SEXUAL ASSAULT AND THE CATHOLIC CHURCH: ARE VICTIMS FINDING JUSTICE?

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Contents

Abstract		v
Statement of Candidate Contribution		vi
Copyright Notice		vi
Acknowledgements		vii
Preface		viii
Definition of Core Terms		x
Chapter 1	**Introduction**	**1**
1.1	Introduction	2
1.2	Background and context for this research	3
1.2.1	Media exposure in Australia	3
1.2.2	Victorian Parliament Inquiry	5
1.2.3	NSW Special Commission of Inquiry	5
1.2.4	National Royal Commission	6
1.2.5	Victorian Crime Prevention Committee	7
1.2.6	International Church-initiated Inquiries	8
1.2.7	International State-initiated Inquiries	13
1.2.8	International Royal Commissions	16
1.3	Why this research is important	17
1.3.1	Civil pathway	17
1.3.2	Criminal prosecutions	19
1.3.3	Victims of crime compensation schemes	23
1.3.4	The Catholic Church's internal complaints processes	23
1.4	Aims of the research	24
1.5	What is justice?	24
1.5.1	Retributive justice	25
1.5.2	Corrective justice	25
1.5.3	Distributive justice	26
1.5.4	Restorative justice: victim-centred justice	26
1.5.5	Procedural justice	29
1.5.6	Transitional justice: truth recovery and denial	29
1.5.7	International human rights law principles: the right to the truth to end impunity	32
1.6	Outline of chapters	35
Chapter 2	**Research Design: Methodology**	**37**
2.1	Introduction	38
2.2	Project proposal: a conceptual framework	38
2.2.1	Research questions	39
2.2.2	Research audience	39
2.3	The research process: qualitative empirical research	39
2.4	Data collection: doing the study	40
2.4.1	Primary sources	40
2.4.2	Interview methodology	41
2.4.3	Audio files and transcripts	41
2.5	Ethical research practice and principles	42
2.5.1	Recruitment process	42
2.5.2	Addressing risks for the victims	44
2.5.3	Addressing risks for the researcher	45
2.6	Data analysis	47
2.6.1	Data management and coding	48
2.6.2	Analytic memoing	49
2.6.3	Describing and analysing concepts	49
2.7	The research process: doctrinal method	50
2.8	Limitations of the research	51
2.9	Conclusion	53
Chapter 3	**Justice for victims of Catholic clergy sexual abuse in Australia**	**54**
3.1	Introduction	55
3.2	Criteria for justice	55

3.3	The truth and its acknowledgement	57
3.3.1	The victim's truth and the Church's truth	58
3.3.2	Acknowledgement by the Catholic Church and its hierarchy	60
3.3.3	Acknowledgement by the offender	62
3.4	Accountability of the Catholic Church and its hierarchy	64
3.4.1	Criminal prosecutions for concealment	64
3.4.2	Mandatory reporting	65
3.4.3	Ability to sue the Church	65
3.4.4	Transparent and fair processes and procedures	66
3.4.5	Additional proposals	66
3.4.6	Discussion	67
3.5	Monetary compensation	68
3.5.1	Why compensation is necessary	68
3.5.2	Type of compensation needed	70
3.5.3	How the compensation is to be paid	71
3.5.4	Compensation: Does it heal the pain?	71
3.5.5	Discussion	71
3.6	Accountability of the offender	72
3.6.1	Prosecutions	72
3.6.2	Laicisation	73
3.6.3	Discussion	74
3.7	Apology	75
3.7.1	Essential ingredients of an effective apology	76
3.7.2	Discussion	77
3.8	Counselling and other services	79
3.8.1	Discussion	80
3.9	Prevention of further crimes	81
3.9.1	Discussion	81
3.10	Justice for secondary victims	82
3.11	Conclusion	82
Chapter 4	**Civil Litigation: Looking for Justice I**	**83**
4.1	Introduction	84
4.2	Australian law	85
4.2.1	Current Australian position: *Lepore*	85
4.2.2	Non-delegable duties	87
4.2.3	Vicarious liability	89
4.2.4	The Ellis defence	96
4.3	Recent developments	98
4.3.1	Life after *Lister*: the 'Catholic cases' in the UK	99
4.3.2	Discussion	111
4.4	Liability in Australia	112
4.5	Conclusion	113
Chapter 5	**Criminal Jurisdiction: Looking for Justice II**	**114**
5.1	Introduction	115
5.2	Prosecutions	116
5.2.1	Prosecution cases	117
5.2.2	Discussion	119
5.3	Victims' experiences of the criminal justice system	119
5.3.1	Discussion	122
5.4	Convictions: Do they bring justice?	123
5.4.1	Discussion	126
5.5	Guilty pleas	126
5.5.1	Discussion	129
5.6	Victims of Crime Assistance Tribunal	129
5.7	Conclusion	130
Chapter 6	**Australian Catholic Church's Internal Complaints Processes, Towards Healing and the Melbourne Response: Looking for Justice III**	**131**
6.1	Introduction	132
6.2	The four themes	133
6.2.1	Differences between the Melbourne Response and Towards Healing	134
6.2.2	Themes	135

6.3	Theme one: The truth	135
6.3.1	Minimisation of the truth	136
6.3.2	The truth about the offender	142
6.3.3	Containment of the truth	144
6.3.4	Victims silenced	145
6.3.5	Summary: Theme one	146
6.4	Theme two: Healing of victims	147
6.4.1	General impacts on victims	147
6.4.2	Specific mental health impacts on victims	148
6.4.3	Causes and sources of the impacts	149
6.4.4	Discussion	151
6.4.5	Summary: Theme two	152
6.5	Theme three: Legalistic approaches	152
6.5.1	Compassionate responses	152
6.5.2	Legal representation	154
6.5.3	Investigations and examinations	157
6.5.4	Threats and conditions	159
6.5.5	Summary: Theme three	162
6.6	Theme four: Compensation, apology, counselling and decision-making	162
6.6.1	Compensation	163
6.6.2	Apology	165
6.6.3	Counselling	168
6.6.4	Decision-making and review	169
6.6.5	Summary: Theme four	171
6.7	Conclusion	171
Chapter 7	**Evaluation of the pathways to justice**	**174**
7.1	Introduction	175
7.2	Criteria for justice	175
7.3	Civil litigation	177
7.4	Criminal prosecutions	178
7.5	Victims of crime compensation schemes	180
7.6	The Melbourne Response and Towards Healing	181
Chapter 8	**Conclusion**	**186**
8.1	The research and its findings	187
8.2	The research and the Australian inquiries	188
8.3	Significance and implications of findings	189
8.4	Requisite reform	190
8.5	Need for further research	196
8.6	Concluding thoughts	197
Bibliography		**198**
Articles, Books and Reports		198
Case Law		206
Legislation		207
Treaties and other UN Documents		207
Other		208
Appendices		**211**
Appendix 1	The Author's Advocacy	211
Appendix 2	Victims of Crime Assistance Tribunal, Victoria	212
Appendix 3	Towards Healing and the Melbourne Response	216
Appendix 4	Letters to legal and non-legal advocates	226
Appendix 5	Interview locations	234
Appendix 6	Interviewee codes	235
Appendix 7	Letters to primary and secondary victims via advocates	236
Appendix 8	Letters to victims who contacted researcher directly	240
Appendix 9	Letters to legal professionals and non-legal advocates	244
Appendix 10	Explanatory statement	254
Appendix 11	Consent form	257
Appendix 12	Primary victim data	258
Appendix 13	Secondary victim data	259
Appendix 14	Primary victims associated with secondary victim interviewees	260

Abstract

Over the last two to three decades in Australia, and internationally, there has been increasing exposure of institutional child sex crimes within the Catholic Church which has prompted demands for justice. In 2012, the Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Non-government Organisations was established as was a commission of inquiry into the Maitland-Newcastle Diocese in New South Wales. At the end of 2012, a national Royal Commission was set up to investigate child sexual assaults in government and non-government institutions, including the Catholic Church.

This doctoral thesis commenced two years before these inquiries. It is a qualitative empirical study and case law analysis that sets out to determine whether victims of Catholic clergy sexual abuse in Australia are finding justice. To tackle this line of investigation, 70 people from Victoria and New South Wales, including primary and secondary victims, were interviewed about their experiences with civil litigation, criminal prosecutions and the Catholic Church's internal complaints processes.

In order to determine whether victims had found justice within these processes, a preliminary question needed to be addressed: 'What is justice for these people?' This latter line of inquiry identified seven critical criteria for justice for victims. These criteria were employed ultimately to evaluate the three pathways to justice, as outlined above.

The findings of this research demonstrate that victims of clergy sexual abuse interviewed in this research are not finding justice. Further, those victims who attended the Church's internal complaints processes, the Melbourne Response and Towards Healing, as well as not finding justice, suffered additional abuse and harm. The thesis concludes by outlining the significance of these findings and the types of reforms necessary to effectively address the justice needs of victims and their families, as identified in this research.

Statement of candidate contribution

This thesis contains no material which has been accepted for the award of any other degree or diploma in any university or other institution and affirms that to the best of my knowledge the thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

Judith Courtin | Date

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Next I want to acknowledge and thank from my heart the survivors and their families without whom this project would not exist. I thank you for trusting me and telling your stories and explaining what it is that you need for justice. Participating in this research required bravery and risk-taking on your part. It cannot have been easy. Your invaluable contributions to this research will, hopefully, benefit many others, both in Australia and internationally. This thesis is dedicated to you.

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Preface

In 2006, a close family member of mine who was then in his early thirties, revealed to me that he had been anally raped on multiple occasions by members of the teaching fraternity of the Catholic Church, the Congregation of Christian Brothers. He was 11 years old at the time of the crimes. His disclosure was triggered by a discussion we were having about the publication of an article of mine that was based on the research I undertook for my Bachelor of Laws Honours' thesis that examined the appellate journey for child sexual assault convictions in Victoria from January 2001 to June 2002.[1]

Shocked by what I heard and moved by his suffering, I was compelled to become involved. I followed his journey during the ensuing years.[2] I decided to investigate Catholic clergy sex crimes against children. I familiarised myself with the civil law in relation to victims finding justice only to find that if victims of such crimes wanted to sue the Church they would face multiple legal brick walls. I made initial inquiries of the Church's internal complaints processes, the Melbourne Response and Towards Healing, as my relative told me that he had experienced many obstacles in his efforts to have his complaints heard by the latter. I spoke to legal advocates and many other victims and their families. Based on these personal accounts and, in particular, the civil litigation laws, it was evident that not only were these people unable to obtain justice, they also suffered the indignity of further injustices and abuse in their dealings with the Church's two internal complaints processes. I also researched international jurisdictions to see whether there were better remedies, and indeed justice, for victims of such sex crimes.

In 2010, when I commenced this doctoral project, there was a paucity of comprehensive empirical, academic research into sexual abuse and the Catholic Church in Australia, in particular, whether victims were finding justice. This thesis contributes to this deficiency. The need for this research was demonstrated not only by the widely-reported denial of responsibility by the Church and its cavalier dismissal of the harm done to the victims of such crimes and their subsequent suffering, but also by the stark need for justice for them and their families. Moreover, it was clear to me as I gained more knowledge of victims' experiences of both the legal system and the Church's complaints processes, especially during the first 18 months of my research, that an independent and State-run inquiry of these issues was urgently needed.

With this in mind, I commenced writing opinion pieces – mainly for Fairfax print media[3] and the open access academic online forum, *The Conversation*[4] – to highlight the injustices facing clergy victims and their families. These pieces were followed by radio and television interviews.[5] The issue gained

1 Judy Courtin, 'Judging the Judges: How the Victorian Court of Appeal is dealing with appeals against conviction in child sexual assault matters' (2006) 18 *Current Issues in Criminal Justice* 265, 275.
2 In May 2011, one offender pleaded guilty to indecent assault in the County Court of Victoria. This replaced a pre-existing plea of 'not guilty' for penetrative offences.
3 Fairfax is an Australia-wide, well-renowned and top quality newspaper.
4 *The Conversation* is an independent online journal and source of news and views, sourced from the academic and research community. <http://theconversation.com/au>.
5 See appendix 1 for an outline of the author's contributions to the campaign for justice for clergy victims including the establishment of the Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Non-government Organisations and the national Royal Commission into Institutional Child Sexual Abuse.

traction. Facts and figures about the alarming number of suicides among victims of clergy sexual abuse in Victoria were exposed, and the call for an independent inquiry rapidly gathered momentum. In 2012, the Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Non-government Organisations was established. More people came forward in other states and eventually a commission of inquiry was established in New South Wales. Finally, in late 2012, a national Royal Commission was set up to investigate child sexual assaults in government and non-government institutions, including the Catholic Church. Two and a half years later, the Commission is still actively involved in its investigations. These inquiries will be discussed below.

Decades of sexual assaults by Catholic clergy in Australia, the knowledge of which was once confined to the injured psyches of the victims and their families, are finally, and rightfully, being exposed as the horrific crimes they have always been.

Many people have fought hard to bring about these significant changes, including the fair-minded media organisations and their reporters and journalists, as well as victims' advocates, including this author. Most of all, however, it has been the victims themselves and their families who, with much courage in the face of many obstacles, successfully fought for these outcomes.

When the inquiries were announced and hearings commenced – one of the main goals motivating my research – I questioned the benefits of continuing with my thesis. But I realised I needed to complete the work. Being the first, comprehensive empirical academic research into Catholic clergy sexual abuse in Australia, it is unique and complements well the growing body of findings from our state and federal inquiries. But, more than anything, I wanted to honour the victims and their families who had brought me into their homes and trusted me, opening their hearts and revealing their pain and suffering and, crucially, telling me clearly what they wanted for justice. So far, they have not only been denied justice but have been exposed to routine ridicule and blame by the Catholic Church and ongoing and insidious re-abuse when faced with the Church's protection of the offenders and its sustained denial and concealment of their crimes.

It is with courage and stoicism that these victims of Catholic clergy sexual abuse and their families continue the fight for justice, and against exceptional odds. This fight is gaining the momentum it deserves. Victims and their families have increasingly been speaking out, marking a new era in which they are demanding that their voices be heard.

But what is justice for these people and what must happen if it is to be delivered? These are the questions that lie at the heart of this research and that I aim to answer.

Definitions of Core Terms

In this thesis, a number of terms are used in specific ways. These are outlined below.

Church authority: Religious Orders, Dioceses and Archdioceses.

County Court Judge: A participant in the empirical research who is a County Court Judge of Victoria and has conducted trials involving victims of Catholic clergy sexual abuse.

Legal advocate: A participant in the empirical research who is a solicitor and who has represented victims of Catholic clergy sexual abuse.

Legal professional: A participant in the empirical research who is either a County Court Judge, litigation solicitor, litigation barrister, prosecution solicitor or a prosecution barrister.

Litigation barrister: A participant in the empirical research who is a civil litigation barrister and who has represented victims of Catholic clergy sexual abuse.

Melbourne Response: The Catholic Church's internal complaints process for the Archdiocese of Melbourne.

Non-legal advocate: A participant in the empirical research who is an advocate for victims of Catholic clergy sexual abuse and who is not a lawyer.

Offender: This term is not used in the strict legal sense of being a person convicted of an offence. The term 'offender', as used by the majority of interviewees, includes both convicted offenders and alleged offenders or accused people.

OPP: Office of Public Prosecutions.

Prosecution barrister: A participant in the empirical research who is a barrister and who has prosecuted in trials involving victims of Catholic clergy sexual abuse.

Prosecution solicitor: A participant in the empirical research who is a solicitor who worked for the Office of Public Prosecutions in Victoria and who has prosecuted in trials involving Catholic clergy victims of sexual abuse.

Primary victim: A person who was sexually abused (see Victim)

Secondary victim: A person who was either a family member or partner of the primary victim.

Towards Healing: The Catholic Church's national internal complaints process involving all Church authorities in Australia, except the Archdiocese of Melbourne.

Victim: The term 'victim' is not used in this thesis in a pejorative sense. It is used in the literal sense in that the person identifies as being sexually abused. It is intended that it includes the meaning of the term, 'survivor'.

VOCAT: The Victims of Crime Assistance Tribunal, Victoria

CHAPTER

1

INTRODUCTION

1.1 Introduction

This chapter outlines the background and context to this research into sexual assault and the Catholic Church, in particular in Australia but also internationally. It addresses the reasons why this research is important, especially the need to contribute to the existing gap in the literature in this area. It outlines the legal obstacles and other limitations facing clergy victims seeking justice. It spells out the aims of the research, which focus on, inter alia, finding out what justice means for the victims. Finally, some relevant theories of justice as they pertain to these victims are examined, followed by an outline of the chapters of the thesis.

