal, including sexual, abuse of children by other personnel, but they fail to report or to act to prevent the abuse or act in a manner that facilitates the abuse (e.g. by transferring the abuser to another place).⁴⁹ While this has been the subject of criminal charges in other jurisdictions, no such criminal prosecutions appear to have been reported in Victoria.⁵⁰

The Cummins Inquiry notes that there is no longer a general common law duty to report a crime to the police.⁵¹ Recommendation 47 of the Cummins Inquiry calls for a new reporting duty within the criminal justice framework.

Recommendation 47

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

- A minister of religion; and

⁴⁵ Department of Justice, Victoria, *Sexual Assault Reform Strategy: Final Evaluation Report* (January 2011) <http://www.justice.vic.gov.au/home/the+justice+system/sexual+assault+reform+strategy+-+final+evaluation+report> (‘DOJ Report’).

⁴⁶ Ibid 80, footnotes omitted.

⁴⁷ Cummins Inquiry, above n 4, 356.

⁴⁸ See eg DOJ Report, above n 45.

⁴⁹ See for example the Ryan Commission, above n 12. Note also: the recent court case involving a security guard at Yeshivah College in Melbourne and allegations that certain personnel at the school knew of the abuse <http://www.haaretz.com/jewish-world/jewish-world-news/australian-sex-abuse-scandal-tars-name-of-venerated-chabad-rabbi-1.431373>; <http://www.theaustralian.com.au/news/nation/yeshiva-turned-blind-eye-to-sex-abuse-claims/story-e6frg6nf-1226130935332>; the first Australian Catholic priest, Father Brennan, to be charged with concealing the alleged sex crimes of another <http://www.theage.com.au/national/priest-charged-with-abuse-coverup-20120830-253g3.html>; note also reports that Monsignor William J. Lynn, was ‘the first [Roman Catholic Church](#) official in the United States ... convicted of covering up sexual abuses by priests under his supervision’ and was sentenced to three to six years in prison <http://www.nytimes.com/2012/07/25/us/philadelphia-church-official-to-be-sentenced-in-abuse-case.html>; see also ‘Deliver Us From Evil’ which documents the story of Father O’Grady, a convicted paedophile in the United States, and suggests that the Church knew of the abuse and actively tried to conceal it, <http://www.deliverusfromevilmovie.com/>.

⁵⁰ Compare cases in NSW, and in US: the first Australian Catholic priest, Father Brennan, to be charged with concealing the alleged sex crimes of another, <http://www.theage.com.au/national/priest-charged-with-abuse-coverup-20120830-253g3.html>; Monsignor William J. Lynn, reportedly ‘the first Roman Catholic Church official in the United States ... convicted of covering up sexual abuses by priests under his supervision’ <http://www.nytimes.com/2012/07/25/us/philadelphia-church-official-to-be-sentenced-in-abuse-case.html>.

⁵¹ Cummins Inquiry, above n4, 354.

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- A person who holds an office within, is employed by, is a member of, or a volunteer of a religious or spiritual organisation that provides services to, or has regular contact with, children and young people.

An exemption for information received during the rite of confession should be made.

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

Any new mandatory reporting requirement within the criminal justice framework would be distinguished from the mandatory reporting regime governed by Victoria's child protection laws. Under Part 4.4 of the *Children, Youth and Families Act 2005* (Vic), certain health professionals, registered teachers, 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. A failure to report attracts 10 penalty units, or \$1408 (in 2012/13).⁵² There are several categories of people contemplated to be under this mandatory reporting regime at some stage in the future but they do not include ministers of religion or personnel of religious organisation who are not otherwise covered by the other categories.⁵³

i) Mandatory reporting requirement under the criminal justice framework

The LIV supports recommendation 47 of the Cummins Inquiry, to create requirements in the Crimes Act 1958 (Vic) for mandatory reporting to police, extended to ministers of religion and personnel of religious organisations, where there is a reasonable suspicion a child or young person who is under 18 is being, or has been, physically or sexually abused by an individual within a religious or spiritual organisation.⁵⁴

We agree with the comments of the Cummins Inquiry that the proposed mandatory reporting obligation should be contained in the *Crimes Act* because the *Children, Youth and Families Act* is concerned with reports to DHS under the child protection regime and not police.

The object of the *Children, Youth and Families Act* is to protect children rather than necessarily holding perpetrators of crimes responsible for their criminal acts or deterring potential abusers. Mandatory reporting to the police of physical or sexual abuse suspected to have been committed by an individual within a religious or spiritual organisation, as recommended, would be a significant step in overcoming systemic abuse. If a person within an organisation has no discretion but to report suspected abuse, and can also be criminally liable for failure to report it, the existence of this legal duty will assist persons within those organisations to take the proper steps to ensure that criminal acts are made known to police rather than covered up or regarded as matters that the religious organisation should handle internally.

We note concerns raised in the Cummins Inquiry that a mandatory reporting requirement to police might cause discomfort or distress to individual victims. We consider, however, that this will be outweighed by the public interest in triggering a criminal justice response that holds the perpetrator responsible and deters potential abusers. It is crucial to investigate matters of past abuse to ensure that the person is not still offending and prevent any further abuse by that person with respect to other children.

⁵² See *Children, Youth and Family Act 2005* (Vic) ss 182, 184, 162(1)(c) and (d).

⁵³ The Cummins Inquiry recommends that the Victorian Government should progressively gazette those professions listed in sections 182(1)(f) - (k) of the *Children, Youth and Families Act 2005* (Vic) that are not yet mandated, beginning with child care workers (Cummins Inquiry, above n 4, recommendation 44).

⁵⁴ Cummins Inquiry, above n 4.

ii) Mandatory reporting where the victim is no longer a child

We note that Cummins Inquiry recommendation 47 limits the mandatory reporting requirement to victims who are children at the time the allegations are made. In this regard, the Cummins Inquiry found that an adult who was previously abused as a child is able to choose whether or not they wish to lodge a complaint of criminal abuse.

Contrary to Cummins Inquiry recommendation 47, the LIV urges this Inquiry to consider recommending that the mandatory reporting requirements extend to situations in which a child victim is an adult at the time that a reasonable suspicion of abuse arises. The purpose of mandatory reporting in this context is not solely to protect the interests of the individual child being abused but to apprehend and deter perpetrators of these crimes and overcome systemic abuse. In the LIV's view, appropriate limitations on the scope of a non-reporting offence, and the inclusion of appropriate defences, could alleviate concerns expressed by the Cummins Inquiry that a mandatory reporting requirement where a victim is no longer a child would result in victims not being able to choose whether to report allegations once an adult.

In this regard, we note that in Ireland, the *Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012* (Ireland) ('Irish Withholding of Information Act') was enacted on 18 July 2012 following the report of the Ryan Commission and other published reports including the Murphy and Cloyne reports.⁵⁵ Section 2(1) of the Irish Withholding of Information Act creates the following offence:

a person shall be guilty of an offence if—

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

and fails without reasonable excuse to disclose that information as soon as it is practicable to do so to a member of the Garda Síochána.⁵⁶

The offence is replicated in s 3(1) of the Irish Withholding of Information Act for vulnerable persons (as defined). Schedule 1 offences include murder, manslaughter, false imprisonment, rape, sexual assault, incest and trafficking, among other offences.

These provisions create an offence for non-disclosure of information to police where an alleged sexual offence was committed against a person who was a child or vulnerable person at the time of the offence, continuing the mandatory reporting obligation even where the victim is no longer a child or vulnerable person.⁵⁷ A person is not obliged to disclose unless she or he has substantive information regarding an offence and fails without reasonable excuse to disclose (ie not vague rumours, innuendo or suspicions). Also the Irish Withholding of Information Act applies only to information that a person receives, or becomes aware of, after the Act commenced.

In recognition of the right of the child or vulnerable person to disclose the commission of that offence, or information relating to it, to the Garda Síochána [the police], it is a defence to the

⁵⁵See second reading speech of the Minister at Criminal Justice (*Withholding of Information on Offences Against Children and Vulnerable Persons*) Bill 2012 [Seanad Tuesday, 26 June 2012]: Second Stage Dáil Éireann Debate Vol. 770 No. 1, 21.

⁵⁶ *Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012* (Ireland) s 2(1) (the Irish Withholding Information Act). Schedule 1 includes rape and sexual assault.

⁵⁷ See for example the Irish Withholding Information Act, ss 2(3), 3(3). The child or vulnerable person against whom the Schedule 1 offence concerned was committed (whether or not still a child) shall not be guilty of an offence under this section, supporting an interpretation that the offence continues after the child is no longer a child.

offence for non-disclosure of information that an accused shows that the child or vulnerable person made known his or her view (provided he or she was capable of forming a view on the matter) that the commission of the offence or information relating to it, should not be disclosed to the police and the accused knew and relied on that view: s 4(1). There is a presumption that a child under 14 or a vulnerable person (as defined) does not have capacity: s 4(2).

It is also a defence for an accused to rely upon the view of a parent or guardian (s 4(4)) provided there were reasonable grounds for the view and the parent or guardian is acting *bona fide* in the best interests of the child or vulnerable person (with some exceptions including where the accused is a family member of the parent or guardian). There are further defences relating to relying on the views of members of a designated profession (e.g. medical practitioner, registered nurse, registered psychologist) about reporting or not reporting. Further, by s 4(9), a parent, guardian or member of a designated profession must have regard to the wishes of the child or vulnerable person so far as practicable when considering whether or not to disclose.

iii) Protections to encourage or facilitate reporting

The Inquiry is seeking information from victims about whether they were encouraged or supported to report abuse to the police. This information will assist the Inquiry to assess what measures might be necessary or desirable to encourage or assist people to report information to police.

The LIV recommends that a legislative regime be established to encourage or facilitate reporting to police by adult victims and other people with information about the commission of criminal abuse of children by providing protections from reprisals and defamation actions, for example, for any disclosures made pursuant to the proposed mandatory reporting requirements, or in the context of the independent oversight mechanism that we propose in section 4.3.2 below.

A number of schemes protecting people who make complaints or disclosures in other contexts are currently in place in Victoria which provide useful models to consider:

Victimisation provisions under the Equal Opportunity Act 2010 (Vic)

The *Equal Opportunity Act 2010 (Vic)* (the EO Act) prohibits victimisation of a person who brings a dispute to the Victorian Equal Opportunity and Human Rights Commission (the Commission) or who has done anything in accordance with the EO Act.⁵⁸ Victimisation occurs where a person subjects or threatens to subject another person to any detriment because that other person – or someone he or she is associated with – alleged a breach of the EO Act or gave evidence or information or produced a document in connection with a proceeding or investigation under the EO Act. A person may bring an allegation of victimisation to the Commission for dispute resolution or make an application directly to VCAT claiming contravention of the victimisation provisions. If a complaint of victimisation is proven, VCAT may make one or more of the orders specified in the EO Act, including paying the victim an amount to compensate for loss, damage or injury suffered or specify certain conduct with a view to redressing the loss, damage or injury suffered because of the victimisation.⁵⁹

Victimisation provisions do not create any civil or criminal liability except to the extent provided in the EO Act.⁶⁰

⁵⁸ *Equal Opportunity Act 2010 (Vic)* ss 103 and 104.

⁵⁹ *Equal Opportunity Act 2010 (Vic)* s 125 sets out the orders the Tribunal can make if a complaint or any part of it is proven.

