

SUBMISSION TO INQUIRY INTO PROCESSES BY WHICH RELIGIOUS AND OTHER NON-GOVERNMENT ORGANISATIONS RESPOND TO THE CRIMINAL ABUSE OF CHILDREN BY PERSONNEL WITHIN THEIR ORGANISATIONS

General Comments

At the outset, I should indicate that I am a 'practising' Catholic, i.e. I attend church services regularly. I have no background on the processes adopted by other organisations and I will limit my comments to the processes adopted in the Catholic Church. I would ask the Committee to bear in mind that their inquiry should not be used as a means to attack the Catholic Church or any of the other organisations under discussion.

I would suggest that, in trying to understand that Catholic Church's responses, it is useful to keep the nature and the history of the Church in mind. Not only is it an organisation (like the Boy Scouts) attempting to serve the community, but it is an organisation devoted to the upholding of moral or ethical standards among its members (and people in general). It is therefore more embarrassing for such a body to have to acknowledge that some of its officers (i.e. priests) with the particular role of telling others how to behave have more than simple human frailties and are acting in unacceptable ways. In relation to its history, the Church is, of course, older than any other organisation in the world. It has been a powerful organisation for more than fifteen centuries and carried western civilisation for much of that time. As such, it developed its own legal system.

This history led to developments that we would not find acceptable in a democratic society, although it is necessary to bear in mind that democracy is a recent phenomenon, with women getting the vote only in the last hundred years or so and unpropertied men not being that far in front of them. For example, the Catholic Encyclopaedia (found in Google) says of 'Benefit of Clergy' that clergy, including monks and nuns, were exempt from the jurisdiction of the secular courts in England from the days of William the Conqueror. Entitlement to the exemption was proved by reading, as only the clergy were generally able to read. There were many permutations, but it was finally abolished in 1827. Again, Wikipedia says of 'Estates of the Realm' that in France before the French Revolution society was divided into three estates, the first consisting of clergy, the second consisting of the nobility, and the third consisting of commoners. It says that the structure of the clerical estate remained 'singly' intact until the religious reformations of the 16th century. Wikipedia says of 'Estates General (France)' that each estate had a separate assembly, called by the king to provide advice and to deal with taxation. It also says that the estates did not always meet separately. It says that the

institution of the estates was comparable to similar institutions across Europe.

The prestige that was reflected in the special status of clerics historically was probably enhanced, even in modern times, by their vows, particularly that of chastity. One can argue whether that vow constituted a step too far for some; it certainly seems brave for a young person to commit to chastity for the rest of his (or her) life. One can also argue that the solitary lives to which parish priests are condemned could have led to the aberrations, but this fails to take account of the molestations committed by brothers or priests living in communities in their orders/societies. Some, e.g. Christopher Geraghty in his book 'Dancing with the Devil: A Journey from the Pulpit to the Bench', suggest that clerics have tended to see themselves as an elite. This would apply to many professional groups and is possibly reflected in the usual starting position that discipline should be applied by the group, rather than by an independent, outside body. Anecdotal evidence of that prestige is given by the tardiness of parents to believe that Father F or Brother B had molested their child.

Again, the Church is an international organisation (probably, the first and biggest multinational corporation) and has a centralised and authoritarian structure (said to be based on the Byzantine Empire) where control is exercised by the Vatican. Even the bishops, who are responsible for local administration, can be quite restricted by the Vatican controls although the orders/societies of clerics seem to have more independence. Its antiquity and centralised and authoritarian structure mean that the Church can be extremely conservative and resistant to change.

The Vatican's Starting Point

Kieran Tapsell's review of *Dancing with the Devil* on www.catholica.com.au says (reasonably accurately):

' . . . Cardinal Ottaviani's 1962 direction, *Crimen Sollicitationis*, having the force of Canon Law, expanded a similar 1922 direction. It provided that where allegations of sex crimes against children by a priest were made, a Canonical Tribunal had to investigate it. The complainant, witnesses and anyone associated with the tribunal, and anyone who became aware of the allegations by reason of their office, were required "to observe inviolably, the strictest confidentiality in all things and with all persons", the breach of which involved automatic excommunication. Excommunication is the Church's worst form of punishment. . . .

The perverse nature of this clerical culture can be seen from the fact that *Crimen Sollicitationis* provided for an investigation and trial for alleged

clergy pedophiles, with punishments in the nature of spiritual exercises in a religious house, suspension of priestly faculties and “in extreme cases”, of defrocking (*degradatio*), but only where there has been “grave scandal to the faithful and harm to souls, attained such a degree of temerity and habitude, that there seems to be no hope, humanly speaking, or almost no hope, of his amendment”. Excommunication is not listed among the punishments. On the other hand, once the Church decided to investigate the allegations, anyone involved in the investigation, including the bishop to whom it is reported, would be automatically excommunicated if they went to the police, even if doing so was required by civil law.'

He also says:

'Cardinal Josef Ratzinger . . . was the Prefect of the Congregation for the Doctrine of the Faith for 25 years before being elected Pope as Benedict XIV in 2005. It was his Congregation that was in charge of administering “*the secret of the Holy Office*”, that forbade Church investigators and others from revealing the information they gained to anyone, including the police, on pain of automatic excommunication'.

He claims that as far back as 1996 a policy was recommended to Cardinal Ratzinger by the Australian bishops, of notifying police about what he himself (presumably as Pope) called “heinous crimes”.'

Some confirmation of Mr Tapsell's point about a recommendation to the Pope by the Australian bishops in 1996 is contained the editorial on the website for *Catholica* for 3 March 2012 which, among other things, said that it was Bishop Geoffrey Robinson's

'work as the initial leader of the response to the clerical sexual abuse crisis in Australia back in the 1990s that more than probably led to the initial modification in Vatican policy that dropped the imposition on Bishops of pontifical secrecy so that clerical crimes could be reported to the civil authorities with the capacity to prosecute. That modification of official Vatican policy was subsequently, and slowly, extended to bishops in other territories of the world and only finally abandoned altogether (and quietly) by the current pope in 2010.'

(According to the Wikipedia entry in relation to *Crimen Sollicitationis*, Cardinal Ottaviani was Secretary of the Holy Office, the predecessor of the office of Prefect of the Congregation for the Doctrine of the Faith and the document was approved by Pope John XXIII. The article translates the title as 'the crime of soliciting' and

says that the document codifies procedures to be followed where priests or bishops are accused of using the sacrament of penance (confession) to make sexual advances to penitents and that it repeats, with additions (described by American canon lawyer Thomas Doyle OP as procedural 'formularies') the contents of an instruction issued in 1922 by the same office. The article says that 70 of the document's 74 paragraphs deal with sexual solicitation in confession and that the last four paragraphs deal with homosexuality and obscene acts with pre-adolescent children or animals (bestiality) by clerics. Charges of those crimes were to be handled in accordance with the norms of the document. This seems to me to diminish the force of the implication made by Mr Tapsell that the accused pedophile was singled out for better treatment than those who reported him. The article quotes Father Doyle as stating that the secrecy obligation did not bind accuser and witnesses before the start of the process (but this says nothing of the cleric to whom the complaint is made).