The incidence and prevalence of child sexual abuse generally is very difficult to determine due to significant limitations.[1] Incidence studies rely upon such cases being reported and prevalence studies rely on the 'valid recall' by victims of abuse cases that are often historical.[2] Not only do such limitations make the incidence and prevalence of clergy sexual abuse within the Catholic Church in Australia difficult to determine, there has never been a nationwide study of Catholic clergy sexual abuse.[3] However, it is estimated conservatively that there are six times more sexual assaults by Catholic clergy than by members of all other Religious Organisations combined – levels of abuse that are 'strikingly out of proportion with any other Church – and that is a reality'.[4] The majority of the evidence provided to the Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Non-government Organisations (the Victorian Parliamentary Inquiry) concerned sexual abuse by Catholic clergy. The Committee found that there has been 'substantial' criminal child sexual abuse in the Catholic Church over a long period of time.[5]

> … the incidence of criminal child abuse within … the Catholic Church, has emerged as a significant issue … across Australia and internationally. There is a striking similarity between the patterns of offending behaviour, the responses of Church authorities and the expressions of victims' anger in this country and those disclosed in inquiries overseas, notably in Ireland and the United States of America.[6]

That child sexual abuse has been 'substantial' in the Catholic Church, compared with other denominations, raises interesting and challenging questions as to why this might be the case. As the main research question, about whether clergy victims are obtaining justice, does not require examination of the causes of such crimes within the Church, it is beyond the scope of this thesis to examine this complex topic. It is acknowledged, however, that controversial issues such as vows of celibacy within the Catholic Church[7]

1 As pointed out in the John Jay College of Criminal Justice, it is impossible to assess the extent of sexual offending, either in general or with child sex offending, because most studies in the general population are derived from samples of those arrested or convicted for sex offenses. John Jay College of Criminal Justice, *The Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States 1950-2002 Report*, (2004), 23.
2 Rebecca Bolan, *Child Sexual Abuse: Its Scope and Our Failure* (SpringerLink, 2002) 65.
3 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report* (2014) 3.1. See also: A.M. Greely, 'How Prevalent is Sexual Abuse?' (2004) 50(2) *Doctrine and Life* 66-71; A.M. Greely, 'How serious is the problem of sexual abuse by clergy?' (1993) 168(10) *America* 6-10.
4 Evidence to the Family and Community Development Committee, Parliament of Victoria, Melbourne, 19 October 2012, 2 (Professor Patrick Parkinson).
5 Family and Community Development Committee, Parliament of Victoria, *'Betrayal of Trust'* (2013) 155-156.
6 Ibid 6.
7 See generally: A.W Sipe, 'The crisis of sexual abuse and the celibate/sexual agenda of the Catholic Church' in T.G Plante (ed), *Sin Against the Innocents. Sexual Abuse by Priests and the Role of the Catholic Church* (Westport, C.T. London: Praeger, 2004) 61-71; John Jay College of Criminal Justice, *The Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States 1950-2002 Report. (2004);* Marie Keenan, *Child Sexual Abuse and the Catholic Church* (Oxford University Press, 2012).

and the strict hierarchical ecclesiastical structure and governance of the Catholic Church,[8] are at least two pivotal and controversial matters that need addressing if the sexual abuse crisis within the Catholic Church is to be understood and addressed.

The Australian Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) is currently undertaking research into the incidence and prevalence of child sexual abuse in institutions in Australia.[9] In the meantime, the Commission has analysed data obtained from the private sessions it held with victims and their families, which revealed that 90 percent of perpetrators were male; on average, female victims were nine years old and male victims ten years old when the abuse started, and on average it took victims 22 years to disclose the abuse, with men taking longer than women.[10] In an attempt to understand the prevalence of abuse, the Royal Commission is compiling data from the police, child protection agencies, education departments and other bodies. The information the Royal Commission has gathered confirms that 'abuse remains a contemporary issue'.[11]

1.2 Background and context for this research

By 2010, when this academic project began, sexual assault and the Catholic Church was becoming increasingly part of a national discourse in Australia. This discourse had been preceded by several decades of growing media exposure – a major factor facilitating this being the willingness of traumatised victims[12] finally to tell their stories, both nationally and internationally. One consequence of this exposure, and the subsequent public outrage, has been the establishment of State-run inquiries in Australia, and both Church-initiated and State-initiated inquiries internationally. These are examined below. But first, because the issue came to light publicly through investigative media stories, there will be a brief outline of some of this early media coverage to provide the necessary context and background to the establishment of the inquiries in Australia and internationally.

1.2.1 Media exposure in Australia

In the early 1990s in Australia, what had been at least four decades of Catholic clergy sexual abuse was beginning to emerge in the media. In 1992, the Australian Broadcasting Corporation's (ABC)[13] respected and influential current affairs program, Compass, aired *The Ultimate Betrayal*,[14] which 'lifted the lid on clerical sexual abuse in Australia'.[15] Compass continued to research and produce programs exposing the Catholic Church. *Conduct Unbecoming*[16] went to air in 1993 and was followed by *The Christian Brothers* in 1994.[17] Four Corners, another well-regarded ABC program, aired *Twice Betrayed* in 1996, which focused on not only the devastating betrayal experienced by the victims of sexual abuse at the hands of the priests and brothers they once

8 See generally: Marie Keenan, *Child Sexual Abuse and the Catholic Church* (Oxford University Press, 2012); G. Robinson, *Confronting Power and Sex in the Church. Reclaiming the Spirit of Jesus* (John Garrett Publishing, 2007); M Papesh, *Clerical Culture, Contradiction and Transformation* (Liturgical Press, 2004).
9 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report* (2014) 3.1.
10 Ibid. According to the John Jay College of Criminal Justice study, a high percentage of those child sexual abuse victims delay disclosure of their abuse to the authorities, and a significant number of children never disclose the abuse. The John Jay College of Criminal Justice, *The Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States 1950-2002 Report,* (2004), 157.
11 Commonwealth, above n 9, 3.1.
12 As indicated above, the term 'victim', which is used throughout this thesis, is not used in a pejorative sense and it is intended that it includes the meaning of the term, 'survivor'.
13 The ABC is Australia's national public broadcaster.
14 Australian Broadcasting Corporation, 'The Ultimate Betrayal', *Compass*, 15 March 1992.
15 Australian Broadcasting Corporation, 'Churches on Trial', *Compass*, 11 December 2012, Summary.
16 Australian Broadcasting Corporation, 'Conduct Unbecoming', *Compass*, 27 June 1993.
17 Australian Broadcasting Corporation, 'The Christian Brothers', *Compass*, 1994.

revered, but also the added insult of the refusal of the Church hierarchy to take responsibility for these crimes.[18] Such stories continue to the present day.[19] The focus of these media reports is changing though as our inquiries unfold and more is known about the responses of the Catholic Church to decades of sexual offending.

The print media was also reporting on the issue. In 2002, Peter Ellingsen of the respected Melbourne broadsheet *The Age*, wrote two investigative articles on sexual abuse in the Catholic Church. The first focused on the cover-up by Frank Little, Archbishop of Melbourne, of accusations of sexual abuse between 1974 and 1996. Little callously moved the abusers from parish to parish without informing parishioners of the accusations.[20] Ellingsen's second feature article concentrated on the Diocese of Ballarat in Victoria and the relationship in the early 1970s between the now-convicted offender, the priest Gerald Ridsdale, and George Pell, who later became the Archbishops of Melbourne and Sydney but who was based in Ballarat at the time.[21] This article highlighted once again the cover-up of crimes – in the case of Ridsdale and another offender, John Day, a monsignor – and the fact that they were moved from one parish to the next over a period of more than 20 years of offending.[22]

The increasing media exposure in the 1990s applied significant pressure on the Church hierarchy and government.[23] In 1996, two internal complaints processes were set up. George Pell established the Melbourne Response and the Australian Catholic Bishops Conference established the national process, Towards Healing (see chapter 6 and appendix 3).

The media, however, continued to expose the problem. In Victoria during 2011, it was revealed that Victoria police knew of 26 suicides of people who had attended Catholic schools in the Ballarat region.[24] This, and other print, radio and television revelations prompted renewed pressure by the community for the Victorian Government to hold an independent State-run inquiry into the Catholic Church and its handling of clergy sexual assaults.[25] There were more reports of suicides of clergy victims of sexual abuse in the Ballarat region.[26] A confidential police report stated, in part, that there was:

> … an inordinate number of suicides which appear to be a consequence of sexual offending … The number of people contacting this office to report members of their family, people they know, people they went to school with, who have taken their lives is constant. It would appear that an investigation would uncover many more deaths as a consequence of clergy sexual abuse.[27]

18 Australian Broadcasting Corporation, 'Twice Betrayed', *Four Corners*, 27 May 1996.
19 See also: Australian Broadcasting Corporation, 'Unholy Silence', *Four Corners*, 24 August 2012; Australian Broadcasting Corporation, 'Churches on Trial', *Compass*, 11 December 2012; Australian Broadcasting Corporation, 'In the Name of the Law', *Four Corners*, 11 August 2014.
20 Peter Ellingsen, 'Speak no evil', *The Age* (online), 4 May 2002 <http://www.theage.com.au/articles/2002/05/03/1019441435037.html>.
21 Peter Ellingsen, 'Ballarat's good men of the cloth', *The Age* (online), 14 June 2002 <http://www.theage.com.au/articles/2002/06/13/1023864324376.html>.
22 Ibid.
23 The then Premier of Victoria, Jeff Kennett, reportedly threatened Archbishop Pell that if he didn't 'clean this thing up', there would be a royal commission. Evidence to the Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney, 26 March 2014, 58 (George Pell).
24 Nick McKenzie and Richard Baker, 'Sex abuse led to 26 suicides says policeman', *The Age* (Melbourne, Victoria), 30 July 2011.
25 Judy Courtin, 'Clergy victims need justice now', *The Age* (Melbourne, Victoria) 14 October 2011; Opinion, 'Child abuse and the Church: no more excuses', *The Age* (Melbourne, Victoria) 14 October 2011.
26 Nick McKenzie, Richard Baker and Jane Lee, 'Church's suicide victims', *The Age* (Melbourne, Victoria) 13 April 2012.
27 Ibid [3]-[4].

An existing inquiry into child abuse and neglect in Victoria, known as the Cummins Inquiry,[28] had its remit extended by the Government so that it could determine whether or not a separate public inquiry should be held in Victoria into the Catholic Church. Cummins did recommend that a formal investigation be conducted. This would inquire into the processes used by religious organisations to respond to accusations of criminal abuse of children by their personnel.[29]

1.2.2 Victorian Parliamentary Inquiry

A Parliamentary Inquiry was soon announced in Victoria. The responsibility for this Inquiry was entrusted to the Family and Community Development Committee,[30] which commenced its private and public hearings in October 2012. There was extensive media coverage of, and community involvement in, the Inquiry.[31] The Committee received 578 written submissions and held 106 public hearings and 56 private hearings.[32] Its two-volume report was handed to the Parliament in November 2013. The Committee addressed several of the issues covered in this thesis, in particular the civil legal limitations facing victims, as well as the impotent responses by the Church's above-mentioned internal complaints processes to allegations of clergy abuse and their impact on victims.[33]

The Parliamentary Inquiry's recommendations include: The strengthening of the existing criminal law to include failures to report to the police any knowledge about the committing of a serious indictable offence (including child abuse);[34] a new grooming offence;[35] a child endangerment offence;[36] that non-government organisations, such as the Catholic Church, be incorporated and adequately insured, thus providing victims with a legal entity to sue (see 1.3.1 below);[37] and amendment of the *Limitation of Actions Act 1958* (Vic)[38] and the *Victims of Crime Assistance Act 1996* (Vic), so that they exclude criminal child abuse from the operation of the limitations periods under those Acts.[39] These recommendations are further discussed in chapter 8.

1.2.3 NSW Special Commission of Inquiry

With the Inquiry underway in Victoria, the media continued to expose sex crimes and their cover-up within the Catholic Church in other parts of Australia.[40] On 9 November 2012, a special inquiry was announced that was specifically tasked to investigate sexual abuse matters within a particular

28 Protecting Victoria's Vulnerable Children Inquiry, *Protecting Victoria's Vulnerable Children Inquiry*, (2012).
29 Ibid Recommendation 48, 356.
30 This Committee was chaired by Georgie Crozier. Its other members were: Frank Maguire (Deputy Chair), Andrea Coote, Bronwyn Halfpenny, David O'Brien, and Nick Wakeling. The terms of reference for this Committee were: The Family and Community Development Committee is requested to inquire into, consider and report to the Parliament of Victoria 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.
31 The inquiry's public hearings were comprehensively covered by the Australian Broadcasting Corporation and Fairfax Media, and to a lesser extent, by News Limited and commercial radio and television.
32 Family and Community Development Committee, above n 5, 38.
33 For a full list of the Committee's recommendations, see: Family and Community Development Committee, Parliament of Victoria, *'Betrayal of Trust'* (2013).
34 Family and Community Development Committee, above n 5, 477.
35 Ibid 465.
36 Ibid 477.
37 Ibid 527.
38 A bill amending this Act was introduced into the Victorian Parliament in February 2015 (see section 1.3.1 below).
39 Family and Community Development Committee, above n 5, 537 and 553.
40 Australian Broadcasting Corporation, 'Studio interview with Senior NSW Detective Peter Fox', *Lateline*, 8 November 2012.

NSW Catholic Diocese. This was more limited than the remits for the Victorian Inquiry and, later, the Royal Commission (see below), which included, inter alia, all religious organisations. The New South Wales *Special Commission of Inquiry into matters relating to the police investigation of certain child sexual abuse allegations in the Catholic Diocese of Maitland-Newcastle*, published its report in 2014.[41] Ms Margaret Cunneen SC was appointed Special Commissioner.[42]

This Inquiry was triggered by allegations by Detective Chief Inspector Peter Fox that there was cover-up of sex crimes within the Catholic Church. He had been investigating Catholic clergy sex crimes in the NSW police force for 35 years. Although the specific allegations by Fox were dismissed by this Inquiry, there was strong criticism of the senior Catholic clergy in the Maitland–Newcastle Diocese for its failure to produce information to police relating to suspected child sexual abuse by clergy offenders that would have facilitated and/or assisted a relevant police investigation.[43]

On 17 March 2015, the Archbishop of Adelaide, Phillip Wilson, was charged with concealing a child sex allegation that was made against now-deceased priest, Jim Fletcher.[44] This allegedly occurred in the NSW Hunter Valley region in the 1970s. This came about nine months after this NSW Special Commission of Inquiry recommended that he be charged. Significantly, Wilson became the most senior Catholic clergyman in the world to be charged with concealment offences.

1.2.4 National Royal Commission

Two days after the announcement of the NSW Inquiry, the national Royal Commission was announced by the then Prime Minister of Australia, Julia Gillard.[45] This Commission was to inquire into institutional responses to allegations and incidents of child sexual abuse and related matters. Although the Catholic Church is only one of a plethora of government and non-government institutions being investigated for the ways in which they responded to such complaints, sexual abuse by Catholic clergy is reported to occur six times more often than by members of all other religious institutions, as mentioned above.[46]

41 New South Wales, *'Special Commission of Inquiry into matters relating to the police investigation of certain child sexual abuse allegations in the Catholic Diocese of Maitland–Newcastle',* (2014). The Inquiry was to report on the following terms of reference: 1) The circumstances in which Detective Chief Inspector Peter Fox was asked to cease investigating relevant matters and whether it was appropriate to do so; and 2) whether, and the extent to which, officials of the Catholic Church facilitated, assisted, or cooperated with Police investigations of relevant matters, including whether any investigation has been hindered or obstructed by, amongst other things, the failure to report alleged criminal offences, the discouraging of witnesses to come forward, the alerting of alleged offenders to possible police actions, or the destruction of evidence.

42 Pursuant to the *Special Commissions of Inquiry Act 1983* (NSW).

43 New South Wales, above n 41, 14-16.

44 Joanne McCarthy, 'Archbishop Philip Wilson becomes world's most senior Catholic charged with concealing child abuse', *The Age* (Melbourne, Victoria) 17 March 2015.

45 The Royal Commission into Institutional Responses to Child Sexual Abuse was established by Letters Patent to the Honourable Justice Peter McClellan, AM, Mr Robert Atkinson, The Honourable Justice Jennifer Coate, Mr Robert Fitzgerald AM, Dr Helen Milroy and Mr Andrew James Murray. The Commission's Terms of Reference were to inquire into: 1) What institutions and governments should do to better protect children against child sexual abuse and related matters in institutional contexts in the future; 2) what institutions and governments should do to achieve best practice in encouraging the reporting of, and responding to reports or information about, allegations, incidents or risks of child sexual abuse and related matters in institutional contexts; 3) what should be done to eliminate or reduce impediments that currently exist for responding appropriately to child sexual abuse and related matters in institutional contexts, including addressing failures in, and impediments to, reporting, investigating and responding to allegations and incidents of abuse, and, 4) what institutions and governments should do to address, or alleviate the impact of, past and future child sexual abuse and related matters in institutional contexts, including, in particular, in ensuring justice for victims through the provision of redress by institutions, processes for referral for investigation and prosecution and support services. <http://www.childabuseroyalcommission.gov.au/about-us/terms-of-reference>.

46 Evidence to the Family and Community Development Committee, Parliament of Victoria, Melbourne, 19 October 2012, 2 (Professor Patrick Parkinson).

An interim report was published 18 months after the Commission's hearings and investigations commenced,[47] which noted that by May 2014 the Commission had held 1677 private sessions and received 1632 written accounts.[48] Some of the early interim findings were that the number of people who had come forward to the Commission represented 'only a minority' of those abused;[49] that child sexual abuse is significantly under-reported in Australia;[50] and that many institutions have either failed to respond to reports of child sexual abuse, or have failed to respond effectively.[51] This Commission, which had its duration extended for two years by the current Federal Government,[52] is continuing to hold public and private hearings. It is now due to complete its inquiries by December 2017.

1.2.5 Victorian Crime Prevention Committee

Prior to these three inquiries, there had been numerous inquiries in Australia into child sexual abuse and neglect.[53] Although these inquiries were not specifically related to sexual abuse within the Catholic Church, one inquiry, the 1995 Victorian Crime Prevention Committee, did make special reference to the the ways in which the Catholic Church responded to complaints of clergy sexual absue. The Chairman, Ken Smith, said: 'Protocols of some religious organisations have received critical comment by some witnesses regarding both the reporting of suspected sexual assaults and the appropriateness of internal investigation of such assaults'.[54]

This Committee put forward 130 recommendations,[55] including that protocols be developed within religious organisations to ensure a civil sexual assault response team be notified immediately of any suspected sexual assaults, and that religious organisations develop protocols to ensure evidence is not contaminated by internal investigations or inquiries.[56] It is noteworthy that these recommendations were made the year before the Catholic Church established its internal complaints processes, the Melbourne Response and Towards Healing.

The experiences in Australia, as outlined above, in many ways are reflected internationally. Church-initiated inquiries into sexual abuse and the Catholic Church have been established in the USA, the UK, the Netherlands, Belgium, Germany and Canada. State-initiated inquiries, including Royal Commissions, have been established in the Republic of Ireland, Northern Ireland and Canada. These are outlined below. An underlying theme of concern about some of these inquiries, including some of those initiated by the state, is that they have not been independent of the Catholic Church.

The international Church-initiated inquiries are discussed first, followed by those initiated by the state and, finally, the international Royal Commissions.