⁶⁰ *Equal Opportunity Act 2010 (Vic)* s188.

Whistleblower protections under the Whistleblower Protection Act 2011 (Vic)

The *Whistleblower Protection Act 2011 (Vic)* ('the WPA') provides a mechanism for people to disclose to the Ombudsman cases of improper conduct or detrimental action by public officers or public bodies, while providing protection to those who provide that information. Section 16 provides that 'in proceedings for defamation there is a defence of absolute privilege in respect of the making of a protected disclosure.' Section 18 of the WPA provides that a person must not take detrimental action against a person in reprisal for a protected disclosure, with penalty for breach of 240 penalty units or 2 years imprisonment. A detrimental action includes where the person threatens to take action.

Further, we recommend that, for the avoidance of doubt, legislation should clarify that in reporting criminal abuse to police, victims will not breach any confidentiality provision or release in a settlement agreement reached with a religious or other non-government organisation or with an individual.

As noted above, it is our view that a confidentiality provision or release could not in law prevent the reporting of a crime.⁶¹ This is necessary because victims are unlikely to understand the relationship between confidentiality agreements and any statutory protections that are introduced.

iv) Information obtained during a religious confession

The Cummins Inquiry recommends that there should be a statutory exemption to the mandatory reporting duty proposed for religious personnel for information received during a religious confession.

In Victoria, section 127(1) of the *Evidence Act 2008 (Vic)* provides that a person who is or was a member of the clergy of any church or religious denomination is entitled in any court proceeding to refuse to divulge that a religious confession was made, or the contents of a religious confession made, to the person when a member of the clergy.⁶² The privilege is the clergy person's and only the clergy person can waive it. Neither the parties nor the person who made the confession can waive the privilege.⁶³ Section 127(1) does not apply if the communication involved in the religious confession was made for a criminal purpose: s 127(2). Section 127 applies to the admissibility of evidence in proceedings and, as it would appear that there is no privilege for religious confessions in common law in Victoria,⁶⁴ such communications might not be protected in Victoria at pre-trial stages of proceedings.⁶⁵

⁶¹ The legislative drafting should ensure that disclosure does not only not breach the confidentiality provision but that such disclosure shall not relieve a party from performing its obligations to pay any agreed settlement sum or otherwise perform any other agreed settlement obligation and that no action may be taken to recover any settlement sum paid or recover damages from any person.

⁶² *Evidence Act 2008 (Vic)* s 127.

⁶³ The parties cannot waive it (because s 190 does not apply to Part 3.10), nor can the person who made the confession. Section 127 differs from the old s 28 of the *Evidence Act 1958 (Vic)* which provided that "No clergyman of any church or religious denomination shall without the consent of the person making the confession divulge in any suit action or proceeding whether civil or criminal any confession made to him in his professional character according to the usage of the church or religious denomination to which he belongs" ie previously the privilege was the clergy person's but it could be waived by the person making the confession.

⁶⁴ 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).

⁶⁵ Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2005) ('ALRC Report'). Available at <http://www.alrc.gov.au/publications/report-102>. The ALRC considers that the privilege in s 127 applies to pre-trial matters "as it relates not only to the adducing of evidence but also allows a member of the clergy to refuse to divulge that a religious confession was made or the contents of the confession" (see for example, ALRC Report, Ch 15). However, section 127 of the *Evidence Act 2008 (Vic)* is in Chapter 3 which is about whether evidence adduced in a proceeding is admissible (see *Evidence Act 2008 (Vic)* s 134). Indeed the ALRC was limited by the terms of reference to considering the application of privilege in the court room. Therefore arguably the purpose of s 127 is not to protect the communication from disclosure but to ensure that evidence about it is not adduced or given in a proceeding and in the absence of any common law privilege, query whether such communications would be protected from disclosure at a pre-trial stage. See further A. K. Thompson. 'Religious Confession

The ramification of the religious confessional privilege now contained in Victoria's Evidence Act is that, in court proceedings, the clergy member may decline to give that evidence based on the privilege but there is no statutory nor common law privilege precluding disclosure of a confession to police, nor any right of the confessor to prevent such disclosure. In these circumstances, it would create a conflict in the operation of the criminal law if the member of the clergy were required to disclose a confession to police in any mandatory reporting requirement but could not be compelled in court to give evidence about it. Securing a conviction of a perpetrator based on their confessional evidence or against the member of the clergy for non-disclosure of the confession would be highly problematic.

We note that section 127 was not recommended by the Australian Law Reform Commission when it considered uniform evidence rules. The ALRC recommended a broad privilege for confidential communications with a discretionary balancing test for admissibility (ie the Court would have a discretion as to whether the communication was admissible after considering the circumstances in which the communication was made and balancing the need for confidentiality against the need for disclosure).⁶⁶ The Victorian Law Reform Commission also recommended that there be a professional confidential relationship privilege with a balancing test.⁶⁷

The LIV suggests that, in adopting Recommendation 47 from the Cummins Inquiry, consideration should be given as to whether any 'exemption for information received during the rite of confession' should be worded in terms of a balancing test as proposed by the ALRC and VLRC when they considered the matter in the broader context of uniform evidence rules.

In our view, the discretionary balancing test would be much fairer 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 partial exclusion. It would be important, however, not to create any unworkable conflict with s127 of the *Evidence Act*.

4.1.3. Compensation and financial assistance for victims of crime

Victims of criminal abuse might be eligible for compensation orders made in the context of criminal proceedings,⁶⁸ and assistance before the Victims of Crime Assistance Tribunal.

If a court has found a person guilty of an offence, the victim can apply under s85B of the *Sentencing Act* for an order that the guilty party pay her or him compensation for medical and other expenses reasonably incurred (or reasonably likely to be incurred) as a direct result of the offence. This option in theory is available to victims of sexual abuse perpetrated by members of a church however, in practice, it may not be useful as (a) such individuals will tend to be impecunious (because of the vows of poverty), and (b) convictions on which to base a compensation claim will be possible only where the accused is still alive and the victim's story can be corroborated sufficiently to satisfy the criminal standard of proof, which

Privilege At Common Law In Australia' *Religious Confession Privilege and the Common Law*. (Martinus Nijhoff Publishers, 2011).

⁶⁶ ALRC Report, above n 65, recommendation 15-1. '15-1 The uniform Evidence Acts should be amended to provide for a professional confidential relationship privilege. Such a privilege should be qualified and allow the court to balance the likely harm to the confider if the evidence is adduced and the desirability of the evidence being given. The confidential relationship privilege available under Part 3.10, Division 1A of the *Evidence Act 1995* (NSW) should therefore be adopted under Part 3.10 of the *Evidence Act 1995* (Cth).' See also ALRC report 26 paras 460-1, 463, 850, 903-956, Bill clause 103 and Appendix C paras 197-204; ALRC report 38 paras 201-213, Bill clause 109, ALRC Report at 15.85-15.88.

⁶⁷ 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>.

⁶⁸ *Sentencing Act 1991* (Vic) s 85B.

becomes less likely as time passes after the abuse occurs (noting, as above, that many such allegations are not raised by victims for long periods).

A victim of a criminal act may, within two years of the act, make an application to the Victims of Crime Assistance Tribunal (VOCAT) for financial assistance to meet, for example, associated counseling, medical expenses and loss of earnings (up to \$60,000) and 'special financial assistance' for pain and suffering (up to \$10,000).⁶⁹ Claims to VOCAT are able to proceed even if no one has been charged with or found guilty of a crime, where the Tribunal is satisfied on the balance of probabilities that an act of violence was involved in causing the victim's injuries.⁷⁰

Our members report that compensation that can be awarded by the Tribunal is substantially lower than the amounts that could be awarded in a successful civil claim. A victim applying to VOCAT with the strongest possible claim might be awarded up to \$70,000 (that is, the maximum \$60,000 award plus \$10,000 in special financial assistance). If the same person were to succeed in a civil claim for the same abuse, if they suffered a substantial loss of earnings or significant pain and suffering, our members report that the damages could exceed \$200,000.⁷¹

The VOCAT system provides a substantially less burdensome process for victims of crime than section 85B of the *Sentencing Act 1991* (Vic). The VOCAT process involves a lower standard of proof (balance of probabilities rather than proof beyond reasonable doubt), and its focus is primarily on investigating the victim's circumstances and injury, rather than the actions and conduct of the accused. As it is the Tribunal, rather than the perpetrator, that pays any award of compensation, issues noted above of impecunious defendants or defendants who are not formal legal entities do not arise. The requirement to bring claims to VOCAT within two years is, however, problematic in cases of sexual abuse of children who might not seek assistance until some time after the events when they are adults.

Where the alleged abuse has reportedly occurred more than two years previously, it is possible to apply to VOCAT to request an extension, providing the victim meets the criteria outlined in s29(3)(a)–(g) of the *Victims of Crime Assistance Act 1996* (Vic). Factors that are required to be considered by the Tribunal in making a determination as to an extension of time include:

- The age of the applicant at the time of the act of violence;
- Whether the applicant suffers from an intellectual disability or mental illness;
- Whether the accused perpetrator was in a position of power or influence in relation to the applicant at the time of the act of violence;
- The physical or psychological effect of the act of violence on the applicant;

⁶⁹ *Victims of Crime Assistance Act 1996* (Vic) ss 8-8A. Awards of compensation are capped at \$60,000 plus an amount of 'special financial assistance' (i.e. 'pain and suffering' damages) (*Victims of Crime Assistance Act 1996* (Vic) s 8(1)). The primary award (of up to \$60,000) is comprised of amounts for medical expenses, an amount of up to \$20,000 for loss of earnings suffered, an amount for expenses incurred relating to loss of or damage to clothing worn at the time of the act of violence, and an amount for 'safety-related expenses' incurred (*Victims of Crime Assistance Act 1996* (Vic) s 8(2)). The 'special financial assistance' available is regulated by the *Victims of Crime Assistance Act 1996* s 8A(5) and the *Victims of Crime (Special Financial Assistance) Regulations 2011* which proscribe that for acts of violence occurring on or after 1 July 2007, special financial assistance for an act of violence involving the sexual penetration of a person must be between \$4,667 and \$10,000, and for an act involving the attempted sexual penetration of a person, between \$1,300 and \$3,250. Where the act occurred prior to 1 July 1997, the amounts are limited to between \$3,500 and \$7,500 for acts involving the sexual penetration of a person, and between \$1,000 and \$2,500 for the attempted sexual penetration of a person.

⁷⁰ *Ibid* s 8A(7).

⁷¹ We note this figure to be consistent with reported awards: see e.g. *GGG v YYY* [2011] VSC 429, a civil case concerning sexual abuse by an uncle in which the abused plaintiff was awarded \$267,000 (comprising general damages of \$200,000, aggravated damages of \$20,000, exemplary damages \$30,000 and special damages of \$17,000) with subsequent submissions invited on interest (over 33 years) and costs. See also *SB v State of NSW* [2004] VSC 514, a civil case concerning sexual abuse in and related to foster care arrangements, in which the plaintiff was awarded damages in the sum of \$281,461.00 (comprising general damages of \$195,000, past loss of earnings of \$26,461 and future loss of earning capacity of \$60,000).

- Whether any delay in commencing an application threatens the Tribunal’s capacity to make a fair decision;
- Whether the applicant was a child at the time of the act of violence, and whether an application to the Tribunal was made within a reasonable time of them turning 18;
- All other circumstances that the Tribunal considers relevant.