An article by Cathy Kezelman, President of Adults Surviving Child Abuse, dated 26 July 2011, headed 'Child abuse in churches is not yet history' and found through Google in 'The Punch' states that in 1996 the Church in Ireland 'implemented' a policy for the mandatory reporting of all suspected crimes of child sexual abuse. (She also says that the policy was not implemented. Perhaps she should have said that such a policy was announced). She says that the Cloyne report, an independent state report released in Ireland into Catholic clergy abuse the previous week stated that the Vatican warned in 1997 that the new Irish Church policy had not been approved by the Holy See and undermined canon law.

It is significant that, according to Tess Livingstone in her book 'George Pell' published by Duffy and Snellgrove in Sydney in 2002, the obligation of confidentiality imposed on the co-chairs and executive director of the National Commission for Professional Standards when a complaint of sexual abuse was made against Archbishop Pell meant that they had to withhold the information from him. At page 430 she says that Brother Michael Hill, one of the co-chairs said that the reason for that practice, which was standard, was that in some cases, telling the alleged perpetrator about the matter could mean repercussions that bounced back on whoever was making the complaint. She also says at page 463 that Archbishop Pell criticised the convenors of the Towards Healing process noting that it was 'remarkable' that he was not informed of the complaint until two months after it was lodged (and then by his own lawyer, who told him that anonymous claims had been posted on a web-site). The effect of the secrecy/confidentiality obligation is not simply to protect the Church.

On 3 October 2008 Father Doyle published an article entitled 'The 1922 Instruction and the 1962 Instruction "*Crimen Sollicitationis*"', promulgated by the

Vatican'. (There is an earlier article by him with the same title, which appears to be a shorter draft). He says that the 1962 document remained in force until 2001, when the Vatican published a new set of procedures for investigating and prosecuting especially grave canonical crimes, including certain sexual crimes committed by the clergy. He states that the 1922 and 1962 documents were identical in content (apart from the formularies). However, according to him, the 1922 document was sent only to diocesan bishops while that of 1962 went to religious communities as well. He says that both documents were issued in strict secrecy and their content was never published in the official publication of the Holy See. (One of the problems with this approach could have been that people who needed to conduct investigations into such offences did not know about the documents). Father Doyle says that the heading '*De crimine pessimo*', covering homosexuality, child sexual abuse and bestiality meant 'The worst crimes'. He says that the Instructions imposed the oath of secrecy on accuser and witnesses without the penalty of automatic excommunication. (This seems to be true of the 1962 Instruction but the 2001 Instructions do not provide for automatic excommunication for anyone involved). He also refers to public statements made by senior Vatican officials as late as 2002 that bishops should not be obliged to cooperate with secular legal authorities in cases involving sexual abuse by clerics. He argues that the documents arose out of, rather than created, a culture of secrecy, clericalism and institutional self-preservation. He sees an over-riding omission in the 1922, 1962 and 2001 documents, namely pastoral care and spiritual healing for the victims of child sexual abuse crimes.

Father Doyle says that the four types of sexual crimes covered by the 1922 and 1962 documents were already included in the 1917 version of the Code of Canon Law. However, the documents (presumably of 1922 and 1962) provided for special procedural norms for these offences, the highest form of confidentiality employed by the Holy See. He mentions that clergy sexual abuse issues have been handled by the Congregation for the Doctrine of the Faith or its predecessors since the 18th century.

Movement in the Vatican

Keiran Tapsell also says:

'In 2001 Ratzinger wrote to the Catholic bishops changing some of the procedures, but again imposing "pontifical secrecy", where excommunication was still possible, but not automatic. It was only in 2010, after cover up scandals were breaking out all over the world, that as Pope, he adopted as general Church law, a policy recommended to him as far back as 1996 by the Australian bishops, of notifying police about what he

himself called “heinous crimes”.’

Father Doyle says that in 2001 the Vatican published a new set of procedures for investigating and prosecuting especially grave canonical crimes, including certain sexual crimes committed by the clergy. The process involved two documents; the first was an 'apostolic letter' by Pope John Paul II dated 30 April 2001 promulgating the new norms and known by its Latin title *Sacramentorum sanctitatis tutela* and the second dated 18 May 2001 (apparently known as *Normae De gravioribus delictis*) issued by the Congregation for the Doctrine of the Faith and containing the actual norms.

The document *Sacramentorum sanctitatis tutela* refers to the promulgation of 'Norms concerning the more grave delicts reserved to the Congregation for the Doctrine of the Faith'. It appears to describe the provisions of the Congregation's document. Article 4 of *Sacramentorum sanctitatis tutela* provides:

'Reservation to the Congregation for the Doctrine of the Faith is . . . extended to a delict against the sixth commandment of the Decalogue committed by a cleric with a minor below the age of eighteen years'.

The sixth commandment, of course, prohibits the commission of adultery. It is interesting that the matters of homosexuality and bestiality appeared not to be reserved to the Congregation any more, which may indicate that the Vatican was taking the sexual abuse of children very seriously.

Article 5 says that criminal action for delicts reserved to the Congregation is extinguished by prescription after ten years, although this period does not begin to run for sexual abuse of a child until completion of his or her eighteenth year. Article 13 permits the local authority to conduct a preliminary investigation of a delict reserved to the Congregation which then decides whether to deal with the matter itself or allow the local authority to proceed with the matter. Article 25 states that cases of this nature are subject to the pontifical secret and that whoever has deliberately or through grave negligence violated the secret and caused 'some' harm to the accused or to the witnesses is to be punished with an appropriate penalty (not automatic excommunication).

Further Movement in the Vatican

An article entitled 'Catholic sex abuse cases in the United States' in Wikipedia states that Pope John Paul II called the US cardinals and the President and Vice President of the US Conference of Catholic Bishops to Rome in April 2002. It says that the Pope asserted that there was no place in the priesthood or religious

life for those who would harm the young. The meeting called for a set of national standards for dealing with sexual abuse of minors by priests. In June 2002, the US Conference of Catholic Bishops unanimously promulgated a Charter for the Protection of Children and Young People, committing the Church to the goal of providing a 'safe environment' for all children and youth participating in activities sponsored by the Church, with uniform procedures for handling sex-abuse allegations against lay teachers in Catholic schools, parish staff members, coaches and others representing the Church to the young. Among other measures, the Conference required dioceses faced with an allegation to alert the authorities and conduct an investigation and remove the accused from duty. (Article 4 of the 2006 version of the Charter required dioceses to report an allegation of sexual abuse of a minor to the public authorities and to comply with all applicable civil laws with respect to the reporting of allegations of sexual abuse of minors to civil authorities).

Wikipedia also said that in June 2002 the Conference decreed 'Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests and Deacons' and revised them in November 2002 to incorporate changes proposed by a commission of four bishops from the Holy See and four from the US which met in October 2002. The Essential Norms were revised again in 2006 and granted *recognitio* by the Holy See. The November 2002 and the 2006 versions both state that:

'11. The diocese/eparchy will comply with all applicable civil laws with respect to the reporting of allegations of sexual abuse of minors to civil authorities and will cooperate in their investigation. In every instance, the diocese/eparchy will advise and support a person's right to make a report to public authorities'.

Insofar as the two standards are different it seems likely that the second – to comply with applicable civil laws as to reporting – is the operative one, particularly given the participation in the drafting of Holy See representatives, the *recognitio* and the history of what happened with the Irish Church's mandatory reporting policy in 1996.