47 Commonwealth, above n 9.
48 Ibid Executive Summary 2.1.
49 Ibid 3.1.
50 Ibid 5.1.
51 Ibid 5.2.
52 L Bourke, 'Royal commission into child sex abuse extended for two years', *The Sydney Morning Herald* (online), 2 September 2014 <http://www.smh.com.au/federal-politics/political-news/royal-commission-into-child-sex-abuse-extended-for-two-years-20140902-10bhle.html>.
53 See also for example: Commission of Inquiry into Abuse of Children in Queensland Institutions, *Commission of Inquiry into Abuse of Children in Queensland Institutions Report*, (1999) (the Forde Commission); Children in State Care Commission of Inquiry (2008) and Children on the APY Lands Commission of Inquiry, *Children in State Care Commission of Inquiry Report* (2008) (jointly known as the Mulligan Inquiry).
54 Crime Prevention Committee, Victorian Parliament, *Combating Child Sexual Assault: An Integrated Model*, (1995) ix. 55
55 Ibid viii – xxxiii.
56 Ibid xxxiii.

1.2.6 International Church-initiated inquiries

USA

This overview will begin with the USA. In 2002, the dramatic media exposure of clergy sexual abuse and cover-up in the Boston Archdiocese[57] prompted the United States Conference of Catholic Bishops to commission the John Jay College of Criminal Justice in New York to research the nature and scope of the problem of sexual abuse of minors by clergy. The study reported in 2004, inter alia, that four percent of priests in the USA had allegations of abuse made against them.[58] A further study by the John Jay College was completed in May 2011. It examined the causes and context of the clergy sexual abuse crisis in the US Catholic Church. The report concluded that there was no single cause or predictor of sexual abuse by Catholic clergy, but that institutional acts and the opportunity to abuse 'played a significant role in the onset and continuation of abusive acts'.[59] Nevertheless, some victims' groups were critical, saying the John Jay reports blamed the individual offending priests, to the exclusion of the Bishops who oversaw them, and that the study was not trustworthy because much of the raw data was provided by the Bishops themselves.[60]

ENGLAND AND WALES

In England and Wales in 2001, in response to public pressure about clergy abuse cover-up within the UK hierarchy, the Archbishop of Westminster, Cormac Murphy-O'Connor, established an inquiry into the sexual abuse scandal in England and Wales.[61] Headed by Lord Nolan, a Judge, the Committee received more than 150 submissions and made 50 recommendations. Its final report, *A Program for Action*, was delivered in 2001.[62]

One recommendation was for the establishment of a national child protection unit to, inter alia, provide support and expert advice; monitor the putting in place of effective arrangements in Dioceses and Religious Orders; and to bring any apparent failures in arrangements immediately to the attention of the Bishop or religious superior.[63] As a result, the Catholic Office for the Protection of Children and Vulnerable Adults (COPCA) was established. A review of the implementation of the recommendations was undertaken in 2007 by the Cumberlege Commission,[64] whose Chairman, Baroness Cumberlege, said that 'although much progress has been made and the Church is now a safer place we believe there is room for improvement'.[65] On the eve of the publication of the Cumberlege Report, the national director of COPCA

57 In 2002, the now Pulitzer prize winning exposé from the Boston Globe, called 'Spotlight Investigation', eventually led to the resignation of its Cardinal, Bernard Law, and the financial ruin of the Archdiocese. The Boston Globe, *About This Site* (2014) <http://www.boston.com/globe/spotlight/abuse/about.htm>.
58 John Jay College of Criminal Justice, *The Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States 1950-2002*, (2004).
59 John Jay College Newsroom, 'John Jay College Reports No Single Cause, Predictor of Clergy Abuse' <http://www.jjay.cuny.edu/4688.php>. A copy of this report was not available on the United States Catholic Bishops Conference website at the time of writing.
60 Rachel Zoll, 'Homosexuality, celibacy didn't cause clergy sex abuse, Catholic study shows', *The Times-Picayune* (online), 18 May 2011 <http://www.nola.com/religion/index.ssf/2011/05/homosexuality_celibacy_didnt_cause_clergy_sex_abuse_catholic_study_shows.html>.
61 This commission's remit was to examine and review arrangements made for child protection and the prevention of abuse within the Catholic Church in England and Wales and to make recommendations. The Nolan Commission, *A Program for Action*, (2001) Executive Summary [1].
62 The Nolan Commission, *A Program for Action*, (2001) Executive Summary [2] & [3].
63 Ibid Executive Summary [16].
64 The Cumberlege Commission, *Safeguarding with Confidence – Keeping Children and Vulnerable Adults Safe in the Catholic Church*, (2007) 3-4.
65 Ibid 3.

resigned, reportedly because she had not been able to get the Church to engage in meaningful dialogue about the issue of sexual abuse within the Church.[66]

Cumberlege found that there was little progress at the parish level, where prevention was needed.[67] That is, the Bishops and religious leaders had not done enough to implement the new policies into the parishes.

Nonetheless, Geoffrey Robertson QC, in his 2010 comprehensive critique of the Vatican, *The Case of the Pope*, describes the Nolan Inquiry as a 'success story' for the Church in dealing with paedophile priests.[68] He also praises the National Catholic Safeguarding Commission (NCSC), which was established by the Cumberlege Commission and is responsible for setting the strategic direction of the Church's safeguarding policy for children and vulnerable adults, and for monitoring compliance. Robertson said the NCSC 'has made impressive efforts to tackle the problem' and their work 'shows that the English authorities are taking their responsibility seriously'.[69] It is suggested, however, that if the UK Church were to take its responsibilities seriously, it would also hand over to the civil authorities all documentation, including documents held at the Vatican, relating to the internal investigations of complaints and allegations of clergy abuse, and would make available to the police all historical Church documentation relating to the sex offences and their cover-up. In other words, if the Church authorities were 'taking their responsibility seriously' they would be more criminally accountable.

NETHERLANDS

Following media reports in 2010 on sexual abuse of children by Catholic clergy in the Netherlands, the Dutch Church established an independent inquiry.[70] This Commission of Inquiry was tasked with identifying the nature and scale of clergy child sexual abuse between 1945 and 2010, as well as the issue of accountability for these crimes.[71] Its findings were that the scale of sexual abuse of minors in the Catholic Church in that period was in the tens of thousands; that Bishops and other Church authorities were not ignorant of the existence of sexual abuse and, in many cases, had failed to take adequate action and had paid too little attention to victims.[72]

In this instance, however, it appears that there were significant political connections at play. The Chair of this Inquiry, Wim Deetman, was a former education minister of the influential Christian Democrats political party. Another politician, Victor Marijnen, who had been the Prime Minister from July 1963 until April 1964, was a member of the Catholic People's Party, which had later merged with another Christian party to form the Christian Democrats. Marijnen was also vice-chairman of the Dutch Catholic Child Protection Agency and director of a Catholic boarding school. It was at this boarding school that a student, who had been the victim of abuse by a monk

66 Jamie Doward, 'Catholic Church's anti-abuse chief quits on eve of scathing report', *The Observer* (online), 15 July 2007 <http://www.theguardian.com/uk/2007/jul/15/religion.children>.
67 The Cumberlege Commission, n 64, 4.
68 Geoffrey Robertson, *The Case of the Pope* (Penguin Books Ltd, 2010) [45].
69 Ibid [47].
70 Wim Deetman, *Seksueel Misbruik van Minderjarigen in de Room-Katholiieke Kerk*, (2011) <https://www.movisie.nl/publicaties/seksueel-misbruik-minderjarigen-rooms-katholieke-kerk>.
71 Summary of the report in English, 3 < http://www.onderzoekrk.nl/english-summery.html>.
72 Ibid 20.

called Gregorious in the 1950s, was allegedly taken to a Catholic psychiatric hospital and castrated. There are also allegations that castrations were performed on up to 10 other clergy abuse victims, all of whom had tried to expose the crimes of their offender.[73]

Although the Deetman Commission received reports of these appalling acts, it did not include any of this information in its report.[74] The report also omitted to mention that Marijnen tried to secure a royal pardon for Gregorious and other convicted Catholic brothers from the boarding school.[75] According to investigative journalist, Robert Chesal:

> … the Deetman Commission refrained from investigating the castration because it knew this would inevitably lead to closer scrutiny … and exposing the role of Victor Marijnen and showing Mr Deetman's own political party in a very negative light … only parliament can be trusted to investigate further … the castration story reveals collusion between institutions, Bishops, politicians, the police and the justice system that enabled sexual abuse in the Church to continue unpunished for decades.[76]

Such serious allegations highlight the risk of lack of independence of Church-installed commissions.

There were calls for a further inquiry from female victims of clergy abuse in the Netherlands because their abuse 'was underexposed' in the Deetman report. These calls were conjoined with those insisting that the alleged castration of victims also be investigated.[77] A second inquiry, again under the chairmanship of Wim Deetman, was commissioned to examine not only sexual abuse but also (excessive) violence against 150 female minors within the Church in the Netherlands between 1945 and 2010.[78]

This second Deetman report found, inter alia, that more than 40 percent of the cases of sexual abuse of girls aged between six and 14 that were investigated involved serious sexual abuse, and that 50 percent of those victims experienced physical and/or psychological violence as well. It was found that the nuns knew and talked about such sexual abuse as far back as the 1960s.[79] It was also found that the nuns who usually worked as teachers or carers committed physical and psychological violence.[80] This second Inquiry did not investigate the alleged castrations of victims.

BELGIUM

Media exposure of clergy sexual abuse in Belgium also forced the establishment of a Church-commissioned Inquiry by the Belgian Episcopal (Bishops)

73 Robert Chesal, 'Time for the truth about Catholic sex abuse in the Netherlands', *Radio Netherlands Worldwide* (online), 19 March 2012 <http://www.rnw.nl/english/article/time-truth-about-catholic-sex-abuse-netherlands>.
74 Ibid.
75 Ibid.
76 Ibid.
77 Andreas Havinga, 'Dutch Catholic child abuse inquiry to focus on girl victims' *Anglican Journal* (online), 23 May 2012 <http://www.anglicanjournal.com/articles/dutch-catholic-child-abuse-inquiry-to-focus-on-girl-victims-10807>.
78 Bert Kreemers, *Deetman recommends special mediation for victims of violence against women in the Roman Catholic Church* (2013) Onderzoekrk, 2-3 <http://www.onderzoekrk.nl/fileadmin/commissiedeetman/data/downloads/Tweede_onderzoek/Deetman.vervolgonderzoek.persbericht_C_Engels.pdf>. Unlike the first Deetman report, an English translation of this second report was unavailable.
79 Ibid.
80 Ibid.

Conference in 2000. The Commission, chaired by retired Magistrate Godelieve Halsberghe, received and investigated more than 300 complaints. Halsberghe, who served on this Commission from 2000 to 2008, reportedly clashed with the hierarchy of the Belgian Church 'over their concealing information about offenders'.[81] The outcomes of this Inquiry are unknown as the report is not publicly accessible.

A second Church-commissioned Inquiry was established in Belgium in 2010 and was headed by child psychiatrist and Catholic, Peter Adriaenssens. Its report was released in September 2010. It documented cases of abuse over the previous 70 years involving 475 perpetrators and 506 victims.[82] The report recommended that the Church establish victims' groups and a treatment centre for offending priests.[83]

In June of that year, in their investigation of an alleged cover-up of sexual abuse by the hierarchy of the Belgian Catholic Church, Belgian police raided Church properties and removed files and documents on abuse cases. This prompted Adriaenssens and other members of the commission to resign in protest because, they said, they couldn't complete their work while police were involved.[84] 'There's enormous frustration that we couldn't finish our job after all these people came forward', said Adrieanssens.[85] Citing a breakdown in trust between the Commission and victims, and the Commission and the judicial authorities, the Commission members said it was no longer possible to go on.[86] There were no further investigations.

GERMANY

As a final example in Europe, in 2011 the Lower Saxony Criminological Research Institute (KFN) was commissioned by the Catholic Church to investigate cases of child sexual abuse. Two years later the German Church terminated this 'independent' Inquiry, citing a breakdown in trust with the researchers.[87] The Director of KFN said the Church had failed to cooperate with the institute, that the Church officials had sought to control the investigation, censored the research, continually intervened and attempted to 'dictate the make up' of his team, and that he was compelled to submit his team's work to the Church for approval.[88]

CANADA

Across the Atlantic in Canada, the Archbishop of St John's established a Church-initiated special commission of inquiry into sexual abuse of children by clergy in his Archdiocese of Newfoundland in 1989.[89] This was known as

81 Jason Berry, 'Past members of sex abuse commissions tell of struggles with Bishop' *National Catholic Reporter* (online), 11 April 2014 <http://ncronline.org/news/accountability/advisers-saw-advice-spurned-past-members-abuse-commissions-tell-struggles>.
82 John W Miller, 'Report Airs Abuse in Belgian Church' (USA) *The Wall Street Journal* (online), 11 September 2010 <http://online.wsj.com/news/articles/SB10001424052748704505804575483710987276970>.
83 Ibid.
84 Ibid.
85 Ibid.
86 AFP, *France 24.com* (online), 29 June 2010 <http://www.france24.com/en/20100629-belgium-probe-paedophilia-inquiry-resigned-masse-pope-raids-Bishops-demasure/>.
87 Barbara Hans, 'Sex Abuse Scandal: German Catholic Church Cancels Inquiry' *Spiegel Online* (online), 9 January 2013 <http://www.spiegel.de/international/germany/german-catholic-Church-cancels-sex-abuse-scandal-inquiry-a-876612.html>.
88 British Broadcasting Corporation, 'Catholic Church in Germany drops sex abuse inquiry', *BBC News Europe* (online), 9 January 2013, [8] – [11] <http://www.bbc.com/news/world-europe-20957406>.
89 *Archdiocesan Commission of Enquiry into Sexual Abuse of Children by Members of the Clergy* (1990).

the Winter Commission and inquired into the causes of child sexual abuse by clergy and why such abuse went undetected for so long. Its findings included that there had been a cover-up by Archbishop Penney of St John's.[90] More recently, Archbishop Penney was also alleged to have lied under oath whilst giving evidence to the Winter Inquiry.[91]

SUMMARY

One of the main concerns raised by the Catholic Church establishing inquiries into the behaviour of its own people, as examined above, is the lack of independence of these inquiries. This claim is backed by further claims that the Church applied pressure to some of the members of these inquiries and attempted to interfere with their work.[92] For example, in 2002 when *The Boston Globe* was exposing the extent of the sexual abuse crisis within the Church, a 12-member panel of lay experts and advisors was set up by the US Bishops to deal with the media outcry.[93] In April 2014, one panel member, a law professor, dean emeritus and canon lawyer, was reported as saying that the panel's 2004 report was 'pretty rough on the Bishops' and didn't think he or any other member of the panel would be selected again to investigate the Church.[94] Another panel member Justice Anne Burke, a Supreme Court Judge, said the American Bishops resisted the panel's advice and '[t]he Bishops didn't honestly deal with each other'.[95] It was reported that Chicago Cardinal George accused the panel members of being 'the downfall of the Church'.[96] A further example of Church interference was reported by the Magistrate who chaired the Belgian Church Commission of Inquiry from 2000 to 2008, Godelieve Halsberghe, who was reported as having clashed with the Bishops 'over their concealing information about offenders'.[97]

Finally, the Catholic Church's motives in establishing the above inquiries are questionable. It can be argued that it was the public outcry engendered by media exposure of the sexual abuse crimes within the Church that forced the hierarchy to act – or, more precisely, react. Such actions are driven not by good faith, which is what victims want, but by defensiveness. Further, the implementation of recommendations from the above inquiries has not been subject to external oversight, with Bishops and Religious Leaders maintaining complete control of these processes. Such attempts by the Church to control the narrative, is a form of denial of the truth of what happened within the institution and its clergy sex crimes and their concealment. See section 1.5 below for a comprehensive discussion on barriers to, and denial of, the truth.

90 The Report of the Archdiocesan Commission of Enquiry into Sexual Abuse of Children by Members of the Clergy (1990) 138-139.
91 Ashley Fitzpatrick, 'Archbishop Penney knew about abuse: documents', *The Telegram* (online), 3 November 2011 <http://www.thetelegram.com/News/Local/2011-11-03/article-2794793/Archbishop-Penney-knew-about-abuse%3A-documents/1>.
92 Jason Berry, above n 81; Barbara Hans, 'Sex Abuse Scandal: German Catholic Church Cancels Inquiry' *Spiegel Online* (online), 9 January 2013 <http://www.spiegel.de/international/germany/german-catholic-Church-cancels-sex-abuse-scandal-inquiry-a-876612.html>; BBC, 'Catholic Church in Germany drops sex abuse inquiry', *BBC News Europe* (online), 9 January 2013 <http://www.bbc.com/news/world-europe-20957406>.
93 Jason Berry, above n 81.
94 Ibid [4].
95 Ibid [5] & [6].
96 Ibid [7].
97 Ibid [14] & [15].

Internationally, State-initiated inquiries into sexual abuse and the Catholic Church were established in the Republic of Ireland and Canada. These are discussed first, followed by the Royal Commissions that were set up in Canada and Northern Ireland. The Scottish government announced that a statutory public inquiry would be held in 2015 to examine historical cases of abuse of children in care in Scotland.[98] It is unknown at this stage whether this will involve sexual abuse by members of the Catholic Church.

1.2.7 International State-initiated inquiries

In the Republic of Ireland, all inquiries into clergy sexual abuse in the Catholic Church have been commissioned by the state.[99] The one exception was a Church-initiated inquiry which was carried out by the Church's National Board for Safeguarding Children.[100]

As with all of the above inquiries – Australian, European and Canadian – the establishment of these Irish inquiries was driven by media reports of sexual abuse within the Irish Church and victims coming forward and revealing their stories.