Many of these factors are particularly relevant in cases of abuse of minors by personnel of religious organisations and there have been some reported cases in which time was extended for applicants who suffered sexual abuse as minors.⁷²

The LIV recommends that the Committee:

- seeks information on the extent to which the requirement to bring claims to VOCAT within two years of a criminal act occurring is having a significant impact in terms of excluding claims from victims of criminal abuse where abuse occurred as a child and they report it as adults;
- considers any possible amendments to the factors to be considered in providing an extension of the two-year requirement under section 29(3) to provide expressly for the circumstances of victims of criminal abuse where abuse occurred as a child and they report it as adults.

4.2. Barriers to civil justice: facilitating redress

Recommendations made by the LIV in this section address issues relevant to the following questions in the Submission Guide:

13.5 Have the legal structures used by religious bodies to manage their affairs and their assets acted to discourage or prevent civil legal action being taken by victims against offenders?

13.12 Are new laws required to more effectively address the institutional abuse of children?

Civil law actions by victims of abuse by personnel of religious organisations could potentially include claims in tort (such as trespass or negligence)⁷³ or in contract (such as an express or implied undertaking not to harm a child or exercise reasonable care for a child’s safety in providing educational services).⁷⁴ These actions might in certain, but not all, cases be available against the perpetrator or against other people and the religious organisation that employs or otherwise appoints the perpetrator to a position in the organisation. The organisation might be directly liable⁷⁵ or indirectly liable (e.g. vicariously liable) for the acts of the perpetrator.⁷⁶

The standard of proof in civil cases is less than the standard in criminal cases, typically requiring proof on the basis of the ‘balance of probabilities’⁷⁷ but the victim bears the burden of proof and is generally required to demonstrate several elements in any given claim. For a

⁷² *CS v Victims of Crimes Assistance Tribunal* [2006] VCAT 1061, at [26]-[31]; *Frost v Victims of Crimes Assistance Tribunal* [2002] VCAT 1390, at [20]-[25]; *Hay v Victims of Crime Assistance Tribunal* [2002] VCAT 45 at [24].

⁷³ See further below.

⁷⁴ For example, if there was an express or implied obligation to act in a child’s best interests incorporated into an agreement for a child to attend a particular religious school; in such a case, it could be argued that abuse of the child would amount to a breach of that term, from which damages might flow.

⁷⁵ Typical examples of this kind of claim are either under contract, where one exists (such as a school providing educational services to children) or in tort, or where a non-delegable duty is pleaded (where the role or nature of the defendant is such that it is contended that its duty was greater than simply having to take reasonable care – it instead had to ensure that care was taken). Note that the state of the law concerning the interplay and availability of negligence and trespass in cases of intentional – that is, non-negligent – harm is somewhat unsettled. See, e.g., *Williams v Milotin* (1957) 97 CLR 465; *Stingel v Clark* (2006) CLR 442; *NSW v Lepore* [2003] 212 CLR 511.

⁷⁶ Discussed further below.

⁷⁷ *Evidence Act 2008* (Vic) s 140(1).

civil claim in tort to succeed, for example, the victim would need to establish, in the case of negligence, that a duty of care exists and that it was breached by the defendant, or in the case of trespass, that the battery occurred and that it was committed by the defendant. The victim would also need to prove that she or he suffered loss and damage, and that this loss or damage came about as a result of the perpetrator's (or religious organisation's) breach of the duty or the trespass.

In civil litigation, victims of abuse will ordinarily seek compensation for the personal injuries (both physical and psychological) suffered, and the losses consequent upon those injuries (for instance, medical expenses, out-of-pocket expenses, and loss of earnings/income). They might seek counselling and pastoral support, and in some cases admissions or apologies. In certain circumstances, damages for pain and suffering might be awarded and in rare cases exemplary damages (designed to punish or deter wrongful conduct, and not merely to compensate for losses) might also be awarded. Compensation ordered by a court, in cases involving sexual abuse has exceeded \$250,000, with the possibility of interest and costs also being awarded.⁷⁸

Set out below are the LIV's submissions with respect to some aspects of civil litigation that undermine the efforts of victims of criminal abuse by personnel of religious organisations to seek redress.

4.2.1. Limitations periods

As noted above, owing to the trauma of victims' abuse, and the discomfort associated with recounting such incidents publicly, many survivors of abuse do not report their experiences to close friends and family members, much less make official statements, for lengthy periods of time after they have taken place.⁷⁹ As a result, our members report that many formal complaints or claims concerning such abuse are not commenced until years or decades have passed since the abuse occurred.

In Victoria, statutory time limits operate to restrict the period within which common law claims for compensation can be commenced.⁸⁰ For claims for personal injuries, these periods range from three to six years from the date of discoverability of the cause of action.⁸¹ A long-stop period also exists in many jurisdictions to provide a final cut-off date for the commencement of proceedings, regardless of whether a cause of action has been discovered (12 years after the date of the injury, or 12 years after the claimant turned 25 in the case of a personal injury caused by a parent/guardian or a close associate of a parent/guardian, in Victoria).⁸² Exceptions exist for circumstances in which a plaintiff was under a relevant disability,⁸³ or where the person has a legal incapacity (including where the person is a child at the time the injury occurs),⁸⁴ allowing the time to effectively be paused for some period, however beyond the long-stop date a claimant will require a court's permission to continue a claim.

It has been successfully argued that the three year period may begin to run from the time a victim realises that she or he is a victim of an offender. In the case of *Clark v Stingel*,⁸⁵ in

⁷⁸ See above n 71.

⁷⁹ See pages 7-8 of this document.

⁸⁰ See *Limitation of Actions Act 1958* (Vic) s 5(1AA) which states that 'an action for damages in respect of personal injury shall not be brought after the expiration of three years from the date on which the cause of action accrued'. See also Part IIA of the *Limitation of Actions Act 1958* (Vic).

⁸¹ In Victoria, the relevant limitation period is 3 years from date of discoverability or 12 years from act or omission, whichever expires first: *Limitation of Actions Act 1958* (Vic) s 27D. In Victoria, the relevant limitation period for a cause of action that is founded on a personal injury to a person who was a minor ('under a disability') at the date of the act or omission is 6 years from the date on which the cause of action is discoverable by the plaintiff or 12 years from the act or omission alleged to have resulted in the injury, whichever expires first: *Limitation of Actions Act 1958* (Vic) s 27E.

⁸² *Limitation of Actions Act 1958* (Vic) ss 27D(1)(b), 27I(1)(b).

⁸³ *Limitation of Actions Act 1958* (Vic) ss 27D(2), 27E.

⁸⁴ *Limitation of Actions Act 1958* (Vic) s 27J.

⁸⁵ (2006) 226 CLR 442.

which a woman commenced proceedings in relation to an alleged rape over two decades after it had allegedly occurred, the claimant was successful in arguing that the delayed onset of post-traumatic stress disorder was a direct impact of the offences that had allegedly been committed against her. The High Court agreed in that case that the *Limitation of Actions Act 1958* (Vic) at the time established that time for commencing a claim begins to run only after the claimant recognises the connection between the alleged assault and the harm they suffer as a result of it.⁸⁶

Where a claimant is out of time to commence proceedings, it is possible to apply to a court for an extension of the time limit.⁸⁷ LIV members report that this process is typically difficult and hard-fought, however, and is usually not successful without a claimant being able to provide a compelling reason for not commencing proceedings within the relevant time limit.⁸⁸ LIV members report that the likelihood of having a potential claim dismissed at the outset on this basis is a significant impediment to more claims being pursued.

LIV members also report that defendants will rely on limitations provisions in applying to have claims struck out or dismissed early,⁸⁹ and anecdotally at least some claimants have considered the potential for defeat on this basis as a major factor in accepting early settlement offers for potentially low amounts.

The rationale for limitation periods in civil claims is that defendants will be unfairly prejudiced by the passage of time since the occurrence of the alleged wrong.⁹⁰ There would seem to be a strong argument, though, that in regard to placing legal restrictions on commencing claims against religious or other organisations that the prejudice suffered by it through the passage of time should be balanced against the harm to the victim and should not receive significant weight in all cases. In these cases of historical abuse of children by personnel in religious organisations, the passage of time significantly prejudices the rights of a claimant.

For example, in many cases, the alleged perpetrators will be deceased, eliminating the ability for them to be examined (and in many cases, meaning the police will not investigate them).⁹¹ As time passes, claimants will likely have greater difficulty producing witnesses who can corroborate their claims. Religious and other non-government organisations, however, are still able to rely on their own organisational records, and will have the benefit of knowing whether the offender had been the subject of complaints concerning similar offences. In this sense, religious organisations might find it easier to defend claims, and a claimant might find it harder to prove them, than would have been the case had the claim been brought within time. The purpose of limitation periods is, therefore, not necessarily supported in cases of abuse of children by personnel in religious organisations.

Case Study: X (a real case, with names removed to protect the identities of the parties)

“X was aged in his late 30s and had been sexually abused over a number of years during his early teens at a religious boarding school in Queensland. Like many sexual abuse victims, it was many years until X made a formal complaint to Police. The perpetrator pleaded guilty at trial and was imprisoned.

⁸⁶ Ibid.

⁸⁷ See *Limitation of Actions Act 1958* (Vic) s 27K: an extension of time will be granted if it is just and reasonable.

⁸⁸ See for example, *Spandideas v Vellar* [2008] VSC 198; *Caven v Women's and Children's Health* [2007] VSC 7.

⁸⁹ See *Spandideas v Vellar* [2008] VSC 198; *Caven v Women's and Children's Health* [2007] VSC 7. See also Angela Sdrinis and Linda Gyorki, “Ensuring the protection of wards of the state and other children in State care”, unpublished paper, Ryan Carlisle Thomas (2009).

⁹⁰ *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 per McHugh J.

⁹¹ See for example, Patrick Parkinson, Kim Oates, Amanda Jayakody, *Study of Reported Child Sexual Abuse in the Anglican Church* (May 2009)

<http://anglican.org.au/docs/Study%20of%20Reported%20Child%20Sexual%20Abuse%20in%20the%20Anglican%20Church%20May%202009%20Full%20Report.pdf> at [4.2], [4.6].

“X wanted to explore avenues for litigation in an effort to attach liability to the relevant church. X’s primary obstacle to proceeding with a claim was limitation of time. The Queensland courts have historically taken a very inflexible view to extending limitation periods in these circumstances.⁹²

“The only way forward for X was to obtain an expert psychiatric report confirming an injury in order to overcome the limitation of time issue. However, X is employed in a specialised area whereby the diagnosis of a psychiatric injury may very well lead to loss of employment.

“The potential claim was further hampered by virtue of the capping of general damages in Queensland pursuant to the *Civil Liability Act 2003* (Qld) and its subordinate regulations, which would see recovery of general damages to the order of \$20,000 to \$30,000. There was little or no special damages claim relating to specific other expenses or losses incurred by X.

“As in other cases, the Church’s internal pastoral care and assistance package was offered. Our members report that these packages are often declined because the victim wishes to ‘make a break’ from the Church, or the internal pastoral and counselling services are not seen as independent.