An article entitled 'Changes made to “*sacramentorum sanctitatis tutela*”' and found on Zenit.org is dated 15 July 2010. It indicates that there are two letters – one introductory and the other explanatory and that the apostolic letter is amended. One was signed by the Prefect of the Congregation and the other by its Secretary. The document printed on Zenit says that article 7 (presumably of *Normae De gravioribus delictis*) is amended by extending the term of prescription of a criminal action to twenty years, still commencing from the victim's 18th

birthday, although the Congregation can derogate from prescription on a case by case basis. It also says that a person over 18 years of age who is developmentally disabled is equated to a minor for the purposes of article 6.1 (presumably of *Normae De gravioribus delictis*) and that the acquisition, possession or distribution of pornographic images of minors under the age of 14 years are added as delicts for the purposes of article 6.1. (The English translation of '*Normae De Gravioribus Delictis*' and found on Google contains the article-numbering referred to in the article). The provision relating to the pontifical secret is retained. This adjustment of issues reserved to the Congregation seems to me to indicate that the Vatican was becoming very concerned about the sexual offences of priests against vulnerable people.

This is obviously not the document referred to by Keiran Tapsell and the *Catholica* website editorial for 3 March 2012 who said that in 2010 the Pope adopted as general Church law the policy of notifying police of clerical sexual crimes. However, they seem to be referring to guidelines on sexual abuse allegations released by the Vatican on 12 April 2010. An article by Scott Richert on the About.com Catholicism website says that on that date the Vatican posted on its website a 'Guide to understanding Basic CDF Procedures concerning Sexual Abuse Allegations'. He says that the Guide (for 'lay persons and non-canonists') is new but the procedures have all been in effect since the issue of *Sacramentorum sanctitatis tutela* in 2001. The text of the Guidelines bears this out since it contains nothing about reporting to the civil authorities and states:

'The applicable law is the Motu Proprio *Sacramentorum sanctitatis tutela* (MP SST) of 30 April 2001 together with the 1983 Code of Canon Law.'

I would conclude that the Vatican did not change its public position in 2010. However, their statements are correct except for the date.

On 3 May 2011, the Vatican's Congregation for the Doctrine of the Faith issued a 'Circular Letter to Assist Episcopal Conferences in Developing Guidelines for Dealing with Cases of Sexual Abuse of Minors perpetrated by Clerics' (found at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_cfaith_doc_201105). The letter states in section I :

' . . . e) Cooperation with Civil Authority

Sexual abuse of minors is not just a canonical delict but also a crime prosecuted by civil law. Although relations with civil authority will differ in various countries, nevertheless it is important to cooperate with such

authority within their responsibilities. Specifically, without prejudice to the sacramental internal forum, the prescriptions of civil law regarding the reporting of such crimes to the designated authority should always be followed. This collaboration, moreover, not only concerns cases of abuse committed by clerics, but also those cases which involve religious or lay persons who function in ecclesiastical structures'.

In section III, it states:

'The Guidelines prepared by the Episcopal Conference . . . should take account of the following observations:

. . .

g.) the Guidelines are to make allowance for the legislation of the country where the Conference is located, in particular regarding what pertains to the obligation of notifying civil authorities . . . '

I have read some criticism of this document on the basis that it should have required bishops in all cases to notify police of allegations, whatever the provisions of the civil law. My guess is that the Vatican's approach is that if the country does not require such notification, it is not up to it to set a higher standard.

Keiran Tapsell's review of Christopher Geraghty's book 'Dancing with the Devil' also indicates that one should be cautious in setting up hard and fast rules. It refers to a seminarian telling Christopher in confidence that a Father Vincent Kiss and he were in a homosexual relationship. The review quotes Christopher:

'Of course, what I should have done was go straight to the village police station at Springwood and report the criminal offences. But my visitor told me later that had I proposed that course, he would never have told me his story'.

 There is also the well-known case of Senator Xenophon publishing, contrary to the wishes of the person concerned, allegations of abuse of a seminarian by three priests.

The Vatican's centralised mindset is illustrated in the Guidelines by the provision :

II. A brief summary of the applicable canonical legislation concerning the delict of sexual abuse of minors perpetrated by a cleric:

. . . In the event that a Conference would decide to establish binding norms it will be necessary to request the *recognitio* from the competent Dicasteries of the Roman Curia'.

It seems to me that however much we may consider such centralisation to be irritating and unnecessary, this is not the appropriate forum in which to discuss it. Apart from anything else, it would be a waste of time. With its long and and tumultuous history, the Vatican is accustomed to weathering crises. The important consideration is that the Vatican finally ceased to put the bishops in an invidious position. One last point on this document is that a news item of 16 May 2011 said that the letter told the bishops' conferences to draft guidelines for preventing abuse and caring for victims and report them back to the Congregation by May 2012. I have seen no such direction but it may have been in a covering letter.

The Church in Australia

Towards Healing 1996

In December 1996, the Australian Catholic Bishops' Conference and the Australian Conference of Leaders of Religious Institutes published a document called:

'Towards Healing

Principles and Procedures in Responding to Complaints of Sexual Abuse against Personnel of the Catholic Church in Australia'

In the introduction, they stated that the first part of the document named the principles that must form the basis of the Church's response to complaints of sexual abuse while the second part detailed the procedures to be followed in particular cases. A note said that the Archdiocese of Melbourne had already implemented a set of procedures that were of similar intention to those set out in Part 2. Both sets of procedures were designed to meet the principles in Part 1 and they acknowledged that the Part 2 procedures did not apply to that Archdiocese. They also said that the publication of the document was intended as a means of seeking the comments of all interested persons in the community. It seems to me that this approach is more democratic than the way the Church generally operates.

Part 1 of the document contains 29 paragraphs, most of which spell out the commitment in paragraph 10 to strive for seven things in particular:

'truth, humility, healing for the victims, assistance to other persons affected, an effective response to those who are accused and those who are guilty of abuse, and prevention of abuse'.

Part Two of the document contains eleven sections. The first, entitled 'Notes' says:

'1.2 These procedures are a revised version of the draft document published by the Australian Catholic Bishops' Conference and the Conference of Leaders of Religious Institutes in April 1992'.

Paragraph 1.3 asserts:

' These procedures are intended to apply to all complaints of sexual abuse by Church personnel, whether they be clerics, religious personnel, lay employees or volunteers'.

This represents a widening of the group covered by Part 1, which consisted only of 'clergy and religious', as is acknowledged in footnote 4.

Paragraph 1.5 states:

'If a complaint concerns a criminal offence, Church authorities shall not jeopardise the right of the police or other civil authorities to investigate the matter and to take appropriate action'.

So far there is no mention of reporting a criminal offence. It is quite clear that the police should not be hindered in their inquiries, as for example, by transferring an accused out of the jurisdiction. It seems unlikely that Church authorities could refuse to answer questions or to give evidence. It would seem likely that any recommendation by the Australian bishops to the Pope in 1996 that there be a policy of notifying police about child sexual abuse by clerics, as asserted by Keiran Tapsell (see paragraph above) would have been made in the context of drafting this provision. It would seem that Towards Healing provided for more cooperation with the police than Vatican would have.

Paragraph 3.1 refers to the establishment of a National Committee for Professional Standards to oversee the development of policy, principles and procedures in responding to to complaints of sexual abuse against Church personnel. Presumably, this body would not have any role in relation to the Melbourne Archdiocese.