The first major Inquiry was established in 2000 and ran for nine years. The Commission to Inquire into Child Abuse, known as the Ryan Commission or Ryan Report,[101] investigated the abuse of children within Catholic institutions. Its investigations included instances of sexual abuse in 250 institutions from 1936 to the present.[102] Twenty recommendations were made to alleviate or otherwise address the effects of the abuse on those who suffered[103] and where possible to reduce and prevent the abuse of children in institutions and to protect children from such abuse.[104]

It was found, inter alia, that there was a climate of fear throughout these institutions created by 'pervasive, excessive and arbitrary [physical] punishment';[105] that sexual abuse was endemic in boys' institutions;[106] that cases of sexual abuse were managed with a view to minimising the risk of public disclosure and consequent damage to the institution and the congregation;[107] that sexual abuse was known to religious authorities;[108] that there were poor standards of physical care;[109] and that there was a disturbing level of emotional abuse.[110]

Despite the extent of these findings in the Republic of Ireland, some concern still exists about the degree of independence of this Inquiry. Judge Lafoy, its first chair, resigned in 2003 following a government departmental review on

98 The full remit and appointments for the inquiry will not be confirmed until the end of April 2015. The Cabinet Secretary said: 'This Parliament must always be on the side of victims of abuse. We must have the truth of what happened to them and how those organisations and individuals, into whose care the children were entrusted, failed them so catastrophically. And to get to that truth we will be establishing a national public inquiry into historical abuse of children in institutional care'. <http://news.scotland.gov.uk/News/Inquiry-into-institutional-child-abuse-13b2.aspx>.
99 See: *Commission to Inquire into Child Abuse*, (2009) (also known as the Ryan Inquiry); the *Ferns Inquiry*, (2005); the *Dublin Archdiocese Commission of Investigation* (2009) (also known as the Murphy Inquiry); *Report into the Catholic Diocese of Cloyne*, (2010).
100 The Elliott Inquiry, *Report on the Management of Two Child Protection Cases in the Diocese of Cloyne*, (2008). This inquiry, which published its report in December 2008, examined two child protection cases within the Diocese of Cloyne. Each case involved members of the clergy as the alleged perpetrators. Child protection was found to be inadequate and in some respects dangerous. Risk had not been appropriately identified or managed.
101 Commission to Inquire into Child Abuse, *Commission to Inquire into Child Abuse Report*, (2009) Executive Summary, 1.
102 Ibid 2.
103 Ibid 461.
104 Ibid 462.
105 Ibid [6.11].
106 Ibid [6.18].
107 Ibid [6.20].
108 Ibid [6.23].
109 Ibid [6.31].
110 Ibid [6.39].

the costs of the commission. Lafoy claimed the budgetary restrictions undermined the independence of the inquiry.[111]

There were also serious concerns about the lack of accountability of the offenders. The Ryan Commission's decision to name offenders was overridden by a successful legal challenge by the Christian Brothers for the abusers to be dealt with anonymously.[112] There was also an earlier undertaking given to the Christian Brothers which included a promise that there would be no prosecutions 'even though the evidence of criminal acts was overwhelming'.[113] David Yallop, who has written extensively on these issues, writes:

> Notwithstanding the straightjacket imposed on the Commission, the report had a profound impact in Ireland and beyond. But a sustained wailing and gnashing of teeth in the face of such sustained criminal behaviour is worthless unless at the end there is a measure of justice for the victims. Without that there would be little to show other than a pile of platitudes.[114]

To further protect the assets and reputation of the Religious Orders, an indemnity agreement was signed between the Irish Government and the 18 Religious Orders that ran the residential institutions where the abuse had taken place. This agreement assured them of immunity and privacy, and indemnified them against any legal action. And not only that, the Religious Orders' total financial liability was limited to 128 million euros. According to Yallop, this did not even cover the costs of the commission, leaving nothing for the victims. Shockingly, it would be the Irish taxpayer who would be forced to foot the bill, estimated in 2010 at one billion euros,[115] and doubled in 2013 to two billion.[116] Further, the indemnity agreement negotiations did not involve victim representatives and were reportedly finalised without government debate or cabinet approval.[117] But for the Irish media's exposure of this Church-State agreement, it would have remained a secret.[118]

The close relationship between the Catholic Church and the Irish State revealed here challenges the notion that a State-run inquiry is more independent than a Church-commissioned inquiry. Independence, in such cases, becomes a fragile principle. The independence of this State-initiated Inquiry was clearly undermined. This must have been beyond difficult for the suffering victims: where else could they turn for their long-awaited justice?

Further State-initiated inquiries in the Republic of Ireland were established. In March 2003, a non-statutory private inquiry was announced to investigate over 100 allegations of complaints of child sexual abuse against 21 priests operating under the aegis of the Diocese of Ferns.[119] The Fern's Report was published in 2005 and found that, although the current child protection practices of the Diocese of Ferns were satisfactory, that had not been the case between 1962 and 2002.[120]

111 Shawn Pogatchnik, *Judge Probing Abuse in Irish Catholic Church-Run Institutions Resigns* (2003) http://www.bishopaccountability.org/news2003_07_12/2003_09_03_Pogatchnik_JudgeProbing.htm>.
112 David Yallop, *Beyond Belief: The Catholic Church and the Child Abuse Scandal* (Constable and Robinson, 2010) 142.
113 Ibid.
114 Ibid 143.
115 Ibid.
116 Conall O Fatharta, 'Religious Orders still refusing to accept 50/50 redress process' *Irish Examiner* (online), 3 September 2013 <http://www.alliancesupport.org/news/archives/004530.html>.
117 Yallop, above n 112, 143.
118 Ibid.
119 The Ferns Inquiry, *The Ferns Report*, (2005) 1.
120 Ibid 2.

Its recommendations included: that there be legislation and publicity that preserves and strengthens a more open environment of reporting crimes; that there be a code of conduct that deals with the manner in which priests, or other employees or appointees, interact with young people; and that every person to whom a complaint of child sexual abuse is made should immediately create a written record of it. The Report also called for consideration to be given to the introduction of a new criminal offence that would apply to situations where any person 'wantonly or recklessly engages in conduct that creates a substantial risk of bodily injury or sexual abuse to a child or wantonly or recklessly fails to take reasonable steps to alleviate such risk where there is a duty to act'.[121]

The Archdiocese of Dublin was also under sustained media attack for its contribution to the sexual abuse crisis. This led to the State-initiated Dublin Archdiocese Commission of Investigation. This became known as the Murphy Report. Its remit, under the *Commissions of Investigation Act 2004*, was 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 to 2004'.[122] It published its report six months after the Ryan Report.

Importantly, the Murphy Report was not required to establish whether or not child sexual abuse actually took place, rather to record the manner in which the Church and State authorities dealt with complaints.[123] The findings in this report were as horrific and damning of the Catholic Church as the Ryan Report. 'It sent shock waves through the country … and was worse than anyone could imagine'.[124]

The Murphy Commission requested documents directly from the Vatican. These requests were ignored and the Vatican was reportedly affronted because the request did not go through the correct diplomatic channels.[125] That is, communications should have originated from the Irish Embassy and been forwarded directly to the Holy See, not the Vatican. The public put pressure on the Irish Government to insist that the Vatican respond, but the Irish Prime Minister of the time, Brian Cowen, was reported as agreeing with the Vatican's specious argument that proper diplomatic procedure had not been followed and that the Vatican, therefore, was not required to comply with the Murphy Commission's request for documents.[126] Once again, the independence of this Commission, at least in relation to its request for Vatican documents, is in question.

In March 2009, about seven months before the Murphy Report was published, the Dublin Archdiocese Commission of Investigation was requested by the Government to carry out another investigation into the Catholic Diocese of Cloyne.[127] This Commission examined how the Diocese managed complaints, allegations, concerns and suspicions of child sexual abuse by relevant clerics

121 Ibid 263 & 266.
122 The Dublin Archdiocese Commission of Investigation, *Report into the Catholic Archdiocese of Dublin*, (2009) 1.
123 Ibid.
124 Mor Rigan, 'Murphy Report: Will ANYONE resign over child abuse in the Dublin Archdiocese?' *GlobalComment* (2009).
125 'Vatican "offended" at being asked to assist Murphy Inquiry – WikiLeaks', *The Journal.ie* (online), 11 December 2010 <http://www.thejournal.ie/vatican-offended-at-being-asked-to-assist-murphy-inquiry-wikileaks-56916-Dec2010/>.
126 Ibid.
127 Commission of Investigation, *Report into the Catholic Diocese of Cloyne*, (2010).

made to the Diocese and other Catholic Church authorities, as well as public and state authorities, in the period 1 January 1996 until 1 February 2009.[128] It found, inter alia, that the Diocesan Bishop, John Magee, had falsified information given to the Government and the health services, which was that his Diocese was reporting all abuse complaints and allegations to the civil authorities.[129] This latter State-initiated Inquiry followed the report by the Church's own child protection watchdog, the National Board of Safeguarding Children, as discussed above.

In Canada, the Law Commission of Canada carried out a substantial State-initiated Inquiry. This was requested by the Minister of Justice in November 1997 to 'assess processes for redressing the harm of physical and sexual abuse inflicted on children who lived in institutions that were run or funded by government', many of which were run by the Catholic Church.[130] Unlike all the above inquiries, this Commission was primarily victim-focused and did not investigate the sexual offences themselves or the way the Church handled them. It recommended, amongst other things, redress schemes for survivors that would address their multiple needs, such as an apology and acknowledgement of the sex crimes, and a raft of legal reforms that would better protect survivors and make it easier for those who may want to prosecute and/or litigate.[131]

This latter Inquiry reflects in many ways the aims of the Australian Royal Commission. It also reflects one of the main aims of this research: to identify the needs of victims in the form of criteria for justice, which will be discussed in chapter 3.

1.2.8 International Royal Commissions

Finally, in this overview of inquiries into sexual abuse and the Catholic Church, in addition to the Royal Commission currently underway in Australia, Royal Commissions have been held in Canada and Northern Ireland.

Royal Commissions are important because they are major formal inquiries usually established by statute, which gives the Royal Commissioner coercive powers, such as the power to summon witnesses and compel evidence. Although Royal Commissions are not prosecutorial bodies, their recommendations may lead to prosecutions.[132] They are also important because they are independent of both State and Church.

The Canadian Royal Commission, which was limited to one jurisdiction, investigated child sexual abuse in a Christian Brothers' orphanage, Mount Cashel, in Newfoundland.[133] Known as the Hughes Inquiry, it reported its findings in 1991 and found that officials had concealed the abuse and moved offenders to other institutions.

In December 2012, the Northern Ireland Assembly enacted legislation providing for a public inquiry into historical institutional child abuse in Northern Ireland.[134] The Northern Ireland Executive's Inquiry and Investigation into Historical Institutional Abuse is currently examining whether

128 Ibid 1.2.
129 BBC News, 'Cloyne report: A detailed guide' (online), 13 July 2011 <http://www.bbc.com/news/uk-northern-ireland-14143822>.
130 Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*, (2000) xiii.
131 Ibid 12-34.
132 <http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1213a/13bd083>.
133 *Royal Commission of Inquiry into the Response of the Newfoundland Criminal Justice System to Complaints*, (1991).
134 *Inquiry into Historical Institutional Abuse Act (Northern Ireland)* 2013.

there were systemic failings by institutions or the State in their duties towards those children in their care between the years of 1922 and 1995.[135] The Inquiry is independent from government and has two main components. The Acknowledgement Forum listens to the experiences of people who were in residential institutions (other than schools) in Northern Ireland between 1922 and 1995 and the Statutory Inquiry investigates whether children suffered abuse in the same institutions between 1922 and 1995.[136] Hearings commenced in January 2014.

Whilst the Australian Royal Commission is investigating all non-government and government organisations, including religious organisations, the Northern Irish Commission is investigating all residential institutions other than schools.

In conclusion, even though the research in this thesis is positioned within both the Australian and international contexts, its main frame of reference is the Australian story. And while this research has been informed to a degree by the Australian inquiries – their findings and recommendations will be presented in chapter 8 – it should, in turn, inform the Australian Royal Commission and any future inquiries in Australia and internationally.

1.3 Why this research is important

This section outlines the formal avenues that victims of Catholic clergy sexual abuse in Australia could use to seek justice. There are several options available, including the civil law, the criminal courts, the Victims of Crime Assistance Tribunal Victoria or its equivalents in other jurisdictions, and the Catholic Church's internal complaints processes. These avenues may offer damages, compensation, counselling, a conviction and punishment of the offender, acknowledgement of the crimes and their impacts and/or an apology. These justice options are, however, of very limited practical assistance, which is one of the main reasons why this research is so important.

Victims of clergy sexual abuse in Australia face significant legal impediments and challenges in their attempts to seek redress and justice. The limitations and deficiencies, outlined briefly below, are comprehensively addressed in the following chapters. 'Justice' in this context is a contested term and, for this thesis, will be considered from the viewpoint of the victim. What justice means for victims will be examined in detail in chapter 3.

1.3.1 Civil pathway

In the civil jurisdiction, tort law offers several options for financial compensation for victims of clergy sexual abuse. First, an action in 'trespass to the person' is available, which demonstrates the importance of an individual's safety, integrity and liberty. Of the three main types of trespass to the person – battery, assault and false imprisonment[137] – battery would be the most likely action for clergy victims. A battery occurs when 'someone directly and intentionally interferes with the person of another without lawful justification'.[138] This is a form of strict liability of the offender in which the victim/plaintiff only needs to prove that the act of touching was intended and not that the offender intended to do harm. However, as far as compensation is concerned,

135 Historical Institutional Abuse Inquiry <http://www.hiainquiry.org/index/acknowledgement_forum/terms-of-reference.htm>.
136 Ibid.
137 Trespass to the person can be battery (an unlawful touching of one by another), assault (an apprehension or fear of immediate contact or touching) or false imprisonment (unlawful imprisonment of another).
138 A Clarke and J Devereux, *Torts: A Practical Learning Approach* (LexisNexis Butterworths, 2008) 539.

this action would be fruitless for victims of clergy sexual abuse because priests and other members of Religious Orders take a vow of poverty, presumably rendering them impecunious.

Other potential causes of action in tort would focus on the institutional liability of the Catholic Church. First, there could be an action in negligence, which would need proof of the existence of a duty by the Church to take reasonable care of a child, a breach of which caused harm to the child.[139] Second, an action in tort for the vicarious liability of the Catholic Church for the sex crimes committed by its priests and religious, while 'in the course of their employment', is another option.[140] Third, there could be an action for a breach of the Church's non-delegable duty to ensure that some third party in the Church was taking reasonable care of the child.[141] The option of vicarious liability of the Catholic Church is thwarted in Australia because of what is known as the 'Ellis defence': the only legal entity for the Church in Australia is a non-corporate property trust whose trustees cannot be held liable for the crimes of the Catholic clergy.[142] Australia is the only country in the common law world where the Church is 'invulnerable to claims' by victims of clergy abuse.[143] Further, even if the Church could be sued, Australia's common law position on vicarious liability and non-delegable duties means that victims of historical child sexual assault have no civil avenues to pursue (see chapter 4 for a comprehensive case analysis of the law in this area).

Another possibility for satisfying the needs of victims trying to find justice is a remedy in equity, known as equitable compensation. A breach of a fiduciary relationship could trigger such an action. A fiduciary relationship exists, according to Mason J in *Hospital Products*, when '… the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of the person in a legal or practical sense'.[144] This is commonly referred to as the 'undertaking test'. The undertaking by the fiduciary to act on behalf of or in the interests of another can be a direct or implied undertaking. Many fiduciary relationships are well recognised, such as lawyer/client, trustee/beneficiary, employer/employee or agent/principal. But this list of established fiduciary relationships is not closed. Other relationships, such as teacher/student and professional advisory relationships such as a banker/customer and accountant/client, can also be fiduciary, where 'there is a reasonable expectation that one party should subordinate his interests in a particular matter to the interests of another'.[145]

Usually, a breach of fiduciary duty will affect the plaintiff's economic interests and not his or her personal or practical interests, such as a non-pecuniary loss due to the negative impacts on a victim's life from the psychiatric harm of the sexual assault. Currently in Australia, a clergy victim would have difficulty bringing an action in equity for a breach of fiduciary duty for

139 Ibid 60.
140 Ibid 216.
141 Ibid 237.
142 See chapter 4 and *Trustees of the Roman Catholic Church v Ellis and Another* (2007) 63 ACSR 346; [2007] NSWCA 117.
143 Dr Andrew Morrison RFD SC, 'Compensation for child sexual assault in religious institutions' (2013) 116 *Precedent* 35, 39.
144 *Hospital Products Ltd v United States Surgical Corporation* (1984) 64 FCR 410, 96.
145 M Bryan and V Vann, Equity and Trusts in Australia (Cambridge, 2012) 155.

the harm caused by child sexual assault. So far there have been no such cases in Australia where compensation has been awarded for a non-pecuniary loss due to a breach of fiduciary duty. Such cases have, however, been successful in Canada[146] and New Zealand[147] where plaintiffs – victims of sexual violence – have been awarded compensation due to the breach of a fiduciary duty by the perpetrator who was found to have held a position of power and trust. According to some commentators, there is no reason why significant non-pecuniary loss, such as the life impacts from psychiatric harm resulting from a breach of fiduciary duty, should not be compensated in Australia.[148]

Assuming clergy abuse victims could sue the offender and/or the Church, there are further impediments to a successful civil action arising due to the various Australian State and Territory statutes of limitations, which restrict the amount of time in which a victim can lodge a claim for damages or compensation. The limitation period for a child clergy victim as provided in the *Victorian Limitation of Actions Act 1985* is six years from the date on which the cause of action is discoverable by the victim or 12 years after the date on which the abuse occurred, whichever is earlier.[149] This is problematic because, typically, it takes a victim of child sexual abuse more than 20 years to disclose such a crime.[150] It is possible, however, for a plaintiff to apply to the courts for an extension of time, and this has been successful in several cases of child sexual abuse.[151] The Victorian Government introduced the Limitation of Actions Amendment (Child Abuse) Bill 2015 in February 2015, which addresses the above limitations (see further chapter 8).

1.3.2 Criminal prosecutions

This section will first discuss the limitations and difficulties experienced by child sexual assault victims in obtaining convictions in the criminal justice system. This will be followed by a brief examination of the non-existence of criminal convictions in Australia for members of the hierarchy who concealed the clergy sex crimes.