X’s case demonstrates the desirability of removing or reducing the impact of the limitation period for sexual abuse cases, much like those found for latent disease cases such as asbestos claims (and upheld in *Clark v Stingel*).⁹³

The LIV recommends that:

- The Victorian government legislate from a future date for a three year moratorium on limitation periods for people to bring forward claims in cases of criminal abuse in religious organisations – this will allow past victims of abuse to consider bringing an action, where they would otherwise have been statute barred. There is precedent for such a moratorium in a number of US states, which is justified on public interest grounds because of the widespread nature of abuse occurring many years previously;⁹⁴
- 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;⁹⁵
- Where a victim makes a complaint directly to a religious organisation about criminal abuse, the ‘clock’ should stop for the purposes of calculating time under any applicable limitation periods, while any internal complaints handling or investigations process is being undertaken – consistent with practice in areas such as medical negligence, where we understand it is common for insurers to agree to ‘stop the clock’ during investigations by the Health Services Commissioner.⁹⁶

⁹² See *HWC v The Corporation of the Synod of the Diocese of Brisbane* [2009] QCA 168.

⁹³ See *Limitation of Actions Act 1958* (Vic) s 5(1A), as held in *Clark v Stingel* (2005) VSCA 107.

⁹⁴ See Orlow, Orlow and Orlow, “NY Bill to change statute of limitations for sex abuse victims fails” (2009). Available at www.hq.org/article.asp?id=7073.

⁹⁵ See for example, Linda Meyer-Williams, “Recall of Childhood Trauma: A Prospective Study of Women’s Memories of Child Sexual Abuse”, (1994) 62(6) *Journal of Consulting and Clinical Psychology* 1167; Browne et al, “Impact of Child Sexual Abuse: A Review of the Research”, (1986) 99(1) *Psychological Bulletin* 66.

⁹⁶ See further LIV submission, *Review of the Health Services (Conciliation and Review) Act 1987* (Vic) (17 August 2012) www.liv.asn.au/submissions.

4.2.2. Corporate and organisational structure of religious orders and entities

A preliminary, and often prohibitive, question faced by victims considering commencing a common law claim against a religious organisation is that of whom to sue. As noted above, possible defendants include the offending individual or the religious organisation in which they hold a position. The precise legal and corporate structure of religious organisations and positions within them vary from one organisation to another, and is frequently a critical factor in decisions concerning the formulation of victims' claims.

In many cases, given the frequent age difference between offenders and victims, the perpetrator of the abuse will be long deceased by the time a claim is made.⁹⁷ Where an alleged offender is still alive or where a claim can be made against an offender's estate, the fact that many religious orders require a vow of poverty to be taken⁹⁸ will mean that there will be few assets against which to claim. A proceeding for damages against the perpetrator might be futile in these circumstances.

The organisational and corporate structure of most religious organisations poses a significant barrier to civil law claims. Religious organisations are typically unincorporated associations which cannot sue or be sued.⁹⁹ Office-holders within a religious organisation might exist as corporations sole (a corporate structure effectively reduced to a single office-holder who can be liable for his or her predecessor's actions) or might have liability only as specific individuals. Caution is needed in asserting that a religious office-holder is a corporation sole in the case of roles or offices not explicitly designated as such. *Ellis v Pell*¹⁰⁰ demonstrates the complexities of suing a religious organisation with respect to sexual abuse of a child.

That case concerned a claim of abuse by a deceased priest, with the Archbishop of Sydney and a Church property trust established under an Act of Parliament were named as defendants, in circumstances where a previous Archbishop had appointed the priest against whom the claims of abuse were made (but who was not alleged to have had knowledge of the abusive acts). The plaintiff's allegation that the Archbishop of Sydney was a corporation sole, and thus assumed previous Archbishops' liabilities, failed because he was sued in a personal capacity, and there was no clear legislative or other intent to so establish the Archbishop's position as a corporate entity. A claim against the related property trust failed because the abuse in question was unrelated to that corporation's statutory purposes; in effect, there was no-one else in existence who could be sued for the abuse. This is the crux of the problems facing abuse victims seeking to claim compensation: in effect, for example, there is no formal 'Catholic Church' to sue.¹⁰¹

In Victoria¹⁰² and some other Australian states,¹⁰³ statutory corporations (known as 'trustee corporations') are created for the express purpose of holding property on trust for such 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

⁹⁷ See Paul Holdway and Ruth Baker 'Acting for Victims of Religious Sexual Assault: Challenges for Victorian Lawyers' (November 2010) Law Institute Journal 50 <http://www.liv.asn.au/News-and-Publications/Law-Institute-Journal/Archived-Issues/LIJ-November-2010/Acting-for-victims-of-religious-sexual-assault-cha>.

⁹⁸ See for example, Vatican II, Code of Canon Law, Can. 573§2.

⁹⁹ See for example, *J Ellis v Pell and the Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (2006) NSWSC 109.

¹⁰⁰ *J Ellis v Pell and the Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (2006) NSWSC 109, overturned by (2007) NSWCA 117 and special leave denied in (2007) HCA Trans 697. Holdway and Baker (above n 97) suggest that "unlike in the US, an Australian bishop is not a "corporation sole". As such, the appropriate bishop to sue is the one who was in office at the time the offences took place.

¹⁰¹ See for example, *J Ellis v Pell and the Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (2006) NSWSC 109.

¹⁰² See for example, *Roman Catholic Trusts Act 1907* (Vic), *The Salvation Army (Victoria) Property Trust Act 1930* (Vic), *Coptic Orthodox Church (Victoria) Property Trust Act 2006* (Vic).

¹⁰³ For example, *Roman Catholic Church Communities' Lands Act 1942* (NSW), *Uniting Church in Australia Act 1976* (WA).

and have perpetual succession, avoiding the problems that arose historically with titles to goods and land when Bishops and Archbishops passed away.¹⁰⁴ 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.¹⁰⁵

Trustee corporations could be sued, for instance, where abuse took place on land owned by such a corporation or trust. The difficulty in this approach has been that while the corporations are intended to hold and deal with property,¹⁰⁶ they are by definition not set up to do anything more than that. Courts have found in relation to several such corporations that their activities did not extend into ‘pastoral’ activities, such as the work of clergy on their land, and therefore that they cannot be sued in relation to activities occurring outside their remit.¹⁰⁷ Therefore, unless a personal injury claim can be configured effectively as an ‘occupier’s liability’ claim,¹⁰⁸ trustee corporations are likely to remain insulated from any common law liability to abuse victims. LIV members report that few, if any, claims succeed on this basis. To the extent they have been resolved, members report that it is typically by private settlement rather than as a result of a judgment.

Reform proposals that have been discussed in this area include specifically legislating to provide that such trustee corporations can be liable to victims of abuse (removing the limitations described in the *Ellis v Pell* decision, as above),¹⁰⁹ or (more aggressively) requiring them to take the form of ordinary associations or organisations, capable of suing and being sued, and employing or otherwise maintaining relationships with their members in a transparent, legally recognisable manner.

The LIV recommends that:

- Where religious organisations have received complaints of criminal abuse of children by religious personnel, they be required by legislation to establish compensation funds for victims of abuse sufficient to meet the claims of victims, having regard to awards made at the conclusion of relevant civil proceedings;
- The Committee should examine and identify the legal status of different religious organisations, and their capacity to sue and be sued.
- 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 organizational and corporate structures to avoid liability in matters not related to property ownership, such as criminal abuse.¹¹⁰

¹⁰⁴ See for example, Preamble to the *Roman Catholic Church Communities’ Lands Act 1942* (NSW).

¹⁰⁵ *J Ellis v Pell and the Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (2006) NSWSC 109 per Patten AJ.

¹⁰⁶ For example, *Roman Catholic Church Communities’ Lands Act 1942* (NSW) s 10.

¹⁰⁷ See for example, *Trustees of the Roman Catholic Church v Ellis & Anor* [2007] NSWCA 117, at [112]-[113]; *PAO v Trustees of the Roman Catholic Church for the Archdiocese of Sydney and Ors*; *BJH v Trustees of the Roman Catholic Church for the Archdiocese of Sydney and Ors*; *SBM v Trustees of the Roman Catholic Church for the Archdiocese of Sydney and Ors*; *IDF v Trustees of the Roman Catholic Church for the Archdiocese of Sydney and Ors*; *PMA v Trustees of the Roman Catholic Church for the Archdiocese of Sydney and Ors* [2011] NSWSC 1216 at [49]-[51].

¹⁰⁸ In which an abuse victim was harmed as a result of their introduction to an inherently hazardous environment owned or held by the trust.

¹⁰⁹ For example, *Roman Catholic Church Trust Property Act Amendment (Justice for Victims) Bill 2011*, NSW Private Members Bill available at <http://davidshoebridge.org.au/wp-content/uploads/2011/12/Justice-for-Victims-Bill-Consultation-Paper-Dec-2011.pdf>.

¹¹⁰ We note public response to the James Hardie decisions in which the company was legally able to organise its corporate structure to isolate funds in connection with asbestos claims, see Anil Hargovan, ‘Australian Securities and Investments Commission v MacDonald [No 11]: Corporate Governance Lessons from James Hardie’ (2009) *Melbourne University Law Review* 984.

4.2.3. Vicarious liability

Vicarious liability is the concept that liability for a wrongdoer's actions can attach to a third party who has an ability or duty to control the wrongdoer's conduct in certain circumstances.¹¹¹ The commonly-used example of this is the relationship between employer and employee: it is uncontroversial that an employer can be held liable for an employee's wrongful actions where those actions occurred within the course of their employment (that is, where the acts are authorised by the employer, or are sufficiently closely connected with the employer's activity).¹¹²

In the context of sexual abuse claims, however, there is reason to exercise caution in the use of these approaches. The High Court 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 *NSW v Lepore*, and was unable to form a concluded view.¹¹³ The question remains undecided.

There is also doubt about whether religious personnel (in particular, ministers of religion), are employees of religious organisations, so that any changes to laws of vicarious liability might not in any case extend to religious organisations – although recent decisions in the UK have altered the standard for vicarious liability sufficiently for a lack of an employment relationship to not be an impediment to imposing vicarious liability on a church for a priest's actions.¹¹⁴

The LIV recommends 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.

4. 2.4. Access to evidence

Another difficulty facing claimants relates to the state of evidence available concerning their claims. Particularly in cases where there has been a substantial gap between the alleged abuse and the time claimants first raise their experiences with others, our members report that it is not uncommon for documents to be lost, and witnesses to have either passed away or have imperfect memories. Considering the onus of proof is on the claimant in a civil claim, this can often represent a very substantial obstacle to successfully mounting a claim.

Documentary evidence made available by defendants through the discovery process can go some way towards remedying these deficits. Victorian civil procedure rules and the law in relation to discovery requires that records be preserved where litigation is anticipated. To the extent such evidence still exists, it will likely be preserved: we suggest that many organisations with a history of allegations of abuse amongst their members will currently find it difficult to maintain an argument that litigation over such issues is not contemplated or

¹¹¹ See Nafees Meah and Philip Petchey 'Liability of Churches and Religious Organisations for Sexual Abuse of Children by Ministers of Religion 34 Comm. L World Rev 39 (2005); not developments in UK discussed below.

¹¹² Laski, "Basis of Vicarious Liability" (1916) 26 Yale Law Journal 105. For an example of a statutory scheme of vicarious liability see *Equal Opportunity Act 2010* (Vic) ss 109-110.

¹¹³ *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.