Paragraph 3.2 refers to the establishment and maintenance of a Professional

Standards Resource Group (Resource Group) in each province, namely, Queensland, New South Wales and the Australian Capital Territory, Victoria and Tasmania, South Australia and the Northern Territory and, lastly, Western Australia. The footnote listing the provinces mentions that the Melbourne Archdiocese was to be represented on the Victorian Resource Group. These provincial Resource Groups were to have the role of advising all Church bodies in matters concerning professional standards.

Paragraph 3.4 requires each Resource Group to ensure the availability of suitable persons to fulfil the roles of contact persons, assessors, victims' support persons and accuseds' support persons. Paragraph 4.1 requires any member of the Church who learns of a complaint of sexual abuse against Church personnel to refer the matter to a contact person within 24 hours. And paragraph 4.3 requires all Church personnel to comply with any requirements for mandatory reporting.

Section 5 is of particular interest in that it deals with the relationship with the civil authorities. It provides:

'5.2 No Church assessment shall be undertaken in such a manner as to interfere in any way with the proper processes of civil law, whether they are in progress or contemplated for the future.

5.3 When the complainant concerns an alleged crime, the Contact Person shall tell the complainant of the right to take the matter to the police and, if desired, provide assistance to do so . . .

5.4 If the victim indicates an intention not to take the matter to the police, this should be recorded by the Contact Person and confirmed by the signature of the victim.

5.4.1 State or Territory law regarding the reporting of knowledge of a criminal offence must be observed.

5.5 The Resource Group shall liaise with civil authorities regarding the proper processes to be followed and the principles that should determine the timing and manner of Church assessments.

5.6 If in the course of a Church assessment, what had been thought not to be a crime is in fact revealed as an alleged crime, the Church assessment shall cease immediately and the complainant told of the right to take the matter to the police. The Contact Person is to assist the complainant if requested'.

The requirement for liaison with the civil authorities on the timing and manner of Church assessments and the steps to be taken on the late revelation of an alleged crime, seem to provide for more cooperation with the civil authorities than the original Melbourne Response, which may have been more consistent with Vatican thinking at the time.

It would seem likely that any recommendation by the Australian bishops to the Pope in 1996 that there be a policy of notifying police about child sexual abuse by clerics, as asserted by Keiran Tapsell (see above) would have been made in the context of drafting this provision.

The great care taken in these provisions to protect civil processes is reflected in paragraph 6.3.4:

'No interview' (by Church assessors) 'with a child victim shall take place if there is the slightest risk that this will interfere with the proper process of civil law'.

Towards Healing – December 2000

A later version, entitled 'Towards Healing -December 2000', first released on 1 March 2001 when Bishop Geoffrey Robinson was chair of the National Committee for Professional Standards, incorporates amendments made in May/June 2003. Its introduction said that:

' . . . Professor Patrick Parkinson, pro-Dean of the Faculty of Law at Sydney University and author of the book *Child Sexual Abuse and the Churches*, was asked to lead the process of revision of the document. This process included broad consultation with complainants, accused, church authorities and the various persons who had a role in responding to complaints – contact persons, assessors, etc'.

This seems to me to be an indication of a continuing democratic approach. The document stated that the major change in the principles was the extension of abuse to include sexual, physical and emotional abuse. A footnote remarked that the Society of Jesus, as well as the Archdiocese of Melbourne, had its own set of procedures. Part One explicitly applies to employees and volunteers.

Part Two requires the Professional Standards Resource Groups (Resource Groups) in each State and the Northern Territory to include both men and women, of diverse backgrounds, skilled in areas such as child protection, the social sciences, civil and Church law and industrial relations and to advise Church bodies in the

State in matters concerning professional standards. There should be a Director of Professional Standards to manage the process in relation to specific complaints and appoint functionaries, including Contact Persons (the usual persons to receive complaints of abuse and pass them on to the Director. After receiving the initial complaint, they may provide support to the complainant assist with communication between complainant, assessors and the Church authority) and Assessors (who shall be responsible for investigating the complaint).

The original Paragraph 5.3 (see above) is taken a bit further, as follows:

'37.1 Where the complaint concerns an alleged crime or reportable child abuse, the Contact Person shall tell the complainant of the complainant's right to take the matter to the police or other civil authority and, if desired, provide assistance to do so. The Contact Person should also explain the requirements of the law of mandatory reporting.

37.2 In all cases other than those in which reporting is mandatory, if the complainant indicates an intention not to take the matter to the police or other civil authority, this should be recorded by the Contact Person and confirmed by the signature of the complainant.

Appendix - 37.2

When a complainant does not wish to go to the police or other appropriate authority and asks the Church to investigate an alleged crime the complainant is required to sign the following statement before the Church takes any action:

“The Catholic Church has strongly urged me to take my complaint to the police or other civil authority. It has been carefully explained to me that any process the Church establishes cannot compel witnesses, subpoena documents or insist on a cross-examination of witnesses. It cannot impose the same penalties as a criminal court. Aware of these limitations, I still state that I do not wish to take my complaint to the police or other civil authority at this time and I ask that a Church process be established”.

These provisions were among those inserted in May/June 2003.

In relation to reporting, the new paragraph 37.3 is of the same effect as the original 5.4.1, although expressed differently:

'All Church personnel shall comply with the requirements for mandatory reporting of child abuse that exist in some States/Territories, and State or Territory law regarding the reporting of knowledge of a criminal offence must be observed'

In relation to Church assessments not interfering with the processes civil law, the new paragraph 37.4 is of the same effect as the original paragraph 5.2. Provision is made for the the relationship of Church and the police to be formalised:

'37.5 The Director of Professional Standards shall endeavour to establish a protocol with the police in each relevant State or Territory to ensure that Church assessments do not compromise any police action'.

In relation to allegations of a criminal offence only emerging during a Church procedure, paragraph 39.4 is of the same effect as the original paragraph 5.6. The new paragraph 40.3.4 prohibits the interview of a child in a Church proceedings if this would interfere with the proper process of civil or criminal law (c.f. the original paragraph 6.3.4).

There is a new provision the significance of which will appear later:

'41.4 No complainant shall be required to give an undertaking which imposes upon them an obligation of silence concerning the circumstances which led them to make a complaint, as a condition of agreement with a Church authority'.

An item in Catholic News for 3 July 2003 said that Archbishop Philip Wilson, the new co-chair of the Committee for Professional Standards, had said that greater transparency was increasing the fairness of the Towards Healing protocol. It said that Jesuit Provincial Mark Raper admitted frankly that the Jesuits had fostered a legalistic approach that harassed the victim and worked against reconciliation. He also said that the Jesuits were working towards embracing the Towards Healing protocol.

Towards Healing 2010

A further version of 'Towards Healing' was issued in January 2010. Footnote 1 mentions only the Archdiocese of Melbourne (not the Society of Jesus) as having a separate set of procedures. On page ii it states that 'Dialogue or comments about the principles and procedures in this document are invited . . .' In the introduction, it says:

'Given the experience since 2000, the National Committee for Professional Standards decided in the latter part of 2008, that it would be desirable to have a further process of consultation on Towards Healing, by inviting written comments and submissions. Professor Parkinson was once again invited to conduct the review'.

In Part three (Procedures), paragraph 34.6 points out that:

'In certain States and Territories of Australia, Church Authorities are subject to laws concerning how to deal with complaints that may affect the operation of the procedures in this document. An example of this is the operation of the Ombudsman Act 1974 (NSW). The procedures in this document must operate subject to the requirements of any such laws'.