SEX OFFENCES

There are multiple provisions in, for example, *Victoria's Crimes Act 1958* that comprehensively address sexual offending and potentially provide retribution for victims.[152] These include: rape;[153] indecent assault;[154] assault with intent to rape;[155] sexual penetration of a child under the age of 16 years;[156] indecent act with a child under 16 years;[157] and persistent sexual abuse of a child under 16 years.[158] Following a recommendation from the

146 *M(K) v M(H) [1992]* 3 SCR 6; *Norberg v Wynrib* (1992) 92 DLR (4th) 449; *Szarfer v Chodos* (1986) 27 DLR (4th) 388.
147 *Mouat v Clark Boyce* [1992] 2 NZLR 559; McKaskell v Benseman [1989] 3 NZLR 75.
148 L Sarmas, 'Uncovering Issues of Sexual Violence in Equity and Trust Laws' (1995) 6(2) *Legal Education Review* 207; S Harder *Measuring Damages in the Law of Obligations: The Search for Harmonised Principles* (Hart 2010) 125.
149 *Limitation of Actions Act 1985* s.27E.
150 Victorian Law Reform Commission, *Sexual Offences, Final Report*, (2004) 84.
151 *GGG v YYY* [2011] VSC 429*; Rundle v Salvation Army (South Australia Property Trust) and Anor* [2007] NSWSC 44.
152 In New South Wales the equivalent provisions in the *Crimes Act 1900* are: sexual sssault (s.61I); aggravated sexual assault (s.61J); aggravated sexual assault in company (s.61JA); assault with intent to have sexual intercourse (s.61K); indecent assault (s.61L); aggravated indecent assault (s.61M); act of indecency (s.61N); aggravated act of indecency (s.61O); sexual intercourse of child under 10 (s.66A); attempting, or assaulting with intent, to have sexual intercourse with child under 10 (s.66B); sexual intercourse with child between 10 and 16 (s.66C); attempting, or assaulting with intent, to have sexual intercourse with child between 10 and 16 (s.66D); persistent sexual abuse of a child (s.66EA); procuring or grooming a child under 16 for unlawful sexual activity (s.66EB).
153 *Crimes Act 1958* (Vic) s.38.
154 Ibid s.39.
155 Ibid s.40.
156 Ibid s.45.
157 Ibid s.47.
158 Ibid s.47A.

Victorian Parliamentary Inquiry, the *Crimes Amendment (Grooming) Act 2014* introduced the offence of grooming for sexual conduct with a child under the age of 16 years. This offence targets predatory conduct designed to facilitate later sexual activity with a child.

There are also criminal offences, which may potentially provide retributive justice for victims for the concealment of the sex offences by members of the hierarchy. In Victoria these offences include: concealing offences for benefit;[159] being an accessory after the fact;[160] and failure to disclose a sexual offence committed against a child under the age of 16 years.[161] These provisions apply to current offences. For offences that were committed before these provisions were enacted, the criminal provisions at that time would operate.

Successful prosecutions for child sexual assault, however, are very low in number and there are multiple reasons for this. In 2004, the Victorian Law Reform Commission (VLRC) published its final report on sexual offences in Victoria. Its remit was to review the current legislative, administrative and procedural changes to determine if reforms were necessary to ensure the criminal justice system is responsive to the needs of complainants in sexual offence matters.[162] The final report's 202 recommendations were aimed at addressing these issues.[163] An earlier finding of the VLRC's interim report was that victims of sexual violence are the least likely to report to the police compared with victims of other person-related crimes such as non-sexual assaults.[164]

In Victoria, it is estimated that about 10 percent of child sexual assault victims report their crimes to the police.[165] Of these reports, there was a 6.5 percent conviction rate in Victoria at that time.[166] Such a low conviction rate of reported cases was, in part, due to a very high attrition rate[167] – 80 percent of cases before trial, mostly due to complainants withdrawing their case.[168] Another concern was the very high appeal rate of these convictions, about 54 percent,[169] of which nearly half were successful.[170] These factors plus the 'secondary legal trauma' of a victim going through a trial[171] and the

159 Ibid s.326.
160 Ibid s.325.
161 Ibid s.327. In New South Wales the relative provision in the *Crimes Act 1900* is concealing a serious indictable offence (s.316).
162 Victorian Law Reform Commission, *Sexual Offences, Final Report,* (2004) xv.
163 Ibid vii.
164 Ibid 59.
165 Victorian Law Reform Commission, *Sexual Offences, Final Report*, (2004) 59; Department of Justice Victoria, *Sexual Assault Reform Strategy: Final Evaluation Report*, (2011) 36.
166 Department of Justice Victoria, *Sexual Assault Reform Strategy: Final Evaluation Report*, (2011) 36; R Shackel, 'Victim impact statements in child sexual assault cases: a restorative role or restrained rhetoric? 34 (2011) *University of New South Wales Law Journal* 211, 212; Judy Courtin, 'Judging the Judges: How the Victorian Court of Appeal is dealing with appeals against conviction in child sexual assault matters' (2006) 18 *Current Issues in Criminal Justice* 265, 275.
167 Attrition refers to the withdrawal of cases at any point during the criminal justice process, but prior to the completion of the matter at trial or with a guilty plea. Department of Justice Victoria, *Sexual Assault Reform Strategy: Final Evaluation Report*, (2011) 181.
168 J Fitzgerald, 'The attrition of sexual offences from the New South Wales criminal justice system', (2006) 92 *BOSCAR Crime and Justice Bulletin* 1, 11; A Cossins, 'Prosecuting Child Sexual Assault Cases: To specialise of not, that is the question', (2006) 18 *Current Issues in Criminal Justice* 318.
169 Judy Courtin, 'Judging the Judges: How the Victorian Court of Appeal is dealing with appeals against conviction in child sexual assault matters' (2006) 18 *Current Issues in Criminal Justice* 265, 268; Department of Justice Victoria, *Sexual Assault Reform Strategy: Final Evaluation Report*, (2011) 183; Victorian Law Reform Commission, *Sexual Offences, Final Report*, (2004) 341-406.
170 Judy Courtin, 'Judging the Judges: How the Victorian Court of Appeal is dealing with appeals against conviction in child sexual assault matters' (2006) 18 *Current Issues in Criminal Justice* 265, 269.
171 Such as very difficult and highly adversarial cross-examinations. A Cossins, 'Cross Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse?' (2009) 33 *Melbourne University Law Review* 68; Victorian Law Reform Commission, *Sexual Offences, Interim Report*, (2003) 243.

evidentiary problems[172] associated with delays in reporting,[173] all combine to provide disincentives for victims to enter the criminal justice system.

In response to the VLRC's recommendations, the Victorian Government established the Sexual Assault Reform Strategy (SARS) in 2006 to improve the effectiveness of the criminal justice system's response to sexual offending.[174] This included: desired outcomes such as an increased reporting rate; decreased attrition rate; reduced rates of appeals and retrials; and an improved criminal justice experience for the victim survivors.[175]

SARS introduced a swathe of reforms aimed at addressing the above concerns, including for example: legislative changes to clarify jury directions relating to consent and delay in reporting; the establishment of specialist sex offences lists in the Magistrates' and County Courts; provision of CCTV, screens and support people for child witnesses; and the establishment of Sexual Offences and Child Abuse Investigation Teams (SOCIT's) within Victoria Police.[176]

In 2008, an evaluation of SARS commenced and a final report was published in 2011.[177] This study found, inter alia, that: overall, there had been little change in the reporting rate of sexual offences; there was an overall decline in the number of guilty pleas at the County Court (although there was an increase in the number of guilty pleas at the committal stage of the prosecutions); police data had shown that attrition rates had increased up until 2009, but had substantially decreased in 2009/2010; and attrition rates at the County Court, due to the prosecution withdrawing its case, had increased in 2009/2010 to double that of previous years.[178] The evaluation report found that although a higher proportion of sex offence cases were progressing through the County Court and juries were more likely to convict than ten years earlier, guilty pleas had reduced and attrition of cases, by way of withdrawal by the prosecution, had increased.

Governments and other stakeholders have worked extremely hard over the past decade or more to improve the criminal justice system so that it becomes a viable pathway to justice for victims of sex offences, including child sexual offences. Based on the above evidence, however, it appears that not much has changed in terms of reporting, attrition and conviction rates,

172 Where there was a considerable delay in reporting sex offences to the police, a well-recognised and inherent factor with child sexual abuse, the trial judge was compelled to warn the jury of the 'dangers' of convicting the accused. These warnings have been the subject of much controversy and multiple reforms were made in Victoria in 2006 to try and address these concerns. An example, the *Longman warning*, informed the jury that as the evidence of the complainant could not be adequately tested after a long delay (eg 20 years), it would be dangerous to convict on the (uncorroborated) evidence, alone, of the complainant, unless the jury, scrutinizing the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy. (*Longman v The Queen* (1989) 168 CLR 79, as per Brennan, Dawson and Toohey JJ at 87).
173 As noted earlier, it is well recognised that there is an average delay of reporting to the police of more than 20 years, for people who were sexually abused as children. Evidence to the Family and Community Development Committee, Victorian Parliament, Melbourne, 19 October 2012, 3 (Deputy Commissioner G Ashton).
174 This strategy relates to adult and child sex offences and there were specific recommendations relating to each group.
175 Department of Justice Victoria, *Sexual Assault Reform Strategy: Final Evaluation Report*, (2011) 7.
176 For a comprehensive list of SARS initiatives see: Department of Justice Victoria, *Sexual Assault Reform Strategy: Final Evaluation Report*, (2011) 9-13.
177 Ibid.
178 Ibid iii-iv.

despite the above reforms and significant changes within Victoria Police,[179] the Office of Public Prosecutions (OPP)[180] and the courts.[181]

Finally, in Victoria, if a criminal trial does result in a conviction, the complainant/victim can make an application to the court for compensation. This application is made under s.85 of the *Sentencing Act 1991* in Victoria. Any such court order is made against the offender. But because members of the Catholic clergy, as mentioned above, are impecunious, such applications are futile.

OFFENCES FOR CONCEALING SEX CRIMES

There have been no convictions of members of the Catholic hierarchy in Australia for concealing clergy sex crimes, but two Catholic priests, one Bishop and one Archbishop have been charged. The first priest, Tom Brennan, formerly of Toronto, New South Wales, was charged in August 2012 with two counts of the common law offence of misprision of felony, or failing to disclose a serious crime. These charges related to alleged child sex offences by defrocked priest John Denham against two boys in the late 1970s.[182] Brennan died of cancer in October 2012. The name of the second person charged with covering up the child sexual abuse of another priest, an 81-year-old retired priest, has not been disclosed. The cover-up related to the abuse of a nine-year-old boy between 1982 and 1984 at a residence in Nelson Bay in Newcastle.[183] A third member of the clergy, former Bishop of Ballarat, Ronald Mulkearns, could not be charged with misprision of felony because the offences of the perpetrator that he allegedly covered up, were not considered to be serious, that is a felony; rather they were considered to be misdemeanours.

> Bishop Mulkearns clearly knew these abuses were going on but he could not be charged with the then offence of misprision of a felony because while it could be shown the Bishop knew about abuse it could not be proved he knew about a felony – which was rape or buggery … [184]

179 In 2003, Victoria Police's Sexual Offences and Child Abuse Co-ordination Unit commenced a wide-ranging evaluation of their *Code of Practice for the Investigation of Sexual Assault*. New codes of practice and conduct were developed. As noted earlier, sexual Offences and Child Abuse Investigation Teams (SOCIT's) were introduced to improve the police response for victims of sexual abuse. Specialist detectives are trained to investigate sexual assault and child abuse and they remain on the one case from reporting through to the court hearings. This means victims will have the opportunity to establish an ongoing relationship and trust with one or two police officers and not have to retell their story several times. <http://www.police.vic.gov.au/content.asp?Document_ID=36237>.

180 The Specialist Sex Offences Unit (SSOU) at the Office of Public Prosecutions provides a "specialist, best-practice approach" to sex offences in Victoria. Specialist solicitors deal with the complexities of sex offences, and work closely with Crown prosecutors who are assigned, solely, to sexual assault matters. It aims to resolve or progress sex offence matters through the court process as quickly as possible; improve the conviction rate; provide greater support to witnesses and victims; and ensure greater consistency in the conduct of prosecutions. These matters are given priority listing in the courts. Legislation requires a matter involving a child victim to go to trial within three months of committal. <http://www.opp.vic.gov.au/Our-Work/Specialist-Sex-Offences>.

181 Many changes have occurred in the courts such as CCTV with remote witness facilities to prevent victims being in the same room as the accused. A specialist sex offences list at the Magistrates' and County Court aim to streamline sex offence cases so that if a sexual offence can be resolved by way of a guilty plea, this is done as quickly as possible; complainants are given as much certainty as possible as to when they will be required to give evidence; all matters in issue in a trial are identified; and all practitioners work diligently and cooperatively to assist the Court in the smooth running of sexual offence cases. <https://www.countycourt.vic.gov.au/sites/default/files/County%20Court%20Annual%20Report_2011-2012.pdf>

182 Joanne McCarthy, 'Priest charged with hiding sex crimes', *Sydney Morning Herald* (online), 31 August 2012 <http://www.smh.com.au/nsw/priest-charged-with-hiding-sex-crimes-20120830-253bn.html>.

183 Joanne McCarthy, 'Second Catholic priest charged with concealing child sex crime', *Sydney Morning Herald* (online), 4 January 2013 <http://www.smh.com.au/nsw/second-catholic-priest-charged-with-concealing-child-sex-crime-20130104-2c80v.html>.

184 Andrew Thomson, 'Church head "moved" abusive priests, says Warrnambool detective', *The Standard* (online), 14 November 2012 <http://www.standard.net.au/story/1075280/Church-head-moved-abusive-priests-says-warrnambool-detective/>.

As discussed above, Archbishop of Adelaide, Phillip Wilson, was charged in March 2015 with concealing a serious indictable offence (a child sex allegation) that was made against now-deceased priest, Jim Fletcher.[185] He is reported as denying these charges, which he will vigorously fight.[186]

The common law offence of misprision of felony was replaced in 1981 in Victoria when the distinction between a felony and a misdemeanour was abolished. *The Crimes Act 1958* (Vic) was amended so that a misprision of felony became a serious indictable offence with a maximum penalty of ten years or more. The limiting element of this provision, however, is the requirement that a person who has concealed a crime must have received a benefit. (See chapter 8 for a discussion on the Victorian Parliamentary Inquiry's recommendation that this provision be amended so that the element of 'benefit' is removed). The common law offence of misprision of felony was replaced in NSW in 1984 with a new provision in the *Crimes Act 1900* (NSW).[187]

1.3.3 Victims of crime compensation schemes

A primary victim can also apply to the Victorian Victims of Crime Assistance Tribunal (VOCAT), which can award an amount of up to $60 000 for expenses (such as counselling and medical costs) and up to $20 000 for loss of earnings.[188] Primary victims are also able to apply for damages up to an amount of $10 000 for pain and suffering. Secondary victims (a family member or a partner of the primary victim) can apply for up to $50 000 for counselling or medical costs and up to $20 000 for loss of earnings.[189] (See appendix 2 for a more detailed account of VOCAT). In NSW, a victim of crime may apply to the Victims Compensation Tribunal for counselling services and monetary compensation up to $50 000.[190]

1.3.4 The Catholic Church's internal complaints processes

The significant legal limitations of the criminal and civil options – in particular the civil – mean that many clergy victims have had no option but to turn to the internal complaints processes of the very institution that employed the offender, that safeguarded him and concealed the abuses. The Catholic Church's internal complaints processes, the Melbourne Response and Towards Healing,[191] may offer to pay for counselling and other professional support for victims. The victims can also apply to the Church for monetary compensation by way of ex gratia payments, although they will be required to sign a Deed of Release. These processes may also offer the victim an apology. For a comprehensive analysis of victims' experiences of these two processes, see chapter 6.

The question to ask, though, is whether these justice models are actually delivering justice to clergy victims of sexual assault. This fundamental question was, finally, the motivator for this in-depth, empirical research.

185 Joanne McCarthy, 'Archbishop Philip Wilson becomes world's most senior Catholic charged with concealing child abuse, *The Age* (Melbourne) 17 March 2015.
186 D Box, 'Adelaide Archbishop Philip Wilson charged with concealing sex abuse', *The Australian* (Australia) 17 March 2015.
187 'If a person has committed a serious indictable offence and another person who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for 2 years. *Crimes Act 1900* (NSW), s.316(1).
188 Victorian Victims of Crime Assistance Tribunal, *Payment to Victims* (2012) Payment of Financial Assistance <http://www.vocat.vic.gov.au>.
189 Ibid.
190 NSW Government *Victims Services* (April 2012) Lawlink NSW Government <http://www.lawlink.nsw.gov.au/lawlink/victimsservices/ll_vs.nsf/pages/VS_compensation>.
191 For a detailed outline of the processes and their procedures, see appendix 3.

This thesis, therefore, provides a unique insight into the justice that clergy sexual abuse victims are looking for. It also highlights the legal and other hurdles faced by these victims and their families in such a pursuit and examines the need for reform in this area.

1.4 Aims of the research

The aim of this research is to ascertain what Catholic clergy sexual abuse victims and their families expect and need for justice and to evaluate the extent to which they have been able to achieve justice from the existing formal justice models.

As outlined above, as the large body of international research reported on in many inquiries into child sexual abuse makes abundantly clear, victims in religious institutions have in the past been rejected, ignored and unacknowledged. With the establishment of several inquiries in Australia, as discussed earlier, the plight of Australian victims is now being acknowledged, but so far, little seems to have changed when it comes to victims actually achieving some justice.

This thesis will contribute to the growing body of academic research in this area and will assist investigative bodies such as the Australian Royal Commission to better understand what victims and their families need for justice, and for this to be reflected in their deliberations and recommendations for legal and other reform in this area. By addressing the legal limitations and hurdles for attaining justice, this research will also assist the courts and parliaments in their understanding of the injustices for, and plights of, clergy sexual abuse victims and their families, such that more informed judicial decisions are made, and effective and just laws are implemented.

Finally, and most importantly, the aim of this research is also to give voice to the experiences and needs of these victims and their families. For too long these voices have been inhibited and overpowered. It is also hoped that this research will in some small way honour those who have died, including by suicide, before they were able to speak out and receive some justice.