¹¹⁴ See for example, *JGE v The English Province of Our Lady of Charity and The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2011] EWHC 2871 and [2012] EWCA Civ 938 dismissing appeal, finding a priest to be 'in a relationship with his bishop which is close enough and so akin to employer/employee as to make it just and fair to impose vicarious liability. Justice and fairness is used here as a salutary check on the conclusion. It is not a stand alone test for a conclusion. It is just because it strikes a proper balance between the unfairness to the employer of imposing strict liability and the unfairness to the victim of leaving her without a full remedy for the harm caused by the employer's managing his business in a way which gave rise to that harm even when the risk of harm is not reasonably foreseeable.' Lord Justice Ward (in the majority) at para 81.

expected. However, it is dependent on the quality of record-keeping and observations made at the time the abuse allegedly took place. LIV members report that here, again, the corporate structure of the religious entity is a factor: the lack of any centralised record-keeping or reporting, or policies as to documenting complaints and preservation of records, means that such decisions appear to have been largely *ad hoc*, and vary greatly from organisation to organisation and location to location within a given organisation.

Further, we understand that religious organisations are typically very reluctant to disclose materials that they do possess. Our members report that, in a number of cases, defendants have resisted providing discovery that could have resolved significant issues much earlier, both in relation to questions of relevance, and in relation to questions as to which entity holds or controls putatively discoverable materials.

The LIV recommends 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 by religious personnel to ensure early and efficient resolution of disputes concerning discovery and the availability of evidence.

4.3. Internal complaints processes: procedural fairness and preserving rights

Recommendations made by the LIV in this section address issues relevant to the following question in the Submission Guide:

13.12 Are new laws required to more effectively address the institutional abuse of children?

In addition to the state systems of criminal and civil justice, some religious organisations have established private internal complaints processes (see examples in Appendix 2). Religious organisations are arguably required by law to establish these processes – for example to satisfy a duty of care for the purpose of defending a negligence claim – but the processes are not regulated by government. In the absence of any clear legal requirement to establish internal complaints processes, religious organisations might justify such processes in terms of risk management, reputation and good pastoral practice.

Internal complaints processes can lead to a confidential settlement and might include an undertaking by the victim not to bring civil proceedings against the perpetrator or the religious organization.¹¹⁵ In theory, they could also lead to an apology and the removal of the perpetrator from the service of the organisation¹¹⁶ as well as internal changes to prevent abuse occurring in the future. Information received in the course of the internal complaints process could be used – including by the religious organisation that controls the complaints process – in any criminal or civil proceedings that might follow an internal process.¹¹⁷

These processes might be categorised as a form of alternative dispute resolution and are often designed to settle claims and avoid civil litigation. Internal response processes might also be characterised as complaint-handling mechanisms, and often have investigatory functions.

Internal response processes can benefit both religious and non-government organisations and victims. Our members report that resort to criminal and civil law litigation is often viewed unfavourably by victims, as it can be an unduly stressful and difficult vehicle for discussing deeply personal and traumatic experiences, and it can also mean that claims take long periods of time to resolve, effectively stretching out any discomfort and unease over a much

¹¹⁵ See above fn 19.

¹¹⁶ See for example <http://www.abc.net.au/news/2012-09-10/three-anglican-priests-defrocked/4252742>.

¹¹⁷ See further below.

longer period. As noted above, victims might wish to preserve their relationship with their faith community and see criminal and civil litigation as alienating them from that community. Victims can avoid the uncertainty and delay of litigation, as well as the need to give evidence, by electing to pursue an internal response process. Religious and other non-government organisations can also avoid the scrutiny of public court proceedings. Internal processes also give organisations the chance to control the nature of the compensation provided.

Some information about compensation payments offered by religious organisations through their internal complaints processes is publicly available, for example the Melbourne Archdiocese makes ex gratia payments of up to \$75,000 through the Melbourne Response process.¹¹⁸

Some of the issues arising from internal complaints processes are considered below.

4.3.1. The rules of procedural fairness and preserving rights

The right to a fair hearing is recognised in common law and the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*.¹¹⁹ In particular, a party to a civil proceeding has the right to have the proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.¹²⁰ A fair hearing also includes adherence to the rules of procedural fairness.¹²¹

What procedural fairness requires (the content of the hearing, bias and no evidence rules) will depend on the circumstances of the particular case.¹²² However, if victims were to pursue their claims through civil litigation, having regard to the seriousness of the consequences of a decision for parties in a proceeding concerning claimed sexual abuse, fairness may require the following procedural requirements:¹²³

- A right to a hearing without undue delay;¹²⁴
- A decision-maker free from any interest in the outcome of the matter in dispute, who is free from the appearance of having prejudged the matter or having any bias or prejudice;
- Disclosure to parties of all material to be considered¹²⁵ and in particular, information adverse to their interests so as to afford a party the opportunity to respond, address, oppose or contradict the information;¹²⁶

¹¹⁸ Catholic Archdiocese of Melbourne, 'Melbourne Response', available at <http://www.cam.org.au/Melbourne-Response/Melbourne-Response.aspx>.

¹¹⁹ *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648, 653 per Deane J; *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1, 27 per McHugh & Gummow JJ; *Kioa v West* (1985) 159 CLR 550, 584, per Mason J.

¹²⁰ *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 24(1).

¹²¹ *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1, 27 per McHugh & Gummow JJ.

¹²² *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 188 which has been frequently cited and approved by Australian Courts, see eg *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 552-553. See also *Kioa v West* (1985) 159 CLR 550 at 613- 615 per Brennan J.

¹²³ Matthew Groves, 'The Imaginary Observer of the Bias Rule' (2012) *Australian Journal of Administrative Law* 19, 188; Hon Justice Brian Preston, 'The Enduring Importance of the Rule of Law in Times of Change' (2012) *Australian Law Journal* 86, 175.

¹²⁴ This could be a right relating more to criminal proceedings (or immigration, community treatment order proceedings) as a component of the fair hearing right because of accused's liberty being impeded while proceedings unresolved, eg by being on bail or in jail. While the AAT, for example, has a duty to act expeditiously and avoid delay, this comes from s 2A of the *Administrative Appeals Tribunal Act 1975 (Cth)*. For VCAT, see s 98(1)(d) of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* although VCAT characterises it as a component of the fair hearing right in its Practice Note VCAT 3.

¹²⁵ See Mark Aronson and Bruce Dyer, *Judicial Review of Administrative Action* (LBC Information Services, 2nd ed, 2000). See also *Sullivan v Department of Transport* (1978) 20 ALR 323; *McLachlan v Australian Securities and Investments Commission* (1999) 85 FCR 286.

¹²⁶ *Sullivan v Department of Transport* (1978) 20 ALR 323; *Kioa v West* (1985) 159 CLR 550; *Ansett v Minister for Aviation* (1987) 72 ALR 469; *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 ALR 411.

- A reasonable opportunity for each party to present their case including the right to lead evidence and to test the opponent's evidence by cross-examination and a reasonable opportunity to obtain the services of counsel;¹²⁷
- Decisions made in accordance with the relevant rules of evidence, allowing all relevant and reliable evidence that is of an appropriate probative value to be admissible in court proceedings;¹²⁸
- The provision of reasons for the decision¹²⁹;
- Right to receive assistance where self-represented so as to enable full participation and ensure a fair hearing;¹³⁰ and
- A right to legal representation of their choice.¹³¹

As noted, rules of procedural fairness would require disclosure of all relevant material, including disclosure to the complainant by the organisation and perpetrator. Although in the context of civil proceedings this would usually concern adverse information, it is not necessarily restricted to adverse information. Information that is adverse to the religious organisation but beneficial to the complainant can still be relevant.

Case study: Adhering to procedural fairness

Under the scheme established by the Melbourne Response, an 'Independent Commissioner is appointed (currently one of two Senior Counsel) is appointed to enquire into and advise the Archbishop with respect to complaints of sexual and other abuse by Church persons. The Independent Commissioner may conduct hearings and is required by the Terms of Appointment to the office to observe the rules of natural justice.¹³² The Terms of Appointment do not specifically state that natural justice will be afforded to the complainant (as opposed to a priest, religious, or other person required to produce to the Commissioner a document, or to answer a question), nor do they expressly state what 'natural justice' should entail.

The Terms of Appointment acknowledge that a priest, religious, or other person required to produce to the Commissioner a document, or to answer a question may refuse to do so on the basis of self-incrimination. They also permit the Independent Commissioner to report sexual abuse to the police, subject to a requirement that all information shall be treated as confidential and 'privileged'. Except to the extent that a complainant must consent to the giving of any confidential information to police, it is not clear on whose behalf the confidentiality and privilege will be claimed.¹³³

¹²⁷ *Barton v Estate Agents Licensing Authority* [1998] 1 VR 164; *Martin v Rowling* [2005] QCA 128 at [30] per Fryberg J, at [86] – [87] per Mullins J; *Adams v Wendt* (1993) 30 ALD 877.

¹²⁸ As per the policy behind the *Evidence Act 2008* (Vic); see the [Statement of Compatibility](#) and [Explanatory Memorandum](#). See also *Evidence Act 2008* (Vic) ss 135, 136, 138.

¹²⁹ Except in exceptional cases: *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 279; *Fletcher Construction Australia Ltd v Lines Macfarlane & Marshall Pty Ltd (No 2)* (2002) 6 VR 1.

¹³⁰ *Reisner v Bratt* [2004] NSWCA 22; *Tomasevic v Travaglini* [2007] VSC 337 per Bell J; *Minogue v HREOC* (1999) 84 FCR 438 at 445–6.

¹³¹ However, administrative bodies and lay tribunals may have a discretion to exclude lawyers pursuant to an empowering statute, though this refusal may in itself amount to a breach of procedural fairness: *Li Shi Ping v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 35 ALD 557, 570; *Wabz v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 204 ALR 687, 59.

¹³² Sub-clause xiii 'Appointment of Independent Commissioner to enquire into sexual and other abuse' 15 February 2011, Attachment 1 to O'Callaghan QC, Peter, Independent Commissioner, Catholic Archdiocese of Melbourne, Submission No 1 (2011), *Inquiry into the Protection of Victoria's Vulnerable Children* <http://www.childprotectioninquiry.vic.gov.au/images/stories/submissions/ocallaghan-independent-commissioner-catholic-archdiocese-of-melbourne.pdf>. See also O'Callaghan QC, Peter, Independent Commissioner, Catholic Archdiocese of Melbourne, *Submission No 2, Inquiry into the Protection of Victoria's Vulnerable Children*, 24 November 2011.

¹³³ Terms of appointment, *Ibid*, sub-clause x.

Victims' and their representatives reported experiences of this process have indicated failings, including a lack of independent support for victims and a lack of transparency of procedures and process.¹³⁴

The Independent Commissioner is instructed and paid by the Archdiocese of Melbourne and under professional conduct rules and standards¹³⁵ must act in the best interest of the client, the Archdiocese of Melbourne. A failure to comply with procedural fairness is not in the interests of the victim and might not be in the interests of the Archdiocese of Melbourne if the claims were ever to proceed to court.