The new paragraph 37.1, dealing with complaints about alleged crimes, is in similar terms to paragraph 34.6 and Appendix-37.2 of the 2000 version (see paragraph above). It says:

'When the complaint concerns an alleged crime, the contact person or Director of Professional Standards shall explain to the complainant that the Church has a strong preference that the allegation be referred to the police so that the case can be dealt with appropriately through the justice system. If desired, the complainant will be assisted to do this. Where it applies, the contact person shall also explain the requirements of the law of mandatory reporting'.

The new paragraph 37.3 and footnote 2 relating to the situation where the complainant does not wish to notify is much the same as its predecessor (Appendix - 37.2; see paragraph above), except that it specifies that it only applies where reporting is not mandatory.

There is a new paragraph 37.4 which provides:

'In the case of an alleged criminal offence, if the complainant does not want to take the matter to the police, all Church personnel shall nonetheless pass details of the complaint to the Director of Professional Standards, who should provide information to the Police other than giving those details that could lead to the identification of the complainant'.

Presumably, this does not apply where reporting is mandatory.

The new paragraph 37.5 (mandatory reporting) is in essentially the same terms as

paragraph 37.3 of the version of 2000. The new paragraphs 37.6 (Church investigation not to interfere with State processes) and 37.7 (Protocol with Police) are in the same terms as the old paragraphs 37.4 and 37.5. Paragraphs 39.4 and 40.3.4. of the 2010 version are in the same terms as their predecessors in the 2000 version. Paragraph 41.5 (no undertaking of silence) is of the same effect as paragraph 41.4 of the previous version.

The Melbourne Response

I have not been able to obtain a copy of the October 1996 version of the Melbourne Response to the sexual abuse of minors and adults. However, the Catholica web site contained an article by 'Jim B' dated 5 July 2010 reproducing the original announcement by Archbishop Pell. He quoted a Pastoral Letter issued by the Catholic Bishops of Australia early in 1996:

' We cannot change what has happened in the past, undo the wrongs that have been done, or banish the memories and the hurt. In seeking to do what is possible, our major goals must be: truth, humility, healing for the victims, assistance to other persons affected, an adequate response to those accused and to offenders, and prevention of any such offences in the future.'

This formula has been the lode star for the different versions of the Towards Healing document as well.

He said that he wished to address the issue in a professional, caring and appropriate manner and announced the following initiatives:

- the appointment of a Queen's Counsel to enquire into allegations of sexual abuse by priests, lay people and religious under the control of the Archbishop of Melbourne
- the establishment of a free counselling and professional support service for victims
- the formation of a Compensation Panel to provide ex gratia compensation to victims of such sexual abuse
- an upgrade of the existing Pastoral Response Team service which provides spiritual and support and counselling at the parish level
- a service providing counselling and support for priests and others accused of sexual assault.

There appears to have a further statement that the Commissioner would be subject to the rules of natural justice and canon law in his enquiries, would be empowered to compel the attendance of accused priests and religious and would recommend appropriate action to the Archbishop. His office would be the first point of contact for people wishing to make allegations or complaints, to seek counselling services, or to inquire about compensation. The victims' counselling service, known as Carelink, while strictly observing usual patient confidentiality and legal reporting requirements, could also disclose information to the Commissioner, with the consent of the patient. Patients would be encouraged to refer allegations of sexual abuse to the Commissioner for investigation. Regarding the Compensation Panel, the apparent statement said:

'The establishment of this Panel and the offer to pay compensation is not an admission of legal liability. The Archbishop, the Archdiocese and the Church do not accept that they have any legal obligation to make payments to people making complaints. Rather, the Panel will provide people making complaints with an alternative to legal proceedings against the Archbishop or Archdiocese. It is hoped that it will provide an informal rather than a legalistic approach and a forum for a fair, just and speedy settlement of claims'.

Tess Livingstone in her book 'George Pell' says that Melbourne Archbishop Frank Little announced his early retirement for 'health reasons' on 15 July 1996. At the same time, the Vatican announced the appointment of Auxiliary Bishop Pell as his replacement (which, for the Vatican, is pretty swift). At page 227, she says that official responsibility was handed over on 16 August 1996 (which is not to say that Archbishop Pell should not have been working on his policy before then). At page 232, she indicates that Archbishop Pell announced the Melbourne Response in October 1996, with compensation payments for victims to be capped at \$50,000, matching the amount paid by the State for crime compensation. She says that Archbishop Pell decided against joining the Towards Healing program because he was satisfied that the urgency of the problem in Melbourne and the comprehensive program of assessment, compensation and counselling he set up was the best way to go. (Given that Towards Healing was issued in December 1996, it seems that the second reason given was more important. One can also ask why the other Victorian dioceses, including Ballarat where the problem with Father Gerald Ridsdale must also have been urgent, chose not to go with the Melbourne Response. At page 404, Ms Livingstone says that Bishop Mulkearns resigned in 1997 amid accusations that he had covered up Father Ridsdale's offences. A further interesting question is why Archbishop Pell did not introduce the Melbourne Response after he became Archbishop of Sydney in 2001).

At pages 413-4, she says that at the time of a public dispute in 2002 about Archbishop Pell's role in relation to allegations against Gerald Ridsdale in 1993 the issue arose about whether the 'compensation' payments made through the Melbourne Response, and also some made through Towards Healing, were 'Hush Money'. She says that after media revelations about confidentiality clauses imposed on some victims who went through the Towards Healing process in NSW, Archbishop Pell and a Sydney Queen's Counsel reviewed the processes. (It is not clear why Archbishop Pell should have taken responsibility for such a review in the other NSW dioceses, instead of leaving it to the National Committee for Professional Standards).

On 9 June 2002, the Queen's Counsel told the press that clauses in deeds of release for victims of clerical sex abuse seemed to be the standard non-disclosure clauses in damage settlements and to be completely at variance with what Church leaders, including Archbishop Pell, believed was happening under Towards Healing. He referred to the inclusion in the Towards Healing document in 2000 of Clause 41.4 that silence should not be required of any complainant in any agreement with the Church authorities.

The Queen's Counsel also said that after making inquiries, he had found that Clause 41.4 had not been appropriately implemented in deeds of release for settlements. At pages 414-5, he was quoted:

'I emphatically state that it is contrary to the express directives' (presumably of Towards Healing) 'and that our bishops as much as victims have been afflicted by conduct which has gone unnoticed and unauthorised. Regrettably it appears that there are professionals who should have had regard to the scheme's directives'.

He also stated with Archbishop Pell's authority that with regard to the Sydney Archdiocese (for he could not speak for other dioceses or religious orders) all cases where Clause 41.4 had been breached would be reviewed and any victims relieved of any obligation of silence which might have been mistakenly imposed.

Ms Livingstone says that a week later, Archbishop Pell asserted in the Sunday Telegraph that:

'There has never been a confidentiality clause in the Melbourne "release" document for victims. The compensation procedures are designed to allow victims to avoid legal confrontation and legal costs'.

However, he agreed with the Queen's Counsel that elsewhere in Australia the

picture was more confusing as the confidentiality clauses used everywhere in out-of-court settlements had often been applied. There had been some uncertainty and inconsistency in implementing the policy adopted by the Australian Catholic Bishops following the protocols in the Towards Healing revision of December 2000.