1.5 What is justice?

What is justice for victims of clergy sexual abuse? This central question of the research is addressed in detail in chapter 3 in an analysis of what interviewees said was necessary if the primary victim is to receive justice. It is important here, though, to contextualise theories of justice relevant to clergy victims.

Justice is a concept grappled with by philosophers since before Plato's time. There are many theories of justice, an analysis of which is beyond the scope of this thesis. This section, however, will focus on the types of justice that are most germane to clergy victims of crime by examining the various concepts of justice: retributive, corrective, distributive, restorative, procedural and transitional, including the international human rights principles that victims of crimes have the right to the truth in order to bring about accountability of the perpetrators of the crime.

Each concept offers different insights into victim-centred justice. Whilst retributive justice focuses on the individual offender and corrective justice on the individual victim, distributive justice deals with burdens and benefits of crime, such as clergy sexual abuse, right across a community. Restorative justice attempts to involve the offender, the victim and the community, whilst transitional justice concentrates more on governments, regimes and institutions. The international human rights principles of the right to the truth to end impunity expand on the theory of transitional justice, as do the aims and intentions of truth commissions which reflect very closely the aims and intentions of the Catholic Church's internal complaints processes. Procedural justice, though, could apply to any one of these forms of justice in its requirement that decision-makers and the processes and procedures used should be fair and transparent.

1.5.1 Retributive justice

Retributive justice is premised on the principle that punishment, if proportionate, is the best response to crime. That is, punishment in itself is considered useful. The proportionality of the punishment would normally require more serious punishment for more serious crimes. Any formula, though, for determining such 'blameworthiness' is a complex process.[192] Kant argues that punishment, as retribution, must be imposed only because the offender has committed a crime, and not to serve or promote any other good, either for society or the offender.[193] Brand characterises retribution as a 'backward looking reason' for punishment as opposed to a 'forward looking reason' for punishment, such as deterrence.[194] Retribution is important, however, because it requires the offender be punished according to what he or she deserves, 'no more and no less'.[195] Retributive justice must then be distinguished from revenge or vengeance, which can lead to punishment that is proportionally more severe than the crime.

As discussed above, and more comprehensively in chapter 5, punishment of the clergy sex offender is uncommon in practice; and punishment for the superiors who concealed the crimes is non-existent, as will be further discussed in chapter 7. Therefore retributive justice as a pathway to justice for the victims of clergy sexual abuse in this research remains mostly an unattainable ideal.

1.5.2 Corrective justice

The principles of corrective justice focus on compensating victims for wrongs done in the areas of tort, contract and property law, or private law. That is, the tortfeasor puts right the injury or other loss caused to the victim or plaintiff. Weinrib describes corrective justice as the idea that injustices are rectified by imposing liability on the wrongdoer, usually in the form of compensation – a theory central to contemporary theories of private law.[196] In this sense, corrective justice is also commonly referred to as reparation, rectification or restitution. Corrective justice, or commutative justice,[197] is underpinned by what is considered a moral wrongdoing, which justifies the imposition of

192 B Bix, *Jurisprudence: Theory and Context* (Sweet and Maxwell, 5th ed, 2009) 125.
193 Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* (W. Hastie trans) (Edinburgh: Clark, 1887) [trans of: Die Metaphysik der Sitten. Erster Theil. Metaphysische Anfangsgrunde der Rechtslehre. Köriigsberg (first published 1797)]. Cited in James White, Contemporary Moral Problems (9th ed, 2009) 210.
194 Jeffrey Brand, *Philosophy of Law: Introducing Jurisprudence* (Bloomsbury, 2013) 188.
195 Ibid 189.
196 Ernest Weinrib, 'Corrective Justice in a Nutshell' (2002) 52 *University of Toronto Law Journal* 349, 349.
197 Bix, above n 192, 263.

liability on the wrongdoer.[198] This theory of justice is central for victims of crime, such as victims of Catholic clergy sexual abuse, especially if the employer of the offender can be held vicariously liable for the wrongs of the offender, such as a victim suing a Bishop or Diocese for damages for negligence. Once again, though, corrective justice via tort law for clergy victims in Australia is currently unachievable as a pathway to justice, as comprehensively discussed and analysed in chapter 4.

1.5.3 Distributive justice

Whereas corrective justice deals with wrongs and losses between one person and another (or organisation), distributive justice deals with burdens and benefits right across a community. That is, each society has an economic framework that distributes economic burdens and benefits across all the members of that society.[199] The principles of distributive justice provide our lawmakers and political and other institutions with some moral guidance for determining such fair and effective distribution.[200] For example, the costs to victims of child sexual assault as victims of crime (the burden) may be distributed across the State (for example through victims of crime compensation schemes) that pays compensation to the victims (the benefit). Victims of crime schemes do not deliver corrective justice. Rather, they are distributive justice schemes run by the State for people in need.

A form of distributive justice in Australia is available for victims of clergy sexual abuse via the multiple state and territory victims of crime compensation schemes (see chapter 5). Unlike corrective justice remedies, as outlined above, distributive justice financial remedies are capped. For example, at VOCAT a victim of crime can be awarded financial assistance up to $60 000 for reasonable expenses and lost earnings plus any special financial assistance up to $10 000.[201] In addition to these expenses, an award up to $20 000 can be made for lost earnings for primary or secondary victims, covering a period up to two years after the crime.[202]

1.5.4 Restorative justice: victim-centred justice

In contrast to retributive justice, which focuses on the punishment of the offender, and corrective justice, which focuses on compensating the victim for harm caused, 'restorative justice' may address additional needs of victims. That is, punishment alone, and even reparation, may not address all the needs of the victim. This would be especially so for the majority of victims in this research whose offender has died and/or has escaped conviction and punishment, denying any form of justice.

Restorative justice, or victim-centred justice, emerged from the crime victims' rights movement of the 1960s, 70s and 80s and developed concurrently with the women's movement, the formulation of children's rights and broad legal and social reform all during a time of systemic and structural change.[203] These changes involved a shift in focus from the victim being peripheral to the

198 S Connell, 'Justice for Victims of Injury: The Influence of New Zealand's Accident Compensation Scheme on the Civil and Criminal Law' (2012) 25 *New Zealand Universities Law Review* 181; Justice K Mason, 'Fault, causation and responsibility: Is tort law just an instrument of corrective justice?' (2000) 19 *Australian Bar Review* 201, 201.
199 S Connell, 'Justice for Victims of Injury: The Influence of New Zealand's Accident Compensation Scheme on the Civil and Criminal Law' (2012) 25 *New Zealand Universities Law Review* 182, 182.
200 P Cane, 'Distributive Justice and Tort Law' (2001) 4 *New Zealand Law Review* 401, 405.
201 *Victims of Crime Assistance Act 1996* (Vic) s.10.
202 Ibid s.8.
203 Bree Cook, Fiona David and Anna Grant, 'Victims' Needs, Victims' Rights' (Research and Public Policy Series No. 19, Australian Institute of Criminology, 1999) xi.

crime, in that they were exclusively a witness for the State, to the more inclusive notion that the victim was central to, or a key stakeholder of, the crime.[204]

The underlying principles of restorative justice embrace and promote support and assistance to victims of crime; accountability of offenders; the restoration of the material and emotional losses of victims; and the provision of opportunities for dialogue and problem solving for victims, offenders, families and affected community members.[205] Restorative justice also seeks to restore offenders, and society in general.[206] As well as being a victim-centred response to crime that seeks to restore victims, offenders and communities, it is also a theory of justice that emphasises repairing the harm caused by criminal behaviour.[207] That is, it is corrective and distributive in nature. King refers to the crime victims' rights movement, also known as the restitution movement, as the genesis for remedies such as court-ordered restitution, criminal injuries compensation, victims' support services and the use of victim impact statements.[208] It was the rise of restitution in the 1970s, combined with the victims' rights and support movements of the 1980s, that exposed the lack of focus on the victim in the justice system.[209]

The use of a restorative justice approach for victims of clergy sexual abuse, according to Gavrielides, is recommended because the harm to clergy victims is complex and includes 'a violation of the Church's sacramental culture and, indeed, Christ', which cannot be adequately addressed through the criminal justice system.[210] This issue is one that was raised by some of the interviewees, and will be discussed in chapter 3 of this thesis.

Restorative justice is particularly relevant to the many victims in this research who had been through the Church's internal complaints processes, the Melbourne Response and Towards Healing. Both of these processes formally adopt a restorative justice approach in that they claim: that they aim to bring healing to the victims; to seek to know the truth about the individual allegations of abuse; to seek to ensure that offenders are accountable for what they have done; that the offenders come to a true appreciation of the enduring harm they have caused and to seek professional help and whatever is in their power to make amends; and, finally, to assist others affected by the abuse, including the broader Church community.[211]

Restorative justice has the potential to address the varied and complex needs of the clergy victim, the Church community and the offender. The willingness and good faith of the offender, or at least his representative Bishop or Provincial leader, is essential if this approach to justice is to be effective. This can be a significant hurdle, as has been identified in the Australian inquiries (above) and revealed in the interviews for this research as discussed below.

204 Shirley S Abrahamson, 'Redefining Roles: The Victims' Rights Movement' (1985) 3 *Utah Law Review* 517, 519.
205 Mark Umbreit, 'What is Restorative Justice?' (1999) Online Resource for the Centre for Restorative Justice and Peacemaking, University of Minnesota <http://www.cehd.umn.edu/ssw/RJP/Resources/default.asp>.
206 M King et al, *Non-Adversarial Justice* (Federation Press, 2nd ed, 2014) 41.
207 Daniel Van Ness, 'An Overview of Restorative Justice Around the World' (Workshop 2, Eleventh United Nations Congress on Crime Prevention and Criminal Justice, 22 April 2005) 3.
208 King et al, above n 206, 43.
209 Van Ness, above n 207, 2.
210 Theo Gavrielides, 'Clergy Child Sexual Abuse and the Restorative Justice Dialogue' (2013) 55 *Journal of Church and State* 617, 629-630.
211 Australian Catholic Bishops Conference and Catholic Religious Australia, *Towards Healing – Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church of Australia* (January 2010) 9-10.

Victim-centred justice is not only associated with restorative justice. It is also a concept pivotal to criminal justice and transitional justice. It is also a highly contested term.

Restorative justice, for example, has its critics, particularly in the area of child sex offences. Cossins argues that restorative justice not only lacks transparency and accountability, it could well undermine and devalue the seriousness of these types of offences.[212] A further concern is that restorative justice will not be able to 'defuse the power relationship between the victim and the offender' thus causing a re-retraumatisation of victims.[213] The very seriousness of child sexual offending, according to Cossins, demands that they remain part of the public process of criminal prosecutions.[214] A further criticism of restorative justice and its re-integrative underpinning for offenders is that victims might feel inappropriately pressured into displaying 'compassion' towards the offender.[215] The use of a restorative justice process for victims of clergy sexual abuse is equally problematic especially due to the very unequal power relationship between a senior church figure and a victim, which may well render the process ineffective.

Victim-centred justice within the criminal justice system is also a highly contested term. As well as victims being at the centre of the victims' rights movements since the 1970s, they have equally been at the centre of conservative thinking and policy-making in relation to crime and criminal justice for the same period of time.[216] Governments have used the 'rights' of victims to push for greater police powers and harsher 'punitive measures' for perpetrators. McEvoy and McConnachie argue that such calls for greater police powers are questionably framed as 'empowering victims'.[217] Victims are also classified as 'an idealized citizen' in that their demands often mirror those of the state's push for harsher punishments for criminals. This lends 'authenticity and moral purpose to treatment [of criminals] that might otherwise appear merely vengeful or abusive'.[218]

It is also claimed that many transitional justice processes, professing to be 'victim-centred', neither seek nor consider the views and needs of many victims.[219] Lundy and McGovern contend that without true participation of the victims and their communities in having their needs addressed, there can be no empowerment.[220] Further, despite the poor and disempowered making up the majority of victims in conflicts, this fact is not reflected in their representation in transitional justice processes, such as truth commissions.[221] Such processes tend to be 'elitist' rather than being driven from the 'grassroots'.[222] Also, they are often created by those involved in the very conflict

212 Annie Cossins, 'Restorative Justice and Child Sex Offences: The Theory and Practice' (2008) 48 *British Journal of Criminology* 359, 375.
213 Ibid 372.
214 Ibid 375.
215 Kieran McEvoy and Kirsten McConnachie, 'Victimology in transitional justice: Victimhood, innocence and hierarchy' (2012) 9(5) *European Journal of Criminology* 527, 530.
216 Ibid 529.
217 Ibid.
218 Ibid, citing Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford University Press, 2007) 136.
219 Simon Robins, 'Towards Victim-Centred Transitional Justice: Understanding the Needs of Families of the Disappeared in Postconflict Nepal' (2011) 5 *The International Journal of Transitional Justice* 75, 76.
220 Patricia Lundy and Mark McGovern, 'Whose Justice? Rethinking Transitional Justice from the Bottom Up' (2008) 35 *Journal of Law and Society* 265, 281.
221 Robins, above n 219, 76.
222 Ibid 76 and 98, citing Kieren McEvoy and Linda McGregor, 'Transitional Justice from below: An Agenda for Research, Policy and Praxis' in *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*, ed. Kieren McEvoy and Linda McGregor (Oxford: Hart Publishing, 2008).

that is being addressed and then supported by a remote and international community that has no real insight into the needs and concerns of the victims.[223] Further, experts write much of the victim-centred justice literature, thereby speaking on behalf of victims[224] – hardly an ideal vehicle that enables victims 'to tell their story' and provide them with the requisite opportunities for 'giving voice'.[225]

1.5.5 Procedural justice

Procedural justice, which refers to the satisfaction of victims' experiences of court processes, is also relevant to clergy sexual abuse victims. Rawls described a 'pure procedural justice' in which the outcome is just if a fair procedure were followed.[226] Victims value being treated with care, which involves having an attentive judge or decision-maker, having their story validated and being treated politely and with respect.[227] Sometimes such procedural justice for victims can indeed be more important than the outcome of the proceedings.[228] Arguably, procedural justice is also important in non-court settings, such as the Catholic Church's two internal complaints processes, where the decision-makers are the Bishops and Provincials of the Religious Orders. Clergy victims who attended these processes wanted to be treated respectfully and to experience a process that was transparent and fair. For most this did not happen, as discussed in chapter 6.

1.5.6 Transitional justice: truth recovery and denial

This section examines transitional justice and its central tenet of 'truth recovery'. It also discusses a major impediment to the recovery of the truth – denial.

The concept of transitional justice has its origins in the Nuremberg military trials following the Second World War in which Japanese and German war crimes were tried. It has developed significantly since that time, focusing on large-scale human rights abuses and other atrocities in countries such as Greece and Argentina where the military juntas have been tried. Transitional justice involves 'processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses in order to ensure accountability, serve justice and achieve reconciliation'.[229] These may include judicial and non-judicial processes and individual prosecutions, truth commissions, reparations and institutional reform.[230] Lundy and McGovern highlight the aims of transitional justice, which are not always complementary, to include: the restoration of the rule of law; retributive justice to deal with the impunity for perpetrators (see below); recompense and restoration of dignity for victims; institutional reform; social and political reconciliation; nation-building and a focus on a shared narrative to 'reconstitute' the past.[231]

The most common mechanism employed for achieving transitional justice in post-conflict communities, is the use of truth commissions, which aim to

223 Ibid.
224 Ibid 77.
225 Lundy and McGovern, above n 220, 270.
226 J Rawls, A Theory of Justice (1971) cited in R Bigwood, 'Conscience and the Liberal Conception of Contract: Observing Basic Distinctions Part II' (2000) *JCL* 191, 195.
227 Michael King, 'Therapeutic Jurisprudence, leadership and the role of appeal courts' (2008) 30 *Australian Bar Review* 201, 202.
228 Ibid.
229 UN Secretary General, *The rule of law and transitional justice in conflict and post-conflict societies* (2004) UN Doc. S/2004/616, 4.
230 Ibid.
231 Lundy and McGovern, above n 220, 267. See also: Eric Posner and Adrian Vermeuele, 'Transitional Justice as Ordinary Justice' (2004) 117(3) *The Harvard Law Review* 761-825.

make a 'fresh start and break with the past' by uncovering the truth about past crimes and injustices.[232] Equally, there are criticisms of truth commissions including that they may polarize the community and unnecessarily reopen old wounds; 'the truth' uncovered is often only partial and limited; there are often 'trade-offs between the truth and justice on the one hand and stability and pragmatic politics on the other', and there is often too much of a focus on individual crimes at the expense of broader socio-economic injustices.[233]

Although this form of justice is associated historically with regime changes in countries where there have been gross human rights abuses, for example in South Africa under apartheid, McAlinden argues that transitional justice is also relevant for dealing with the results and impacts of past child sexual and other abuse, such as by those in the Catholic Church in Ireland.[234] McAlinden draws on the theoretical framework of transitional justice, especially that of 'truth recovery', to argue that full disclosure and collaboration from the Church are essential if there is to be justice.[235]

Nagy also extends the bounds of the transitional justice framework to the Canadian Truth and Reconciliation Commission[236] – a truth seeking commission that was constituted and created by the Indian Residential Schools Settlement Agreement. It was established in 2008 and completed its mammoth task in June 2015. The Commission spent six years travelling Canada to receive testimonies from the Aboriginal people who had been taken from their families as children, often forcibly, and placed in residential schools. Many suffered sexual and other abuse.[237] Nagy argues that although truth commissions in stable democracies such as Canada 'are at odds with transitional justice orthodoxy', there is a growing need for transitional justice to be more inclusive. If matters such as colonialism, social inequality and racism (all historically evident in Canada) are not included in transitional justice approaches, then peace and justice will be weakened.[238]

Just as McAlinden and Nagy have adopted a transitional justice framework to address the respective histories of child sexual and other abuse in Ireland and Canada, so too can a transitional justice approach provide a response to the decades of institutional sexual offending and its cover-up within the Catholic Church in Australia. That is, there exists the same responsibility to deal effectively with past child sexual abuses within large institutional settings, such as the Catholic Church. For primary and secondary victims of clergy sexual abuse, the discovery and acknowledgement of the truth – a pivotal objective of any transitional justice approach – is vital if there is going to be any justice.