The use of the title 'Independent Commissioner' in the Melbourne Response is problematic because there is the potential for conflict of interest, as the Commissioner's client's interests (that is, the Archdiocese of Melbourne) are likely to be directly affected by allegations made by a victim of sexual abuse. We note recent reports that a 'Commissioner' has paid money from his own pocket to personnel affected by allegations of abuse, which could seriously compromise any pretensions to 'independence'.¹³⁶ The terms 'Independent' and 'Commissioner' could mislead complainants into thinking that the person appointed to this role is independent from the church, and could lead to a higher level of trust being placed on any guidance provided by the person appointed in the role, than may have been the case had the role been named in conformity with its nature.

The use of the word 'Commissioner' in this private context appears to be an anomaly: the term is usually associated with a high-level official appointed by government with legislated terms of reference and mechanisms to ensure public accountability and transparency, including record keeping and reporting obligations.¹³⁷ None of these defining elements of a 'Commissioner' could be said to apply to the 'Independent Commissioner' under the Melbourne Response, which is a private appointment of the Melbourne Archdiocese, with no public accountability and no obligation to report publicly on activities.

The rules of procedural fairness¹³⁸ are widely recognised to produce good decisions, in the sense that the decisions are more likely to be accepted by those affected by them; they are fair; and they accord with evidence.¹³⁹ The rules of procedural fairness also reflect common sense ideas of fair decision-making. Most lay people would expect that a decision maker would be impartial, base a decision on evidence and allow a person affected by the decision an opportunity to be heard. The rules of procedural fairness can assist religious organisations to settle claims by providing a framework to guide individual decision-makers. Reports arising from at least one process (see case study above) suggest that procedural fairness principles are not necessarily followed.

¹³⁴ Holdway and Baker, above n 97, 54; see also Towards Justice, the Charter of the Melbourne Victims' Collective, Australia, Acting against Abuses from Clergy, Religious and Lay Personnel in the Melbourne Catholic Archdiocese, <http://www.igfa.com.au/pdf/Charter.pdf>.

¹³⁵ Catholic Archdiocese of Melbourne, Sexual and Other Abuse: The Melbourne Response. Available at <http://www.cam.org.au/Portals/0/Documents/Melbourne-Response--Appointment-of-Independent-Commissioner.pdf>.

¹³⁶ See <http://www.theage.com.au/national/abuse-inquirer-paid-principal-20120916-260mq.html> reporting that Peter O'Callaghan paid out of his own pocket, money to the principal of a school whose career ended as a result of his stance against an alleged paedophile priest.

¹³⁷ The title of Commissioner is usually assigned to a senior government official authorised to perform certain duties. For example, the [Victorian Legal Services Commissioner](#) is defined as an 'independent agency' responsible for handling complaints about lawyers in Victoria.

¹³⁸ Procedural fairness is also referred to as natural justice, although procedural fairness is the preferred term: *Kioa v West* (1985) 159 CLR 550, 583-584 per Mason J, 601 per Wilson J, 631 per Deane J, *Waga v Technical & Further Education Commn* [2009] NSWCA 213, [45] per Beaten JA, Beazley and Giles JJA agreeing.

¹³⁹ For example the [Veterinary Medicine Authority](#), the [WA Ombudsman](#) and the [NSW Ombudsman](#) have each recognised the benefits of natural justice to an investigator or decision-maker.

There are examples of private organisations being required by legislation to comply with aspects of procedural fairness obligations, including:

- under the National Privacy Principles, organisations must give reasons for denying access to person information or refusing to amend personal information;¹⁴⁰
- employers are required to follow concepts of procedural fairness when taking disciplinary action and might otherwise face a claim for unfair dismissal; and¹⁴¹
- private education providers are required to have an internal complaints handling and appeals process for overseas students.¹⁴²

To ensure that a victim's right to a fair hearing is maintained, and having regard to the rights of children, the State should ensure that any internal process established by an organisation, at a minimum, afford victims appropriate aspects of procedural fairness. There is no justification for removing or undermining a victim's right to a fair hearing through an internal response process. In this context, the victim's right to privacy might warrant a private hearing.¹⁴³

Although internal response processes have the potential to settle claims without the need for civil litigation, they should not undermine the fundamental rights to which victims would be entitled, were they to pursue their claims through civil litigation or if criminal proceedings were initiated. We note in this regard the potential for evidence, information, and documents gathered through internal complaints processes to be used by the organisation or alleged perpetrator in subsequent proceedings and the potential unfairness that could arise if such evidence, information and documents were gathered in circumstances where procedural fairness was not afforded.

The LIV recommends that:

- The Committee should assess the extent to which the practices, policies and protocols in religious and other non-government organisations meet the requirements of procedural fairness, specifically for victims.
- To assist religious and other non-government organisations to identify what the rules of procedural fairness require, guidance on procedural fairness could be provided by an appropriate statutory body (such as the oversight body suggested below) with power to issue best practice guidelines, such as those issued by the Overseas Student Ombudsman for complaint handling by private education providers.¹⁴⁴
- Religious organisations should be required to disclose any relevant information to complainants during an internal response process.

4.3.2. Accountability and independent oversight

In 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.¹⁴⁵ Access to an external review

¹⁴⁰ *Privacy Act 1988* (Cth), Schedule 3, cl 6.7.

¹⁴¹ For example: *Wadey v YMCA Canberra* [1996] IRCA 568; *Farquarson v Qantas Airways Limited* [2006] AIRC 488; *Byrne & Frew v Australian Airlines Ltd* 185 CLR 410.

¹⁴² *National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007*, standard 8; *Education Services for Overseas Students Act 2000* (Cth).

¹⁴³ See *Children and Young Persons Act 1989* (Vic).

¹⁴⁴ Overseas Student Ombudsman, *Better Practice Complaint Handling for Education Providers* (February 2011).

¹⁴⁵ These include, 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*).

increases accountability of private organisations and facilitates adherence to procedural fairness principles.

The nature of claims made in relation to criminal child abuse by personnel of religious and non-government organisations suggests that a specialised approach to resolving them is needed, addressing the difficulties posed by both institution-specific resolution policies as well as barriers to civil and criminal law claims in this area. Access to effective remedies through an appropriate dispute resolution regime is likely to depend on reforms to ameliorate the barriers to civil litigation (see section 4.2 above). Organisations (and their insurers) are unlikely to approve more substantial compensation payments where they believe that a civil claim will not succeed.

There are alternative models for hearing and resolving widespread complaints of historical wrongdoing, including the appointment of independent assessors, commissions of inquiry, and the regular use of informal modes of appropriate dispute resolution based on restorative justice.¹⁴⁶ Features of an alternative model for resolving historical wrongdoing would include:

- Independence (and perceived independence) from the defendant organisations: the imposition of a truly independent third party umpire greatly enhances the credibility of any dispute resolution system.¹⁴⁷
- Informal, appropriate dispute resolution-based processes, avoiding adding stress and disturbance to what is already a difficult process for complainants.¹⁴⁸
- Efficient resolution of claims: civil law claims can be prolonged, particularly where a defendant seeks to obstruct or delay matters. An appropriate dispute resolution-based approach with an active mediator (or other referee) with appropriate powers can assist in overcoming delays.¹⁴⁹
- No requirement for claimants to participate in systems or services offered by defendant institutions (such as pastoral care services) or to face the accused perpetrator (or indeed any member of the religious organisation) in person, if it is against the victim's wishes.¹⁵⁰
- Observance of principles of procedural fairness: the legitimacy of any system designed to precede the pursuit of common law rights through the courts will ultimately depend on observance of procedural fairness principles as described in section 4.3.1 above.¹⁵¹

Case study: Y (a real case, with names removed to protect the identities of the parties)

“Y, now aged 12, was sexually abused by a teacher in a school run by a church on a number of occasions when Y was 8 or 9 years old. Because of her age, Y had the benefit of anonymity (i.e. her identity was suppressed) and was not confronted with any limitation of time issues by virtue of her being a minor.

¹⁴⁶ Holdway and Baker, above n 97. 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

¹⁴⁷ Graeme Orr and Joo-Cheong Tham, Work and Employment (2011) *Australian Journal of Administrative Law* 18, 127. One complaint often cited by participants in the Melbourne Response processes, for example, is that the system is too close to the Church itself (promoting its own case services, for example), in circumstances where the Church is trying to protect one of its own (see Case Study above). Ensuring that any resolution mechanisms are separate from the entities to which the allegations relate helps relieve this difficulty.

¹⁴⁸ Chief Justice Diana Bryant and Deputy Chief Justice John Faulks, *The Helping Court Comes Full Circle: The Application and Use of Therapeutic Jurisprudence in the Family Court of Australia* (2007) *Journal of Judicial Administration* 17, 93.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ Matthew Groves, ‘The Imaginary Observer of the Bias Rule’ (2012) *Australian Journal of Administrative Law* 19, 188.

“Due to Y’s age, it was asserted that there would be a future economic loss component, and costs of independent counselling were sought. As the school had been put on notice regarding the perpetrator’s misconduct, there was also an element of exemplary damages claimed.

“Although proceedings were issued, the matter settled at mediation in the sum of \$200,000.

“Y’s claim was readily settled with the issues of limitation, liability and causation not being raised.

Y’s case shows that alternative dispute resolution in these types of claims can be productive in achieving a positive outcome, with a minimum amount of distress for the victims. Our members report that churches and other non-governmental bodies embrace alternative dispute resolution, even in cases which have limited legal prospects of success.

The LIV recommends that:

- an independent statutory body should be established to provide an external review mechanism for internal response processes of religious and other non-government organisations based on principles of restorative justice.
- consideration be given to whether the independent statutory body should also be able to receive complaints directly
- powers of the independent body could include the issuing of guidelines for preventing abuse¹⁵²

¹⁵² See for example, the Office of Chief Psychiatrist Guidelines on Sexual Safety (regarding dealing with allegations of sexual abuse in mental health services). Available at <http://docs.health.vic.gov.au/docs/doc/Promoting-sexual-safety-responding-to-sexual-activity-and-managing-allegations-of-sexual-assault-in-adult-acute-inpatient-units--June-2012>.

Appendix 1

International responses

Ireland

As mentioned, the Ryan Commission investigated child abuse in Irish Institutions for children. The Commission was established in 2000 pursuant to the *Commission to Inquire into Child Abuse Act 2000*¹⁵³ and had three primary functions:

- 'to hear evidence of abuse from persons who allege they suffered abuse in childhood, in institutions, during the period from 1940 or earlier, to the present day;
- to conduct an inquiry into abuse of children in institutions during that period and, where satisfied that abuse occurred, to determine the causes, nature, circumstances and extent of such abuse; and
- to prepare and publish reports on the results of the inquiry and on its recommendations in relation to dealing with the effects of such abuse'.¹⁵⁴

There were two separate committees who heard evidence for the Commission – the Investigation Committee and the Confidential Committee.¹⁵⁵ The Chairperson of the Commission was a justice of the High Court, Justice Ryan and other ordinary members of the Commission sat on either committee and were drawn from various disciplines.¹⁵⁶

The Commission's Final Report was released on the 20th of May 2009 and detailed numerous instances of abuse and systemic problems such as a failure to accept responsibility for the abuse, knowledge by organisations that abuse was a chronic problem – but the solution to this problem was to transfer offenders rather than dismiss them; and that safety of children was not a priority at any time.¹⁵⁷

Among other things, the Commission recommended that:¹⁵⁸

- the State admit past abuse of children;
- counselling and education services be available to ex-residents of institutions and their families;
- future childcare policy should be child-centred and the needs of children should be paramount;
- policies for, and the provision of, childcare services should be regularly reviewed;
- the culture be changed so that rules and regulations be enforced, breaches be reported and sanctions applied.