A document headed 'Appointment of Independent Commissioner to enquire into sexual and other abuse' was approved by Archbishop Hart on 15 February 2011. It refers to the retention by the solicitors for Archbishop Pell of Peter O'Callaghan QC as independent Commissioner to inquire into and advise the Archbishop on allegations of sexual misconduct by any priest of the Archdiocese and religious and lay persons working within the Archdiocese on the following terms and conditions. It says that Archbishop Hart renewed the appointment and confirmed the terms and conditions when he became Archbishop. It says that the terms were formulated in consultation with the Victoria Police and it was and is agreed that there can be no substitute for a Police investigation into complaints of sexual and other abuse which may constitute criminal conduct. The Archbishop has supplemented the terms and conditions as set out in Clauses 4 to 6 (so that it appears that the processes in the other clauses were in the original document).

Clause 1 contains definitions, including that of 'sexual and/or other abuse' which include:

- 'a) Any form of criminal sexual assault, sexual harassment or other conduct of a sexual nature that is inconsistent with the public vows, integrity of the ministerial relationship, duties or professional responsibilities of Church personnel; and
- b) Conduct by a person with a pastoral responsibility for a child or young person which causes serious physical pain or mental anguish without any legitimate disciplinary purpose, as judged by the standards of the time when the behaviour occurred'.

Clause 2 provides:

...

- 'iii. The Commissioner immediately upon there being made or referred to him a complaint of sexual or other abuse (which may constitute criminal conduct), shall inform the complainant that he or she has an unfettered and continuing right to make that complaint to the police, and the Commissioner shall appropriately encourage the exercise of that right.

iv. Subject to sub clause xi below, upon becoming aware of sexual or other abuse (which may constitute criminal conduct), the Commissioner may report that conduct to the police.

v. The Commissioner will not act so as to prevent any police action in respect of allegations of sexual or other abuse by Church personnel.

...

ix. The Commissioner shall interview a child or conduct a hearing at which a child is present, only with the written authority of the parent or guardian of such child, and whom the Commissioner shall request be present at such interview or hearing.

x. The Commissioner shall treat as confidential and privileged all information acquired by him in the course of his investigation. Provided that (subject to sub clause 2(xi)) the Commissioner may . . . provide . . . such information to the police, and with the consent of the complainant, to the Compensation Panel.

xi. If a complainant, prior to stating the facts and circumstances constituting his or her complaint informs the Commissioner that he or she is only prepared to divulge those facts and circumstances to the Commissioner upon his assurances that he will not (unless required by law) disclose those facts and circumstances to any person other than a person nominated by the complainant, the Commissioner (unless required by law so to do) shall not disclose those facts and circumstances to any other person save to members of his staff from whom he shall have procured an undertaking of confidentiality'.

Paragraph 4 deals with liaison between the Commissioner and the police and prohibits further action by the Commissioner (except for referral of the complainant to Carelink and recommendations to the Archbishop as to the alleged offender) until completion of any police investigation and proceedings. Paragraph 5 provides that, except where the alleged offender has died or criminal proceedings have been concluded or the police have decided against further action or have failed to act within two years of referral of the case to them, the Commissioner is to provide the complainant with an information sheet and to endeavour to obtain his or her written acknowledgment. The sheet acknowledges that the Commissioner

- has informed the complainant that because the conduct complained of

may be criminal, the complainant has a continuing and unfettered right to report the matter to the police

- has encouraged his or her exercise of that right
- has explained that the police have more powers than he does such as those of issue of search warrants and arrest and that only through the police can the offender be brought before a court and punished for a crime.

It also confirms that the complainant does not want to go to the Police but wants the Commissioner to proceed with the matter and requires the Commissioner to keep his or her identity confidential to the best of his ability and except as required by law. The complainant acknowledges that he or she can refer the complaint to the police at any time, and that if he or she does so, the Commissioner will take no further steps until completion of the police investigation and any resulting proceedings.

Paragraph 6 provides that except where paragraph 5 above applies, where the Commissioner informs an alleged offender that a complaint has been made to the Commissioner against him or her, he is to tell the person that the complainant does not presently wish to report the matter to the police, despite being told that he or she has a continuing and unfettered right to do so and despite being encouraged to exercise that right. He is also to tell the person that if the matter is subsequently referred to the police, he will take no further steps in relation to the complaint but will not inform him or her of such referral for at least four weeks or an agreed further period.

A document of the Archdiocese, 'Melbourne News' dated 16 February 2011, and headed 'Changes to the Melbourne Response process' stated that the changes enhanced the way in which the Independent Commissioner informed and encouraged complainants to take their complaints to the police.

It appears from the associated media release dated 15 February 2011 that this was the first time terms of the Commissioner's appointment had been modified, in so far as it said that the original terms of his appointment in 1996 had been formulated in consultation with Victoria Police.

A brochure headed 'Sexual and Other Abuse The Melbourne Response' bears Archbishop Hart's signature but is undated. There is a general and historical introduction, tending to emphasise sexual abuse but also referring to other abuse. One statement is of particular interest in the light of the controversy about confidentiality clauses in releases:

'Sexual abuse in any form, and any attempt to conceal it, is a grave evil and

is totally unacceptable. We must face up to the truth and not attempt to disguise, diminish or avoid in any way, the actions of those who have betrayed their sacred trust'.

The brochure points out that the Melbourne Response is directed at abuse by priests, religious and lay persons who are or were under the control of the Archbishop in the Archdiocese or under his auspices. It also makes it clear that the Melbourne Response does not apply to religious orders operating in the Archdiocese.

The brochure specifies the help available, namely, the reception of complaints, counselling and support and compensation. The role and powers of the Commissioner are explained. The continuing and unfettered right of the complainant to go to the police if the complaint may constitute a crime is mentioned, as is the practice of the Commissioner to encourage that step and to explain that the police have greater powers of investigation than he does. It also says that the Commissioner assists any complainant wishing to go to the police and that he will take no further action until completion of the police investigation and any proceedings resulting from it.

The role of the Compensation Panel is also explained. It arranges for the provision of ex gratia compensation for people found by the Commissioner to have been abused by persons presently or formerly under the control of the Archbishop. It provides an alternative to civil legal proceedings as a forum for the settlement of claims. Compensation payments recommended by the Panel and binding on the Archbishop are capped at \$75,000 (which exceeds the amount available under the State's victims of crime compensation system). Payment is accepted in full settlement of all legal claims against the Archbishop and the Archdiocese. (It appears from the decision of NSW Court of Appeal in Ellis' case (see below) that the Archbishop and the Archdiocese can still suggest that it is not appropriate to sue them for abuse by such persons). If the recommended payment is not accepted, the complainant is free to use the normal court processes (which do not provide for a cap on damages). The brochure also says that while the Panel maintains strict confidentiality in relation to the hearings, a claimant is free to disclose them to anyone. Lastly, the brochure refers again to the lack of restrictions on the role of the police, the right of victims of abuse to go to the police and the fact that their powers are greater than those of the Commissioner. It indicates that only the police can take criminal proceedings.

It appears likely that the the Terms and Conditions as supplemented in Conditions 4 to 6 were added as a result of a disagreement between the Commissioner and Victoria Police. In the Catholic Forum for 22 April 2010 'James' referred to a

report in that day's Age that the police were unhappy about two inquiries (their own and that of the Commissioner under the Melbourne Response) continuing in parallel. He said that if he were an investigating police officer, he would be particularly concerned if the Commissioner said he would inform the priest that he was being investigated. 'James' said that there was nothing illegal about doing that, but in his experience, police were always concerned about witnesses being 'got at' by the accused or their friends.