The concept of transitional justice could assist with not only the identification of past sex crimes, but also with determining the reasons why the Catholic Church and the State failed to learn from those wrongs.[239] Equally, uncovering the crimes that were previously concealed by the Church and coming to a fuller understanding of the context, causes and consequences of

232 Lundy and McGovern, above n 220, 270.
233 Ibid.
234 A McAlinden, 'An inconvenient truth: barriers to truth recovery in the aftermath of institutional child abuse in Ireland' (2013) 33 *Legal Studies* 189, 190.
235 Ibid 191.
236 Rosemary Nagy, 'The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission' (2013) 7 *The International Journal of Transitional Justice* 52, 53.
237 The Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future Report* (2015) v.
238 Nagy, above n 236, 73.
239 McAlinden, above n 234, 191.

these crimes and their concealment, would go a long way in bringing justice to victims and preventing such crimes in the future.[240]

As noted above, one of the main processes for dealing with large-scale abuses and to ensure accountability and provide justice, is truth commissions. It is noteworthy that the aims of the Catholic Church's internal complaints processes, the Melbourne Response and Towards Healing, closely parallel the expectations and benefits of truth commissions.[241] First, as discussed further in chapter 6, the Melbourne Response and Towards Healing processes are committed to seeking to know and understand the full extent of the problem of abuse and its causes and the truth about individual allegations of abuse.[242] Truth commissions set out to clarify and acknowledge the truth. Second, the Church authorities have a responsibility to seek to bring healing to victims of abuse who should be offered appropriate assistance, as this is the Christian thing to do.[243] The Church authorities must also listen to victims concerning their needs and ensure they are given such assistance as demanded by justice and compassion.[244] Truth commissions also aim to respond to the needs and interests of victims. Third, the Church's protocol insists that Church authorities respond to the perpetrator in a way that is consistent with the appropriate civil or canon law and to ensure that the perpetrator will be held accountable.[245] Likewise, a critical responsibility of truth commissions is to provide justice to victims by way of accountability of the wrongdoers. Finally, the promotion of reconciliation is another central aim of the Church's processes,[246] as it is for truth commissions. See the final chapter for further discussion on these claims of the Catholic Church.

Truth also runs along a continuum. At one end the truth can 'reduce the number of lies' about the past and at the other end, truth can bring about reconciliation by exposing past crimes that perpetrators had previously denied or hidden.[247]

Parmentier and Weitekamp note that a major obstacle to dealing with the past is the continued denial of what happened including multiple and contradictory versions of the truth.[248] Denial comes in multiple forms. Cohen's iconic work 'states of denial', provides a framework in which to contextualise many of the Catholic Church's responses to clergy victims and their families, especially at the Church's internal complaints processes, Melbourne response and Towards Healing. This is examined in chapter 6.

According to Cohen, denial of atrocities and human suffering has several dimensions. Denial can be individual or personal ('I just don't want to know'), social or official (government denials to allegations of atrocities) and cultural (for example the Holocaust denial).[249]

Further, denial can be literal, interpretive or implicatory.[250] Literal, factual or blatant denial involves a denial of the facts or knowledge of the facts.

240 Ibid 198.
241 P Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (Routledge, 2001) 24.
242 Australian Catholic Bishops Conference and Catholic Religious Australia, above n 211, 9.
243 Ibid 30.
244 Ibid.
245 Ibid 10-11.
246 Ibid 24.
247 Nagy, above n 236, 356.
248 Stephen Parmentier and Elmar Weitekamp, 'Punishing Perpetrators or Seeking Truth for Victims: Serbian Opinions on Dealing with War Crimes' (2013) 13 *International Criminal Law Review* 43, 55.
249 Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering* (Polity Press, 2001) 7-9.
250 Ibid 10-11. See also: Claire Moon, 'What One Sees and How One Files Seeing: Human Rights Reporting, Representation and Action' (2012) 46(5) *Sociology* 876-890.

Interpretive denial means the facts are given a different meaning – not to say that 'nothing happened' but what happened is not what it is being called. For example, the killing of civilians is labelled as 'collateral damage'. Equally, the very high number of reported suicides and premature deaths of clergy sex abuse victims may well be described as 'collateral damage'. Implicatory denial, on the other hand, denies neither the facts nor their interpretation. Rather, the 'psychological, political and moral implications' are denied and minimised, or rationalised. For example, a man witnesses another person being assaulted but does not intervene because 'It's got nothing to do with me' or 'Someone else will deal with it'.

All of these categories of denial can be attributed to the Catholic Church and its hierarchy rejecting, minimising or re-framing clergy sex crimes and/or their concealment (see chapter 6 for a comprehensive analysis of the Church's internal complaints processes as responses to clergy sex complaints).

McAlinden also discusses the 'politics of denial' of the Irish state and the Catholic Church as a barrier to truth recovery.[251] In the aftermath of institutional child abuse in Ireland, these organisations refuted or minimised their involvement in the historical abuse, such that they 'had to employ rationalising mechanisms to make them "legible"'.[252] For example, the State and religious orders perpetuated the myth that children within the industrial schools were 'the object of Christian charity', whereas the industrial school system was established in law and funded by the State.[253]

Denial by the Catholic Church was demonstrated in part by distancing itself from the clergy sexual abuse by failing to admit the extent of its knowledge of the crimes and by 'normalising and pathologising such cases as an aberrational rather than a systemic problem'.[254] The Church also treated the sexual abuse complaints as a moral or psychological problem of the perpetrator, rather than a criminal problem.

The organisational culture of the Church 'helps create a double layer of subterfuge which facilitates denial and obfuscates the truth'.[255] These claims by McAlinden are supported by the findings of the Murphy report, which described a 'culture of secrecy' surrounding clergy sexual abuse, whilst the Ryan report named it a 'culture of silence'.[256]

The central principle of transitional justice – truth recovery – is also critical if justice is to be found by clergy sexual abuse victims and their families. Denial of such truth by the Church and its agents will be examined in more depth in chapter six.

1.5.7 International human rights law principles: the right to the truth to end impunity

Expanding on the theoretical framework of transitional justice and the pre-condition of 'truth recovery' in delivering justice, the remainder of this section will draw on what are well-established principles in international law, particularly in the area of human rights violations. First, there is a 'right to the truth' for victims of crime to know all the information about the crimes

251 McAlinden, above n 234, 208.
252 Ibid 208. Drawing on the work of K McEvoy.
253 Ibid 209.
254 Ibid.
255 Ibid 210.
256 Ibid 211.

committed, such as serious human rights violations.[257] Second, knowing the truth about serious human rights abuses is an essential element of what is recognised as 'the right to an effective remedy'.[258] Finally, it is now acknowledged that the lack of accountability of the perpetrators, or impunity, causes further pain and suffering to victims of the crimes[259].

The United Nations Commission on Human Rights describes what it calls the 'inalienable right to know the truth' which is essential if there is to be prevention of human rights violations in the future.[260] The right to the truth is an internationally-recognised legal right,[261] which is established in several international treaties and instruments, [262] as well as by national, regional and international jurisprudence, and numerous resolutions of intergovernmental bodies at the universal and regional levels.[263]

As with the concepts of transitional justice, these further principles also developed in response to gross human rights violations in war-torn countries and military conflicts. As such, it is not being claimed that these international law principles have a direct application to Catholic clergy sex crimes. By analogy, however, these principles parallel and offer insight into the ongoing injustices suffered by sexual abuse victims and their families, particularly the abuse caused by the impunity enjoyed by members of the Catholic hierarchy who concealed these sex crimes and protected the offenders. Those who were sexually abused by the clergy offender are also being harmed by the impunity of those offenders who evaded prosecutions, for as long as that impunity lasts.

Impunity is an absence, or exemption, of punishment for crimes committed. Impunity can be de jure, where existing criminal laws may be inadequate because they do not criminalise criminal conduct, or the laws 'shield' the offenders from prosecution.[264] De facto impunity arises when there is a lack of political will or desire to punish the wrongdoers, despite any laws already

257 Diane Orentlicher, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1, 61st sess, Agenda Item 17, (8 February 2005) Principle 2; K McEvoy and L Moffett, 'Victim-Centred Justice: Beyond the Rhetoric' on *slugger o'toole blog*, (12 February 2014) <http://sluggerotoole.com/2014/02/12/victim-centred-justice-beyond-the-rhetoric/>.

258 T M Antkowiak, 'Truth as Right and Remedy in International Human Rights Experience' (2002) 23 *Michigan Journal of International Law* 977, 978.

259 Paz Rojas Baeza, 'Impunity: an Impossible Reparation' (2000) 69 *Nordic Journal of International Law* 27, 28

260 Diane Orentlicher, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1, 61st sess, Agenda Item 17, (8 February 2005) Principle 2.

261 T M Antkowiak, above n 258; D Groome, 'The Right to Truth in the Fight Against Impunity' (2011) 29.1 *Berkeley Journal of International Law* 175.

262 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 1125 UNTS 3, entered into force December 7, 1978; United Nations Human Rights Commission, *Right to the truth*, HR res 9/11, September 24, 2008, A/HRC/RES/9/11; *International Convention for the Protection of All Persons from Enforced Disappearance*, opened for signature 20 December 2006, E/CN.4/2005/WG.22/WP.1/Rev.4 (entered into force 20 December 2006); *American Convention on Human Rights*, OAS Treaty Series No. 36, 1144 U.N.T.S. 123, (entered into force July 18, 1978) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

263 *Promotion and Protection of Human Rights: Study on the right to the truth*, GE.06-10656 (E) 140206, 62nd sess, Agenda Item 17, UN Dic E/CN.4/2006/91, (8 February 2006) [55].

264 Human Rights Watch, *'Waiting for Justice: Unpunished Crimes from Nepal's Armed Conflict'*, (2008) 48. The Vatican and its administrative arm, the Holy See, also enjoy impunity. Seeking the truth from the Holy See to ensure some accountability has proved highly problematic. With respect to the USA, the Holy See asserts that it is immune from suit in that country, and takes advantage of the American *Foreign Sovereign Immunities Act* to justify its de jure impunity. L Martinez Jr, 'Sovereign Impunity: Does the Foreign Immunities Act Bar Lawsuits Against the Holy See in Clerical Sexual abuse Cases?' (2008) 44 *Texas International Law Journal* 123, 124. The Australian Royal Commission requested documents from the Vatican, especially in relation to the internal deliberations of the Vatican about Australia's cases of child sexual abuse. Apart from some documents in relation to two cases, the request was refused. The Vatican claimed the Holy See maintains the confidentiality of internal deliberations, and it would not be appropriate to provide such documents to the Royal Commission. Australian Broadcasting Commission, 'Vatican refuses to hand over documents to Royal Commission', *AM* (online), 5 July 2014 <http://www.abc.net.au/news/2014-07-05/vatican-refuses-to-hand-over-documents-to-royal/5574074>.

in place.[265] Impunity is based on the denial of the truth of what happened with crimes, the hiding of the perpetrators – whether behind the law or due to the insufficiency of the law – and the denial of justice for the victims, their families and the community, all of which are profoundly injurious.[266] As Paz Projas Baeza, a Chilean psychiatrist who treated victims of the massive violations committed by the Pinochet regime in Chile, highlights:

> Impunity is a new aggression that amounts to a crime against humanity. Together with the traumatic consequences of pain, suffering, loss, mourning and helplessness, it threatens the great human values, destroys beliefs and principles … like the crimes themselves, impunity is a human decision, an intention to disguise and cover-up…[but] these crimes will forever remain in the persons directly affected and also in society, in the collective imagination, which will transmit them for generations. [267]

Impunity will end only when there is criminal accountability and the chance of prosecutions. But there can be no accountability, and impunity will persist, unless the truth of all the circumstances of the crimes is known.

Although the 'right to know the truth' and the international importance of impunity had its origins in Latin America where military dictatorships committed gross human rights violations,[268] these principles have powerful relevance to the critical criteria for justice for clergy victims of sex crimes and, therefore, parallel the behaviour of the members of the Catholic hierarchy who are guilty of the crime of concealment yet remain criminally unaccountable. Until victims know the truth about what happened, they remain trapped in their grief. As Paz Rojas Baeza put it:

> … at the core of impunity is crime, [which] is committed in a place, at a time, in a precise geographical location, on one day, on a special date. And in this way it will be remembered in the innermost depths of the persons who lived through it. But all this remains in anonymity, and this allows the crime to penetrate into the human mind as an absence – horribly present – like a confusion that nevertheless is an inexorable reality, experienced and at the same time denied … dramatically insistent questions whose answers cannot be found.[269]

The right to know the truth and accountability of the hierarchy are of particular relevance for the families and loved ones of the victims of clergy sexual abuse who committed suicide or died prematurely. They have unanswered questions about the circumstances of the abuse and the role of the hierarchy in protecting the sex offenders. See the final chapter for a discussion on the need for further research in this area.

In summary, the key principles of retributive, corrective, distributive, restorative, procedural and transitional justice and the international human rights principles of the right to the truth to end impunity have been identified and discussed. The types of justice wanted by clergy victims are many and varied.

265 Diane Orentlicher, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1, 61st sess, Agenda Item 17, (8 February 2005) Principle 2.
266 Baeza, above n 259, 29.
267 Ibid 28.
268 Antkowiak, above n 258, 979.
269 Baeza, above n 259, 28.

In this research, some victims want retribution. Others want compensation, or corrective justice. Many want a restorative approach. Most, though, while probably wanting a combination of all of the above, do want the truth to be told and acknowledged, in the form of truth recovery, so that there can be an end to the impunity of those guilty of concealing the sex crimes and protecting the offenders. The above theories of justice and the international human rights law principles of the truth and impunity reflect the main findings of this research. That relationship will be further examined and discussed in chapters 7 and 8.

The present chapter now concludes with an outline of the chapters of this thesis commencing with the methodology used in this research. A chapter on what justice means to the interviewees is followed by an analysis of the three main pathways to justice for victims. An evaluation of these pathways precedes the conclusion and recommendations.

1.6 Outline of chapters

This chapter has outlined the background and context within which this research is placed, why this research is important, the main aims of the research and key theories of justice that apply to Catholic clergy victims of sexual abuse.

Chapter 2 details the methodology used in undertaking this research. The project proposal and its research questions and audience are discussed, as are the data collection methods. The ethical research practice and principles are examined. Grounded theory is identified as offering the most useful way of analysing and understanding the considerable and complex interview data. The doctrinal method that was employed for the case law analysis component of the research is explained, and some of the limitations of this research are considered.

What justice actually means to clergy victims and their families is examined in chapter 3. Seven criteria for justice are presented based on an analysis of the interviews with all interviewee groups in this research. A range of justice measures are identified such as: accountability of both the clergy offender and the members of the hierarchy who covered up the sex crimes; the telling of the truth by the victims and the Church personnel; financial compensation; apology; and counselling services.

Chapters 4, 5 and 6 examine the existing potential avenues of redress, or justice for victims. Chapter 4 analyses the civil law and its limitations for clergy victims wanting to sue the Catholic Church and/or its Bishops. The current Australian legal position on vicarious liability is contrasted with the more advanced and expanded Canadian and UK judicial interpretations in this area. It also examines a further limitation unique to Australia, the so-called 'Ellis defence', which precludes the legal entity of the Catholic Church in Australia – a Property Trust – from being sued by clergy victims because the trustees cannot be held liable for the offences of the clergy.

The experiences and outcomes for the victims who have been through the criminal courts looking for justice are presented in chapter 5. Experiences with the police and personnel at the Office of Public Prosecutions are analysed and discussed, as are the varied impacts on victims of offenders who pleaded guilty compared with those whose conviction was by way of a jury verdict.

In chapter 6 the experiences of victims and their families of the Catholic Church's internal complaints processes, the Melbourne Response and Towards Healing, are closely examined and comprehensively analysed. Both processes were designed to be pastoral in their approach, bring healing, advance the truth and provide compensation.

Chapter 7 will examine the seven criteria for justice, as found in chapter 3, in light of the theories of justice discussed above in this chapter. These same criteria for justice are then used to evaluate the findings from this research of victims' lived experiences of the three main pathways in trying to find justice. These three pathways are also discussed in light of the relevant theories for justice.

Chapter 8 concludes with highlighting the importance and significance of this research. It proposes areas for future research and suggests reforms necessary to address the criteria for justice for victims and their families.

CHAPTER

2

RESEARCH DESIGN: METHODOLOGY

2.1 Introduction

This research study sets out to determine whether victims of Catholic clergy sexual abuse in Australia are finding justice, in terms of the existing avenues for justice and from the perspective of victims themselves. Such a question demanded a dual approach involving both empirical qualitative and doctrinal research methods. The empirical component of this study involved interviews with victims, family members and legal and non-legal professionals working in this area of Catholic clergy sexual abuse. The doctrinal method, or traditional legal method approach, was employed in the analysis of case law in the area of negligence and tort law. The majority of this chapter is devoted to the empirical component.

This chapter outlines the methodology used for this research. It commences with the project proposal and conceptual framework, and the research questions and research audience. The research process, including the sampling methods, is examined, as are the data collection methods. In addressing research ethics and principles, the recruitment process and risks for the interviewees and the researcher are discussed. The data analysis section includes an outline of data management, coding, analytic memoing and the description and analysis of concepts. The doctrinal method, as it pertains to case law analysis, is then outlined before the limitations of the research are examined and discussed.

2.2 Project proposal: a conceptual framework

The conceptual framework for the project proposal, which evolved as the research progressed, is based in the principles of victim-centred justice. Hearing the voice of victims is paramount and makes a valuable contribution to victim-focused, evidence-based policy for subsequent legal reform.[1] The proposal is comprehensive and provides the rationale for the research. It was designed to produce the type of empirical data, by way of interviews, that are required to respond to the main research question: 'Are clergy victims of sexual abuse finding justice'.[2]

The original rationale for this thesis had a central focus on the use and effectiveness of mediation as a means of dispute resolution between the Catholic Church and victims in order to bring justice to victims. One component of the original focus was the conceptual framework of 'procedural justice', which prompted the questions: 'Do victims feel "heard" by the authority figures conducting mediation, such as the mediator and/or the Church authority, and do they feel they are being treated with respect and dignity?'