In March 2006, the Dublin Archdiocese Commission of Investigation ('the Commission') was established to report on 'the handling by Church and State authorities of a representative sample of allegations and suspicions of child sexual abuse against clerics operating under the aegis of the Archdiocese of Dublin over the period 1975 – 2004'.¹⁵⁹ The Commission was made up of three members – Judge Yvonne Murphy (Chairperson), Ita Mangan (Commissioner) and Hugh O'Neil (Commissioner). The Commission was later asked by the Government to carry out a similar investigation into the Catholic Diocese of Cloyne. As part

¹⁵³ The Commission to Inquire into Child Abuse, *About Us* (accessed 19 September 2012). Available at <http://www.childabusecommission.ie/about/index.html>.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ The Commission to Inquire into Child Abuse, *Executive Summary* (2009). Available at <http://www.childabusecommission.com/rpt/pdfs/CICA-Executive%20Summary.pdf>.

¹⁵⁸ *Ibid.*

¹⁵⁹ Commission of Investigation: Report into the Catholic Archdiocese of Dublin, July 2009, p 1, <http://www.dacoi.ie/>.

of its investigation into the Catholic Diocese of Cloyne, the Commission ‘examined all complaints, allegations, concerns and suspicions of child sexual abuse by relevant clerics made to the diocesan and other Catholic Church authorities and public and State authorities in the period 1 January 1996 – 1 February 2009’.¹⁶⁰

In both investigations, the Commission was required to report back to the Government with regards to:

- a representative sample of complainants,
- the nature of the response by the diocese and other Church authorities and by public and state authorities; and
- whether such response was adequate or appropriate.¹⁶¹

The adequacy or appropriateness of the response was to be measured by comparing it to the prevailing standards and guidelines issued by the Church and State authorities.¹⁶²

In relation to the Report into the Catholic Archdiocese of Dublin (‘the Murphy Report’), the Commission received complaints, suspicion or knowledge of child abuse with regards to 102 priests who were within the remit of the report.¹⁶³ Of those, a representative sample of 46 priests was chosen.¹⁶⁴ With regards to the Report into the Catholic Diocese of Cloyne (‘the Cloyne Report’), as there were complaints, suspicions, concerns or knowledge of child sexual abuse regarding 19 clerics within the remit of the Commission, all 19 cases were investigated by the Cloyne Report.¹⁶⁵

In response to the reports, a Bill sponsored by Senator Maurice Cummins on behalf of the Minister for Justice and Equality was presented to Parliament on the 23rd April 2012.¹⁶⁶ The *Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012* was enacted on 18 July 2012.¹⁶⁷ The Act creates the following offence:

a person shall be guilty of an offence if—

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

and fails without reasonable excuse to disclose that information as soon as it is practicable to do so to a member of the Garda Síochána.¹⁶⁸

United Kingdom

In 2000, Cardinal Cormac Murphy-O’Connor asked Lord Nolan to set a framework for best practice and prevention to assist the Catholic Church.¹⁶⁹ In 2007, the Cumberlege Commission carried out a review of Lord Nolan’s 2001 report¹⁷⁰ entitled *Safeguarding with Confidence: Keeping Children and Vulnerable Adults Safe in the Catholic Church* (‘the Cumberlege Commission Report’).

¹⁶⁰ Commission of Investigation: Report into the Catholic Diocese of Cloyne, December 2010, p 1, <<http://www.dacoi.ie/>>.

¹⁶¹ Ibid 25.

¹⁶² Ibid.

¹⁶³ Commission of Investigation: Report into the Catholic Archdiocese of Dublin, July 2009, p 2, <<http://www.dacoi.ie/>>.

¹⁶⁴ Ibid 3.

¹⁶⁵ Commission of Investigation: Report into the Catholic Diocese of Cloyne, December 2010, p 29.

¹⁶⁶ Houses of the Oireachtas, <<http://www.oireachtas.ie/viewdoc.asp?DocID=20908&&CatID=59>>, accessed 16th August 2012.

¹⁶⁷ Ibid.

¹⁶⁸ *Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012* (Ireland) s 2(1). Schedule 1 includes rape and sexual assault.

¹⁶⁹ The Cumberlege Commission Report, *Safeguarding with Confidence: Keeping Children and Vulnerable Adults Safe in the Catholic Church* (Incorporated Catholic Truth Society: London, 2007) p 3.

¹⁷⁰ Lord Nolan recommended that his 2001 report, ‘A Program for Action’, be reviewed in five years’ time.

While the Cumberlege Commission Report sets out many recommendations,¹⁷¹ it recognises that the recommendations will not be binding on bishops or congregational leaders – therefore the Commission recommended that the Conference of Bishops draw up a general decree (*decreta generalia*) for England and Wales, to be sent to the Holy See for *recognition*. This would allow the recommendations to become part of the particular law of the Church and bring clarity to procedures for the prevention and reporting of child sexual abuse. It would also give an ecclesiastical remedy against bishops and congregational leaders who fail to follow the recommendations.¹⁷²

See the Cumberlege Commission Report, Safeguarding with Confidence: Keeping Children and Vulnerable Adults Safe in the Catholic Church (Incorporated Catholic Truth Society: London, 2007).

¹⁷¹ See pages 92-102 of the Cumberlege Commission Report for a summary of the recommendations.

¹⁷² The Cumberlege Commission Report, *Safeguarding with Confidence: Keeping Children and Vulnerable Adults Safe in the Catholic Church* (Incorporated Catholic Truth Society: London, 2007) pp 89-90.

Appendix 2

Comparative internal complaint and dispute resolution mechanisms

The Anglican Church

The Anglican Church found that the patterns of abuse within the Church were quite different to those found in the general population and that there were often long delays in reporting offences, with an average delay of 23 years.¹⁷³

The Anglican Church operates an internal Pastoral Care and Assistance Scheme, however the Scheme normally operates where the alleged abuser is either deceased or is no longer subject to the disciplinary process/protocol of the Church.¹⁷⁴

The Anglican Diocese of Melbourne has prepared a detailed disciplinary process dealing with allegations of abuse by church workers, which is publicly available.¹⁷⁵ The protocol is quite clear in its stance that abuse complaints will be taken seriously and that the Church will be supportive of complainants.¹⁷⁶ However, the Professional Standards Committee has the power to dismiss or take no further action in relation to a complaint should it take the view that the complaint “can properly be dealt with by other means” or is considered “false, vexatious, misconceived, frivolous or lacking in substance.”¹⁷⁷

Complainants that proceed through the system may be offered a dedicated Professional Support Person who assists the complainant to explain and clarify the process and possible outcomes of making a complaint and provide counselling, even if a formal complaint is not made.¹⁷⁸ Those who have a complaint of misconduct made against them are also offered the services of a Professional Support Person.¹⁷⁹ If a complaint is made, complainants have the opportunity to provide a Victim Impact Statement and participate in mediation.¹⁸⁰ The Anglican Professional Standards Committee (‘PSC’) may still investigate a complaint even if it has been made anonymously or has been withdrawn.¹⁸¹ During the complaint process, the Archbishop or relevant Church authority has the power to suspend or stand down any person against whom a complaint is made.¹⁸² There is also a positive obligation to report abuse to relevant child protection agencies and/or police.¹⁸³ The Protocol does not, however, appear to detail any remedy to a complaint other than offering a “pastoral response”¹⁸⁴ and the ability of the PSC to refer the matter to the Board or any equivalent body in another

¹⁷³ Patrick Parkinson, Kim Oates and Amanda Jayakody, *Study of Reported Child Sexual Abuse in the Anglican Church* (May 2009), p5.

¹⁷⁴ General Synod Standing Committee, *Resolution SC2009/03/037* (16-18 October 2009).

¹⁷⁵ Anglican Diocese of Melbourne, *Power and Trust in the Church: A Protocol under the Professional Standards Act 2009* (26 August 2010).

¹⁷⁶ *Ibid* 3.

¹⁷⁷ *Ibid* 6-7.

¹⁷⁸ *Ibid* 7.

¹⁷⁹ *Ibid* 9.

¹⁸⁰ *Ibid* 7.

¹⁸¹ *Ibid* 9.

¹⁸² *Ibid* 10.

¹⁸³ *Ibid* 17.

¹⁸⁴ *Ibid* 16.

Diocese where they determine that the Church worker is unfit or should have conditions or restrictions places on their employment or duties.¹⁸⁵

The Baptist Union of Victoria

The Baptist Union of Victoria ('the BUV') has a complaints procedure whereby a Professional Standards Group ('the Group') oversees the complaints processes within the Union. As part of this process, the Group will not proceed with complaints unless the complainant agrees to be identified.¹⁸⁶ The complainant may make a complaint directly to the Director of Ministries or to a Deacon/Church leader as a representative of the church.¹⁸⁷ The complaint must then be made in written form to the Group whereby a Professional Standards Worker ('the Worker') of the BUV will speak with the complainant and explain the process. As part of this contact, Workers are to offer the assistance of an Advisor to assist the complainant throughout the process. If the complaint warrants investigation, the Director of Ministries recommends that it may be beneficial for the person who is the subject of the allegation to be asked to stand aside temporarily, with income.¹⁸⁸ If the allegations are of a criminal nature, the Worker will encourage and assist the complainant to report the allegations to the police.¹⁸⁹ If the matter is investigated by the police, the BUV will suspend its investigation.¹⁹⁰

The initial investigation involves informing the complainant and respondent of the commencement of the investigation, assigning both parties an Adviser (if the party wants one) and the Advisers will meet with their respective parties and advise them of the process, clarify issues, provide guidance and ensure appropriate pastoral care.¹⁹¹ The Worker will also set up a Panel to investigate the complaint. The complainant will be required to provide a 2-page document to the Panel advising them of the relationship with the alleged person; a description of the alleged behaviour and the dates; the consequences for the complainant and the personal impact of the alleged behaviour on the complainant.¹⁹² The Panel then determines an interview time with the respondent which will occur at the panel hearing. The complainant is not to be present at the panel hearing.¹⁹³ The Panel then makes a determination and this is used to decide an appropriate course of action.¹⁹⁴

A Professional Standards Misconduct Sub-Committee will then recommend the appropriate course of action. This recommendation will take the form of a written document and may include career redirection; recommendation that the respondent be removed from various lists; notification of misconduct to all churches, committees or working groups and notification to current employers.¹⁹⁵

Either party has the right to appeal the outcome on the basis that the process was not properly carried out or that new evidence has come to light.¹⁹⁶ The complaint procedure document then outlines the various roles of each of the persons involved in the process.¹⁹⁷

¹⁸⁵ Ibid 11-12.

¹⁸⁶ Baptist Union of Victoria, *Complaint Procedure for Allegations of Misconduct by Pastoral Leaders* (May 2008). Available at <http://www.buv.com.au/about-us/church-health-capacity-building/professional-standards>.

¹⁸⁷ Ibid 8.

¹⁸⁸ Ibid 9.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Ibid 10.

¹⁹² Ibid 10-11.

¹⁹³ Ibid 11.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid 12.

¹⁹⁶ Ibid 13.

¹⁹⁷ Ibid

Catholic Archdiocese of Melbourne

'Towards Healing'

In 1996, the Australian Catholic Bishops Conference introduced its 'Towards Healing' document which sets out the principles that form the basis of the Church's response to complaints of abuse in Australia.