'James' quoted Stephen Crittenden in the ABC's Radio National Religion Report of 5 June 2002:

'There's one aspect of the national protocol where the church still has significant work to do, and that relates to informing the public about if and when the police are brought in . . . Where an allegation involving criminal behaviour is involved, it is always referred directly to the police . . .

. . . mediation might well begin before the legal process has ended. But I'm told it's regarded as very important not to do anything that might be regarded as tampering with evidence, or to start interviewing people before the police have given a clearance.'

Why the Melbourne Response?

The reason for Archbishop Pell instituting the Melbourne Response has never been made clear. It would not make sense for him to have done so because he was unhappy with the anticipated delay in publication of *Towards Healing*, because that was only a few weeks away in fact. It would be most surprising if he had not seen a draft of *Towards Healing*. If he had, he (and the Vatican) might have disliked the restrictions in Clause 5 on the independent action of the Church and the requirements that it cooperate with the civil authorities. Admittedly, the requirement in sub-clause 5.4.1 of observation of the civil law on reporting would have been hypothetical as Victoria had no clear requirement in this area. However, it could still have been a factor in his thinking. It may have been that he thought it preferable to concentrate on the Church's legal liabilities, by bringing in lawyers, as with the Independent Commissioner and the Chair of the Compensation Panel and 'cap' the compensation payable. This could kill off the civil claims asap and minimise the Church's liabilities and the damage to its reputation.

The transcript of the above mentioned National Religion Report of 5 June 2002 shows that Stephen Crittenden said that in the Melbourne Response:

'Archbishop Pell put together a very formal process: an independent QC to

deal with complaints, a compensation panel, and a ceiling on compensation payments to \$50,000. I'm told by senior figures in the Church that people associated with the national scheme regard the Melbourne scheme as deeply flawed, and that having a ceiling figure of \$50,000 is "crazy" - not because it's too low, but because it doesn't individualise, and because this can easily create the impression that people are being bought off.

'The national scheme is very different, it doesn't even mention the word "compensation". Instead, it's a process of independent mediation, which speaks about meeting the needs of people who have been abused, and their families'.

All Church bodies involved in developing policies on child molestation – the Vatican, the Conference of Australian Catholic Bishops with Towards Healing and the Melbourne Archdiocese with the Melbourne Response have refined their process in their own way and in their own time. In relation to cooperation with the police, the right of the Church to independent action and the breadth of the concept of 'abuse', the Melbourne Response lagged well behind Towards Healing but has caught up. Much the same can be said of the Vatican in relation to cooperation with the police and compliance with reporting requirements.

The path of most resistance

Stephen Crittenden said in the Religion Report of 5 June 2002:

'What about the Jesuits? I'm told that if your claim is against the Jesuits, you are in fact very likely to receive a letter telling you that your claim will be vigorously defended. I'm told the Jesuits have decided to take the path of most resistance, testing every claim for compensation through formal litigation'.

The Jesuits were not the only ones who have opted for a vigorous defence. Technical defences have been argued or threatened in NSW and the ACT (which is good for the development of the law but not for the image of the Church). For example, when Marist College in Canberra was sued because of abuse by Brother Kostka (John William Chute), an issue arose about the ownership and conduct of the school. A Broken Rites piece on the Internet 'Marist Brothers deny duty of care to their victims' says that lawyers for the Marist Brothers told the ACT Supreme Court on 4 June 2008 that (unlike lay teachers who are employed on salaries) the Brothers are not, technically, 'employees'. (At that time three claimants were participating in the proceedings, but their lawyer indicated that dozens more civil claims would be lodged against the Marist Brothers relating to

Brother Kostka and possibly other Brothers) and against Daramalan College regarding an abusive lay teacher, Paul John Lyons. It said that the plaintiffs needed to prove that the school knew, or ought to have known, about the abuse so the statements of claim alleged abuse against other students, aiming to establish a pattern of inaction by the school and the Marist Brothers. Lawyers acting for the Marist Brothers applied to the court in May 2008 for the three suits to be struck out on the basis that Brother Kostka was not an 'agent' of the Marist Brothers, as he was not technically employed (in the light of Lepore's case (see later) this would not matter but it might apply to his religious superiors) and that the Marist Brothers did not owe a duty of care to his victims. Justice Richard Refschaue refused to strike out the suits but ordered the victims' lawyers to restructure the documents.

A further Broken Rites piece under the heading 'Marist Brother Kostka (John William Chute), Marist College, Canberra: Full story' states that on 23 June 2008, immediately after Brother Kostka Chute was jailed, a press release was issued by Brother Alexis Turton for the Marist order. Brother Turton encouraged victims to go through the Towards Healing process, rather than legal action, and said that what was in issue was the appropriateness of suing the particular legal entity named in the suit, given earlier court decisions involving other Church bodies. The solicitor for the Marist Brothers confirmed to the media that the Marists planned to rely on the NSW Court of Appeal decision in the Ellis case to avoid legal liability. (The article said that in that case, the Church obtained a judgment that priests were not agents of the Church and therefore it could not be sued for their actions). That same month, the lawyers for the claimants filed papers seeking the names of former principals, deputy principals and senior teachers, claiming that they knew of abuse but failed to act. It said that the lawyers might take civil action against these individual teachers and administrators.

The ABC Lateline programme for 20 October 2008 carried a story that the corporation known as The Trustees of the Marist Brothers claimed not to operate the Canberra Marist College although the reporter said that there was 'a range of evidence that would suggest the Marist Brothers Trust owns and operates the school'. The lawyer for the claimants acknowledged that it was necessary to prove that the school knew or ought to have known about the abuse. The reporter said that the actions alleged that the school failed to act on warnings about Brother Kostka and another abusive teacher, Mr Paul Lyons. Apparently, lawyers for the defence advised in January 2008 that the body running the school at all relevant times was the 'Trustees of the Marist Brothers'. However, on the day on which Brother Kostka was sentenced, the 'school' issued a 'statement' or a 'release' contradicting that advice.

The Court of Appeal of the Supreme Court of NSW gave judgment in the case of Trustees of the Roman Catholic Church v Ellis and Another on 24 May 2007. The entry in the austlii website states that the plaintiff alleges that between 1974 and 1979, when he was a young altar server, he was sexually abused by an assistant priest in the Bass Hill parish, Sydney. He sued Cardinal Pell for and on behalf of the Roman Catholic Church in the Archdiocese of Sydney, the Trustees of the Roman Catholic Church for the Archdiocese of Sydney and the alleged abuser.

The alleged abuser was appointed to the position at Bass Hill by the then Archbishop, acting in consultation with the Archdiocesan Council (which is separate from the Trustees). Cardinal Pell had no relevant connection with the Sydney Archdiocese before his appointment as Archbishop in 2001. The proceedings against the alleged abuser, who died in 2004, were discontinued. The plaintiff's claims against the other defendant were statute-barred in 1985 but he sought an extension of time. The trial judge held that a cause of action in tort could not be maintained against Cardinal Pell, either personally or as a representative of the members of the Roman Catholic Church in the Archdiocese of Sydney. However, the judge held that there was an arguable case that the Trustees were liable in tort because they constituted the entity adopted by the Roman Catholic Church in the Archdiocese in Sydney as its permanent corporate entity. Both the plaintiff and the Trustees appealed the orders against them.