The Towards Healing framework established a Professional Standards Resource Group to advise on matters concerning professional standards, such as all types of abuse (whether the complainant is a child or an adult). Each Resource Group appoints Assessors (responsible for investigating the complaint) and Facilitators (responsible for meeting with the victim and to attempt to mediate an outcome).¹⁹⁸

The policy provides that anonymous complaints will not be acted upon by the Church, save for informing the Police, until such time that the identity of the complainant is ascertained.¹⁹⁹

The Church claims that it also actively encourages complainants to refer allegations to the police, and claims that it requires a complainant to sign a document in the event that a complainant refuses to refer the matter to the police, failing which the complaint will not proceed to assessment under the 'Towards Healing' process.²⁰⁰

The ultimate outcome for complainants is usually financial reparation and/or counseling. Complainants are not required to give an undertaking of confidentiality.

'Towards Healing' also claims to go some way towards addressing preventative strategies²⁰¹ by warning clergy about the risks of abuse and encouraging the reporting of inappropriate behaviour. Clergy are also offered the opportunity to be referred for psychological assistance in the event that they feel as though they may be at risk of offending.

The 'Melbourne Response'

Following a number of historical allegations of abuse within the Melbourne Archdiocese, in 1996 the Catholic Church in Melbourne established a complaints system known as the 'Melbourne Response',²⁰² intended to facilitate the reporting and investigation of complaints against individuals under the control of the Archbishop of Melbourne, and to provide counselling, support and compensation to victims.

In 2012, the Archbishop of Melbourne issued a public apology concerning the history of abuse,²⁰³ recognising that grave abuse had taken place over many years.

The Melbourne Response provides victims with counselling and support and,²⁰⁴ where the Commissioner is satisfied that abuse took place, ex gratia compensation of up to \$75,000.²⁰⁵ The amount of compensation is decided upon by an independent Compensation Panel after receiving a reference from the Independent Commissioner.²⁰⁶ The Commissioner also has

¹⁹⁸ Catholic Religious Australia, *Towards Healing* (January 2010), p15.

¹⁹⁹ *Ibid* 16.

²⁰⁰ *Ibid* p7-18.

²⁰¹ Catholic Religious Australia, *Towards Healing* (January 2010)29.

²⁰² <http://www.cam.org.au/Melbourne-Response/Melbourne-Response.aspx>

²⁰³ Pastoral Letter on the Victorian Government Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations 21 August 2012 <http://www.cam.org.au/Portals/0/Documents/Pastoral-Letter-Parliamentary-Inquiry.pdf>. See also Hart, D, *A Pastoral Letter on Sexual Abuse* (1 July 2010).

²⁰⁴ http://www.cam.org.au/Portals/0/Documents/sexual_abuse_melbourne_response.pdf.

²⁰⁵ <http://www.cam.org.au/Melbourne-Response/Melbourne-Response.aspx>.

²⁰⁶ *Ibid*.

the ability to refer the complainant to the Church's internal counseling service, Carelink, who will provide treatment and counseling at no charge.²⁰⁷

See further <http://www.cam.org.au/Melbourne-Response/Melbourne-Response.aspx>

The Salvation Army

The Salvation Army acknowledges that between the 1940s and 1970s child abuse (for the most part physical) took place in some of its Children's Homes, and expected 500 potential claimants totaling up to \$25m in compensation (up to \$50,000 per complainant).²⁰⁸

The Salvation Army's Guidelines for Salvationists – Reporting Child Abuse only states that Salvationists should be aware of their legal responsibilities and act accordingly but should remember that 'any report will have social and emotional consequences for all concerned'.²⁰⁹ The website provides no provision for reporting of child abuse or resources for claimants other than a link to a professional standards email address 'for enquiries or concerns regarding abuse or unethical behaviour'.²¹⁰

However, our members report that when proceedings are issued against the Salvation Army, they will defend them vigorously, usually relying on limitation issues,²¹¹ even when liability and causation is clearly attached to the Salvation Army.

Uniting Church of Australia

The Uniting Church Constitution and Regulations provide that the Presbytery has the responsibility for discipline of members and adherents in relation to matters of sexual misconduct.²¹² The Regulations provide that where a complaint of sexual misconduct is made, the Policies for the Prevention of Sexual Misconduct shall apply.²¹³ The Uniting Church has two distinct processes for addressing allegations of sexual misconduct. The first is undertaken by the Sexual Misconduct Complaints Committee (SSMCC) which engages with all those involved by investigating the complaint and seeks an agreed outcome that 'encourages healing and maintains the integrity of ministry within the Church'.²¹⁴ The options available to the SSMCC are: conversation, inquiry, mediation and collaborative resolution.²¹⁵ Legal representation is not permitted.²¹⁶ The second process is undertaken by the Committee for Discipline. This process is triggered when the SSMCC refers a complaint to the Committee for Discipline and is similar to a court process.²¹⁷ The person against whom the complaint is made may be represented by a lawyer or by a member of the Church.²¹⁸ The Committee for Discipline finds on fact and may determine disciplinary outcomes.²¹⁹

²⁰⁷ Ibid.

²⁰⁸ Salvation Army, *The Salvation Army's response to child abuse allegations* (1 August 2006).

²⁰⁹ Salvation Army, *Guidelines for Salvationists – Reporting Child Abuse* (4 June 1994) http://www.salvationarmy.org.au/about-us_65047/about-the-salvation-army/positional-statements--and--guidelines/guidelines-on-reporting-child-abuse.html.

²¹⁰ Salvation Army, *Contacts*, <http://www.salvationarmy.org.au/action/STANDARD?s=0.pc=CONTACTS.html>.

²¹¹ See: *Rundle v Salvation Army (South Australia Property Trust) & Anor* [2007] NSWSC 443 and *The Salvation Army (South Australia Property Trust) v Graham Rundle* [2008] NSWCA 347.

²¹² Uniting Church of Australia, *Constitution and Regulations*, 2012 edition (revised March 2012). Available at <http://assembly.uca.org.au/images/stories/Regulations/2012%20constitution.pdf>.

²¹³ Ibid [5.2.5].

²¹⁴ Ibid [5.6.1].

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ Ibid.

The Policies mentioned in the Regulations include the *Policy for dealing with a Complaint of Sexual Misconduct made against a Member or Adherent of the Uniting Church in Australia*.²²⁰ This document details preventative measures to be undertaken by the church in relation to sexual misconduct by both members and adherents. This document provides operational guidelines for making a complaint and an overview of the complaints system. As part of the complaint principles, it is provided that where a complaint involves a person under the age of consent, the police or appropriate child protection agency shall be contacted.²²¹

In order to initiate the process, it appears that complainants should contact Lauren Mosso, the ethical standards officer. For support or counselling, the church provides details of an independent organisation that deals with church abuse – Bethel.

See further <http://assembly.uca.org.au/images/stories/policies/2001sexualmisconduct.pdf> and <http://assembly.uca.org.au/images/stories/Regulations/2012%20constitution.pdf>

United States

One international example of a Church's response to reports of the sexual abuse of minors has been the *Charter for the Protection of Children and Young People* ('the Charter') which was created by the Ad Hoc Committee for Sexual Abuse of the United States Conference of Catholic Bishops (USCCB).²²² The Charter was approved by the full body of US Catholic bishops at its general meeting in June 2005 and a second revision was approved by the general meeting in June 2011.²²³

The Charter aims to:²²⁴

- Promote the healing and reconciliation with victims/survivors of sexual abuse of minors;
- Guarantee an effective response to allegations of sexual abuse of minors;
- Ensure the accountability of the Church's procedures;
- Protect the faithful in the future.

The 2005 Charter created the National Review Board ('the NRB') which was assigned responsibility to oversee completion of the study of the causes and context of what was termed the 'recent crisis' (the allegations of sexual abuse of minors by Catholic priests).²²⁵ The NRB engaged the John Jay College to conduct the research and to summarise its findings and present a summary report to the United States Conference of Catholic Bishops. The John Jay College ultimately produced two reports – a study into the nature and scope of sexual abuse of minors; and a study into the causes and context of that abuse ('the Causes and Context Study').²²⁶

In response to the Causes and Context Study, in June 2012, the NRB published some recommendations for diocesan bishops which fell broadly into three categories, identified by

²²⁰ Available at <http://assembly.uca.org.au/images/stories/policies/2001sexualmisconduct.pdf>.

²²¹ Uniting Church of Australia, *Policy for dealing with a Complaint of Sexual Misconduct made against a Member or Adherent of the Uniting Church in Australia*, November 2001, <http://assembly.uca.org.au/images/stories/policies/2001sexualmisconduct.pdf> (at [2.2(c)]).

²²² United States Conference of Catholic Bishops, *Charter for the Protection of Children and Young People: Essential Norms – Statement of Episcopal Commitment*, Revised June 2011.

²²³ *Ibid.*

²²⁴ *Ibid.*

²²⁵ John Jay College Research Team, *The Causes and Context of Sexual Abuse of Minors by Catholic Priests in the United States, 1950-2010: report Presented to the United States Conference of Catholic Bishops*, May 2011, <http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/The-Causes-and-Context-of-Sexual-Abuse-of-Minors-by-Catholic-Priests-in-the-United-States-1950-2010.pdf>.

²²⁶ *Ibid.*

the study – education; situational prevention and oversight and accountability.²²⁷ Some of these recommendations are:

- To ensure education regarding situational factors in formation programs;
- To require safe environment and codes of conduct training for all seminarians and candidates for the permanent diaconate;
- To monitor and communicate widely with the Church through the audit process;
- To train diocesan personnel in the requirements of the Charter and in recordkeeping, state laws and mandated reporting, and train the various segments of parish life in this as well;
- To provide for the measuring, monitoring and reporting the effectiveness of the safe environment programs required by the Charter;
- To develop an ongoing system of clergy evaluations and support;
- To improve the audit as the instrument of accountability for the bishops;
- To review written policies and procedures for handling allegations of inappropriate behaviour with minors.²²⁸

The NRB considers that its recommendations, as drawn from the Causes and Context study, should form part of an ongoing dialogue between members of the Church and bishops.

See further *United States Conference of Catholic Bishops, Charter for the Protection of Children and Young People (US Conference of Catholic Bishops: Washington DC, 2005)*, www.nccbuscc.org/ocyp/charter.shtml, and <http://www.reuters.com/article/2012/06/26/us-usa-crime-church-idUSBRE85P1GV20120626>
<http://online.wsj.com/article/SB10001424052702303740704577522603440183734.html>
<http://blogs.wsj.com/law/2012/07/12/penn-state-scandal-brings-clarity-to-the-clery-act/>
<http://www.higheredcenter.org/mandates/clery-act>
<http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/What-has-the-Catholic-Church-done-to-effectively-respond-to-sexual-abuse-by-church-personnel.pdf>

²²⁷ The full text of the recommendations can be found at <http://www.usccb.org/issues-and-action/child-and-youth-protection/national-review-board-recommendations-2012-june.cfm>.

²²⁸ National Review Board Recommendations: 2012 June – Based on *The Causes and Context of Sexual Abuse of Minors by Catholic Priests in the United States, 1950-2010*, <http://www.usccb.org/issues-and-action/child-and-youth-protection/national-review-board-recommendations-2012-june.cfm>.