The plaintiff alleged that Cardinal Pell was liable under various grounds in tort and for a breach of fiduciary duty in equity both directly and vicariously. He alleged that the Trustees were liable under various grounds in tort both directly and vicariously. He submitted that they were liable directly or as representing the unincorporated association known as the Catholic Archdiocese of Sydney for the wrongdoing of the alleged abuser. He also invoked the legal concept of a corporation sole against Cardinal Pell. Both Cardinal Pell and the Trustees argued that they were not the proper defendants in the proceedings.

It appears from the judgment of the Judge at first instance (Patten AJ, on 3 March 2006) that the trustees, being the Archbishop and the Diocesan Consultants, had been incorporated under the name 'The Trustees of the Roman Catholic Church for the Archdiocese of Sydney'. He also referred to the decision of the Court of Appeal in the case of Archbishop of Perth v. AH and JC (1995) 18 HCSR 333 on Western Australian legislation creating a statutory corporation known as the Roman Catholic Archbishop of Perth, claims of sexual abuse by members of the Christian Brothers and claims of breaches of duty by the Church hierarchy many years before. The court considered that the legislation was directed only to the holding, acquisition, disposition and management of property and did not render the corporation liable for torts arising from the conduct of Catholic clergy

unrelated to property.

The Court of Appeal held that:

- (1) An unincorporated association (presumably the members of the Archdiocese) cannot be sued in its own name at common law because, among other reasons, it does not exist as a juridical entity;
- (2) If the activity in which persons or groups in an unincorporated association exercise palpable control gives rise to a claim in tort otherwise recognised by law, they can be held liable as principals;
- (3) However, liability remains personal and not representative; it therefore remains with the members forming the Committee or other controlling body who were in office at the relevant time;
- (4) The relationship between individual office-holders in the Roman Catholic Church and its members as a whole is too slender and diffuse to establish the vicarious liability of the members in tort;
- (5) The evidence does not support an argument that either Cardinal Pell or the Trustees, let alone all the members of the Church, engaged or employed the alleged abuser at the relevant time ;
- (6) The appointment, management and removal of priests in a Church are not functions that the Roman Catholic Church Trust Property Act 1936 conferred on the Trustees as a body corporate. They did not have power to appoint priests under the Act and in fact did not appoint any;
- (7) The fact that the Trustees hold property for and on behalf of the 'the Church' does not mean that they and the funds they administer can be subject to all legal claims associated with Church activities;
- (8) The office of Archbishop of Sydney is neither a statutory nor common law corporation sole and does not have perpetual succession and cannot be made liable for the alleged torts of previous Archbishops;
- (9) Cardinal Pell and the Trustees were not estopped from denying that they were the proper defendants to the action. A draft deed of release (of Cardinal Pell and the Trustees) prepared in the course of settlement discussions did not implicitly indicate the parties that the plaintiff could sue if he rejected the offer of settlement.

An article published on the CathNews website on 19 July 2010 headed 'Abuse victim criticises Towards Healing' talks of the Ellis case and said that the trustees in each diocese in NSW and the ACT were not responsible for the conduct of priests and teachers in parochial schools at least prior to 1986, when the relevant legislation was amended and that the position after 1986 had not yet been tested. I have not yet looked at the effect of the 1986 amendments.

The transcript of proceedings in the High Court in *Ellis v The Trustees of the Roman Catholic Church of the Archdiocese of Sydney* shows that on 16 November 2007, special leave to appeal from the decision of the Court of Appeal was refused because that there were insufficient prospects of success, the principles to be applied to the particular facts being well-established.

The website for High Court of Australia judgment summaries pre-2006 shows that on 6 February 2003 the High Court held in three cases (collectively known as *Lepore v the State of NSW*) that State education authorities will not generally be held liable for the sexual abuse of pupils by teachers unless fault on the part of the authorities is shown. Each case involved alleged abuse by a primary school teacher on school premises during school hours. The cases raise the issue of liability of education authorities for damage suffered by pupils even when there is no fault on the part of those authorities, such as negligence in their engagement and supervision of staff, in their systems or procedures, or in a failure to respond to complaints of misconduct. The Court held that education authorities were vicariously liable for acts performed in the course of teachers' employment, but that sexual abuse was generally too far removed from a teacher's duties to be regarded as occurring in the course of their employment. As indicated above, this seems to me to establish that the authority's liability in child abuse cases is not increased because the actual perpetrator is an employee but says nothing about the relevance of the status of his or her supervisors.

An illustration of the complexity in this area is contained the Melbourne Catholic Education Office's Policy 2.20:

'Definitions

. . . **Employer.** The employer in Catholic schools may be the Bishop, the Association of Canonical Administrators, the Parish Priest, the Congregational Leader of a Religious Institute or the Incorporated Body. The delegated employer of staff in the Catholic Education Office, Archdioceses of Melbourne is the Director of Catholic Education'.

Mr David Shoebridge MLC (NSW) of the Greens Party has raised the issue of the

on-going accountability of the Catholic Church for abuse of children by people in Church institutions, in the light of the Ellis case. A comprehensive discussion was published and called for submissions by 6 February 2012. I do not know what steps have been taken by the Greens Party since then.

The last word on this topic should be given to former Toowoomba Bishop, William Morris. The above-mentioned article on the CathNews website on 19 July 2010 said that the previous week, on behalf of his diocese, he accepted formal liability for the actions of a paedophile teacher it employed.

Where to from here?

There are more issues for the Church than for the government. In Victoria, the Roman Catholic Trusts Act 1907 provides for the establishment of diocesan trusts to hold and deal with property. I would suggest that the legal position of Church bodies (including orders and dioceses) be examined and changed if necessary to ensure that there was an ongoing entity which could be held responsible for the failure of supervisors of 'personnel', i.e. clerics, employees and volunteers, to protect victims, however long previously the abuse had been committed. It would not be desirable for the Church to be liable to any greater extent than a State government or other 'employer' under Lepore's case (except that the formal status of the supervisor should not be relevant).

It is not clear to me that mandatory reporting provisions are needed.

It is not clear that the problems that were aired in Sydney in 2002 about confidentiality clauses have been resolved. It is good for the National Committee on Professional Standards to say that such clauses were inappropriate; the question remains whether they are still being inserted into releases and what steps have been taken to ensure that they are not. One of the lessons for the Church should be that real scandal arises when cover-ups are revealed, as when the existence of confidentiality clauses becomes public. In fact, it is arguably in the Church's own long-term interests that releases not contain confidentiality clauses at all.

An article by Barney Swartz of The Age, dated 30 August 2011 and headed 'Catholic order "suppressed report on child sex"' indicated a falling out between Professor Parkinson and the Australian Catholic Bishops Conference and/or the Professional Standards Committee over a report he had made in August 2010 into the conduct of three Salesian priests. Given that two others leading the Australian Church's thinking in this area in the past have fallen by the wayside, one can wonder at the approach that the Bishops' Conference will take in the future.

I note that Broken Rites has suggested that there is something suspicious in Catholic Church Insurances funding the National Commission on Professional Standards. On the face of it, this may be a fair point, but it would be surprising if it affected the judgment or bona fides of three well-known victim-sympathisers associated at various times with the Commission, namely, former Bishops Geoffrey Robinson and William Morris and Professor Patrick Parkinson.

Noel Gregory