After initial research, and as a way of answering the above research question more completely, it was recognised that a specific focus on mediation and procedural justice was too narrow when there are so many other pathways to justice. The research design, therefore, evolved into a more comprehensive analysis of all existing possible pathways for justice for clergy victims and their families, of which mediation could be one component. These pathways are: criminal law, which includes the victims of crime compensation schemes; civil litigation; and the Church's own complaints processes. The research focus also extended to the separate question: 'What do victims and others want, or see as, justice?' This part of the process meant breaking down and separating out what was a very complex set of issues.[3]

1 Kieran McEvoy and Kirsten McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame' (2013) 22(4) *Social and Legal Studies* 489, 492.
2 C Marshall and G Rossman, *Designing qualitative research* (Sage Publications, 4th ed, 2006) 10-11, 24.
3 Pat Bazeley, *Qualitative Data Analysis: Practical Strategies* (Sage Publications, 2013) 35.

2.2.1 Research questions

The overarching thesis question that drove the design of the empirical work, is whether victims of Catholic clergy sexual abuse in Australia are finding justice. Answering this question required further clarifying questions which were formulated concurrently with the rest of the early design of the project and included: 'What processes are victims of child sexual assault, at the hands of the Catholic clergy in Australia, using to seek justice?' and 'What is the effectiveness of these processes?' That is, 'Are the outcomes just from the standpoint of the victim?' These broad questions, including 'What do victims require for there to be justice?' were designed deliberately to ensure that the data generated would be as comprehensive as possible and would directly address the main research question.[4]

2.2.2 Research audience

Another consideration at the research design phase was being cognisant of the intended audience.[5] That is: 'To whom will the results be directed and who are the main stakeholders in this area of research?' The main audience for this thesis is a scholarly one. But because identifying justice for victims and their families was the motivation behind the research, this thesis, or sections of it, could also be used by the judiciary, law-makers, policy-makers and the Catholic Church itself. Many primary and secondary vicitms have expressed a wish to receive a copy of the thesis. Commissions of inquiry, as discussed in the first chapter, also came to be a possible audience for this research because they have the power to make recommendations for legal reform, for example, in the area of vicarious liability and the need for a legal entity for the Catholic Church that could be sued by victims.

As stated above, the main research question – 'Are victims of clergy sexual abuse finding justice?' – required both empirical and doctrinal research, and a multi-method approach was, therefore, adopted. Primary data needed to be collected from victims and other informed parties directly so as to understand victims' experiences and their notions of justice. The data were analysed using the principles of grounded theory, which allowed the researcher to be open to the voices of the participants. This is discussed below. At the same time it was essential to examine the case law, especially in relation to tort law, to gain an understanding of the challenges and legal barriers for victims in gaining compensation from the Catholic Church.

2.3 The research process: qualitative empirical research

The main source of empirical data for this research was individual interviews, and a purposive sampling model of recruitment was adopted.[6] The four specific groups of people who were selected – primary and secondary victims and legal and non-legal professionals – were those who could address the particular research goals of understanding whether or not victims of clergy sexual abuse were finding justice and what they were wanting for justice.[7] In other words, it was these 'information-rich' groups of interviewees that could best address the main research question: 'Are victims finding justice?'[8]

The decision to include secondary victims, especially family members of victims, was made after informal preliminary discussions with several affected families. It was soon apparent that secondary victims were also

4 Ibid 46.
5 Ibid 56.
6 Also known as qualitative sampling.
7 Bazeley, above n 3, 49.
8 Michael Quinn Patton, *Qualitative research and evaluation methods* (Sage Publications, 3rd ed, 2002) 242.

greatly impacted by sexual abuse crimes and needed justice. Of particular concern were the family members of those victims who had committed suicide or died prematurely. Eight of the 18 secondary victims interviewed had a family member who had been sexually abused and had committed suicide, and a further two had a family member who had died prematurely of alcohol and drug-related illnesses. The key issue in these cases was that the deceased victim no longer had a voice and if their story were to be told, a family member or friend would need to do so. As discussed below, secondary victims contacted the researcher expressing their interest in participating in the research.

Further, secondary victims' voices needed to be heard as they had personal experiences of the available avenues for justice, such as attending the Church's internal complaints processes. They were also eligible to apply to VOCAT and to lodge victim impact statements with the courts.

With respect to the sample size, it was anticipated that the number of primary victims would be small. For this reason, the initial sample size was left open. However, so many came forward to be interviewed that a cut-off point had to be set. This was informed by what is called 'data saturation', meaning that no new information was being added to the existing coding categories.[9] A 'theoretical saturation' was also reached, when after 23 interviews with primary victims, for example, it became clear that no new information was being added to the emerging themes and theory.[10]

2.4 Data collection: doing the study

This section discusses the primary sources of the empirical data, the profiles of the participants, the interview methodology and the management of the audio files and transcripts.

2.4.1 Primary sources

In total, 70 people were interviewed for this research. One interviewee withdrew from the study after the interview was conducted. One primary victim and one secondary victim withdrew before the interview. The remaining 69 interviewees comprised 23 primary victims; 18 secondary victims (family members and/or life partners); five non-legal advocates; 12 legal advocates; three prosecution solicitors; two litigation barristers; two prosecution barristers; four Victorian County Court Judges; and one Catholic priest. One participant was interviewed in her capacity as both a primary victim and as a non-legal advocate. All interviewees were adults. Codes have been used for the interviewee groups to ensure their anonymity (see appendix 6).

Of the 23 primary victims, 15 were male and eight were female.[11] All 15 male victims were sexually abused as children. Four of the female victims were sexually abused as adults; three were abused as children; and one was sexually abused as a child and again as an adult (see appendix 12). The relationship of the 18 secondary victims to their primary victims included seven mothers, two fathers, one brother, three sisters, three wives, one partner and one daughter (see appendix 14).

9 Anthony Onwuegbuzie and Nancy Leech, 'A Call for Qualitative Power Analyses' (2007) 41 *Quality and Quantity* 105, 112; Pat Bazeley, *Qualitative Data analysis: Practical Strategies* (Sage Publications, 2013) 50.
10 Bazeley, above n 3, 50.
11 It is only in recent times that the extent of child sexual assault on boys has been understood and acknowledged. Further, sexual abuse by the Catholic clergy is much more likely to be against boys than girls. Judy Cashmore and Rita Shackel, 'Gender Differences in the Context and Consequences of Child Sexual Abuse' (2014) 26(1) *Current Issues in Criminal Justice* 75, 75.

One female victim was concerned that the references to her in this study would have identified her. To address this concern, her gender has been referred to as male and the references to her experience have been edited to her satisfaction. This does not change the fact that there are 15 male and eight female primary victim interviewees, as indicated above.

2.4.2 Interview methodology

Qualitative research interviews can be structured, semi-structured or unstructured. In this research, to maximise the responses from the interviewees particularly in relation to whether they were finding justice, a combination of the semi-structured and unstructured interview was employed. The semi-structured interview involved closed and open-ended questions, which allowed room for the researcher to change the order of questions and to ask additional questions, based on 'the context of the participants' responses'.[12]

Prior to the interview, information was sent to the interviewees that included the broad issues to be covered and the types of questions that would be asked (see appendix 8). This was designed to help prepare the interviewee. These semi-structured interviews were also 'in-depth', employing deeper discussion into the interviewees' social and personal matters, especially of the primary and secondary victim groups.[13] With the non-victim groups – the legal and non-legal professionals – discussion was less about their personal experiences and more about their professional experiences.

The unstructured components of the interviews involved spontaneous questions in response to the interviewees' narration,[14] as the interview progressed, making them more or less like a guided conversation.[15]

Ethical research principles require interviewees to be provided with some knowledge of the topic and the likely stress involved in participating in an interview to enable them to provide fully-informed consent.

Interviews were conducted at a venue chosen by the interviewee. Interviews for more than half of the primary and secondary victims were conducted in their homes. This helped establish an atmosphere of trust and comfort in which the interviewee would feel freer to discuss their experiences[16] (see appendix 5).

2.4.3 Audio files and transcripts

Given the sensitivity of the information, audio taping of the interviews presented a potential problem in relation to confidentiality and the safety of the audio files. This risk was addressed by adhering closely to the following steps. As soon as practicable after the interview, the audio files were downloaded from the audio-recorder on to the researcher's home office computer, which was and is, password-secure. The audio files on the audio recorder were then deleted. The audio files on the computer were then copied onto a compact disc, which was hand-delivered to the transcriber. The transcriber signed a confidentiality agreement in relation to the content of the audio files. When the transcriber had completed the transcriptions, the word files were hand-delivered back to the researcher on a USB stick, which was used to have

12 Y Zhang and B M Wildemuth, 'Unstructured Interviews' (2009) in B Wildemuth (ed), *Applications of Social Research Methods to Questions in Information and Library Science* 223.
13 B DiCicco-Bloom and B F Crabtree, 'The qualitative research interview' (2006) 40 *Medical Education* 314, 315.
14 Zhang and Wildemuth, above n 12, 224.
15 DiCicco-Bloom and Crabtree, above n 13, 315.
16 J Corbin and J M Morse, 'The Unstructured Interactive Interview: Issues of Reciprocity and Risks When Dealing With Sensitive Topics' (2003) 9 *Qualitative Inquiry* 335, 338.

the transcripts printed at Monash University library. These word files were also downloaded onto the researcher's home office computer. Any word files on the USB stick were then deleted. The original compact discs containing the audio files were also returned to the researcher, which were then kept in a locked filing cabinet in the home office. They have since been destroyed. The audio files have been retained on the home computer for academic integrity and to satisfy the Monash University Human Research Ethics Committee requirements for data storage.

Participants' names were not recorded on the transcribed word file. Interviewees were assigned a code and only the researcher kept a copy of the master list linking the names and codes in a location separate from the data.[17] For example, primary victims were referred to as 'V1-1, V1-2 etc. Secondary victims were coded as V2-1, V2-2 etc. Legal advocates were known as LA-1, LA-2 etc, and so on (see appendix 6).

2.5 Ethical research practice and principles

Ethical approval was obtained from the Monash University Human Research Ethics Committee (MUHREC). This Committee is guided by the principles of 'good research practice', which involves the highest ethical standards and a commitment to protecting, amongst others, the rights, dignity, health, safety and privacy of the research interviewees.[18] There were multiple ethical considerations in this research, particularly as the primary victims and their family members were vulnerable groups. Anonymity, for example, whilst extremely important, can be hard to guarantee, especially within particular circles or social groups, such as the relatively small number of lawyers who specialise in clergy sexual abuse within Melbourne and Sydney.[19] Unequal power relationships, such as those between the researcher and the primary victims, also presented challenges requiring clear guidelines for both the interviewees and the researcher at the outset. Honesty and trust were paramount.[20] These are now discussed.

2.5.1 Recruitment process

The recruitment process for the victims is considered first, followed by the legal professionals and non-legal advocates, and, finally, the prosecutors and County Court Judges.

VICTIMS

A very important consideration was that victims should not feel compelled or pressured into participating in the research. To ensure this, a three-step recruitment process was adopted. Step one necessitated initially contacting, by phone or email, the director or manager of a number of legal and non-legal victim advocacy groups – for example, legal advocates who had represented clergy sex victims – to determine their early interest in participating in the research. The victim participants were recruited through these groups because it was important that they were already engaged with advocates and had existing support, as opposed to recruiting victims by way of public advertising. Next, a formal letter was sent to the lawyer or advocate outlining

17 Bazeley, above n 3, 67.
18 These are based on the *Australian Code for the Responsible Conduct of Research*, 2007 and the National Health and Medical Research Council's *National Statement on Ethical Conduct in Human Research* (2007).
19 Bazeley, above n 3, 51.
20 M Miles, A Huberman and J Saldana, *Qualitative Data Analysis: A Methods Sourcebook* (Sage Publications, 3rd ed, 2014) 62.

the rationale and aim of the research and requesting that victim members/clients of this advocate be given access to a separate letter. This separate letter to the victims (see appendix 7) outlined the description and aim of the research, invited them to contact the researcher and gave details of the interview and the types of questions that would be asked.

There were also precautions, first, to address the problem of any dependent or unequal relationships between the victims and their legal or non-legal advocate, and second, to preserve the rights of the victims to either decline to participate and/or withdraw from participation. Such precautions were addressed in the following paragraph in the explanatory statement to the victims: [21]

> Even though [advocate] has passed on this information to you to see if you would like to participate in my research, I urge you not to feel obliged in any way to participate. Whatever your decision, you do not need to let [advocate] know – unless you prefer to do so. Also, if you do decide to participate and then change your mind at any stage, you are absolutely entitled to do so. Such a decision would be respected and thoroughly supported. Once again, you do not need to let [advocate] know about this, unless you choose to do so. I will not, at any stage, be talking with [advocate] about your participation or whether or not you decide to withdraw from the project.

At about this time, October 2011, the author published an opinion piece in *The Age* newspaper, which outlined the problems facing clergy victims of sexual assault. As a result of this, and of further media exposure of the problems facing clergy victims, many primary and secondary victims contacted the author directly, expressing their wish to participate in the research by way of interview. Of the 23 primary victims ultimately interviewed, five approached the author via the letter to the advocate and the remaining 18 contacted the author directly, having heard about the research through the media or by word of mouth (see appendix 8). Of the 18 secondary victims, six contacted the author directly due to their relationship with the primary victims who participated in the research, and the remainder had heard about the research either through the media or by word of mouth (see section 2.8 below for further discussion).

LEGAL PROFESSIONALS AND NON-LEGAL ADVOCATES

Recruitment of the legal professionals[22] and non-legal advocates, selected for their first-hand experience of working with clergy victims, involved an initial email or telephone contact to determine whether they were interested in participating in the research. The contact details of the legal professionals and non-legal advocates were available on their respective websites. The rationale and aim of the research and a list of the types of questions to be asked at interview were included in an explanatory statement (see appendix 10), which was included with a formal letter (see appendix 9). The researcher also asked the potential interviewee to pass on the request to anyone else who worked in the same area who might be interested in participating. The use of such

21 The explanatory statement also outlined the aim and purpose of the research; what the research involved in terms of interviews; any possible discomfort or inconvenience; confidentiality; storage of data and results of the project. See appendix 10.
22 This included litigation solicitors, litigation barristers and prosecution barristers.

'snowball sampling' was not necessary in the end as all of the potential interviewees contacted by the researcher accepted the invitation to participate in the research. Three of the five non-legal advocates approached the researcher directly as a result of reading her articles in the newspapers.

PROSECUTORS AND JUDGES

Recruitment of prosecutors and judges involved additional requirements. Before prosecution solicitors at the Office of Public Prosecutions in Victoria could be interviewed, the researcher was required to sign an undertaking that there would not be, inter alia, any disclosure or publication of the details of any victim of any criminal offence or any information from which the identity of any victim of any criminal offence may be ascertained.

The Executive Committee of Judges at the County Court of Victoria was provided with copies of the explanatory statement and the list of questions for the interviews so as to obtain approval to interview judges of that jurisdiction who had conducted criminal trials involving Catholic clergy sex crimes. The Executive ultimately advised that the author could approach the judges individually, leaving it to the judges themselves to decide whether or not they would like to be involved in the research.

A generic letter was then sent to 38 judges who were listed as conducting criminal trials at the County Court of Victoria. It was not possible to ascertain specifically which judges had conducted trials involving Catholic clergy accused. Ultimately, four judges accepted the offer, contacted the researcher and participated in the research by way of an interview. Explanatory statements were sent to these judges.

CATHOLIC PRIEST

One Catholic priest had heard about the research and made contact and participated.

Finally, all interviewees were asked to sign a consent form agreeing, inter alia, to take part in the research project and that such participation was in a voluntary capacity (see appendix 11).

2.5.2 Addressing risks for the victims

Victims of childhood abuse who are interviewed are more likely to report distress when recalling the past, compared with those who were not sexually abused as children. At the same time, child sexual abuse victims are more likely to report a benefit from the interview.[23] This was a consideration when decisions were being made about interviewing victims of clergy sexual abuse. Another important consideration was that some survivors of trauma do not necessarily foresee the stress and distress associated with giving an interview about their traumatic experiences.[24]

Taking these ethical issues into consideration, none of the questions for the victim interviewees asked for any details of the sexual abuse. Instead they were confined to questions such as how old the victim was when the abuse occurred and how long the abuse went on for. The same applied to the

23 Suzanne Decker et al, 'Ethical Issues in Research on Sensitive Topics: Participants' Experiences of Distress and Benefit' (2011) 6 *Journal of Empirical Research on Human Research Ethics: An International Journal* 55, 55.
24 Lauren Collogan, Farris Tuma and Alan Fleischman, 'Research with Victims of Disaster: Institutional Review Board Considerations' (2004) 26 *Ethics and Human Research* 9, 9.

secondary victims. Nevertheless, anything that requires a victim to go back in time and re-visit that part of their life is potentially stressful and difficult.

It should be noted that the author was able to draw on her 20-plus years' experience as a health practitioner and six years as a mediator, which often involved interviewing vulnerable people involved in delicate family matters or Magistrates' Court Intervention Orders matters. Additional studies in counselling and stress management for health professionals also contributed to the author's interviewing skills.

To further address the issue of potential distress or discomfort for the victim interviewees, the following information was included in the explanatory statement that was sent to every victim participant (appendix 10):

> Inconvenience/discomfort: Discussing your experiences of your abuse and your involvement with Towards Healing or the Melbourne Response and/or the legal system, may be distressing for you. We can suspend or terminate the interview at any point if you wish. I will encourage you to talk to your support person if at any point you find the interview distressing, or if you feel distressed after talking to me.

The secondary victims were sent the following information in the explanatory statement about possible inconvenience or discomfort of the interview:

> Discussing your experiences as a secondary victim may be distressing for you. We can suspend or terminate the interview at any point if you wish. I will encourage you to talk to a support person if at any point you find the interview distressing, or if you feel distressed after talking with me.

During the interview the primary and secondary victim interviewees were periodically asked how they were going, and breaks were encouraged. The majority of the interviewees were telephoned by the researcher after the interview to ask them how they were and, if necessary, counselling or some other form of support was suggested. None reported the need for such support.

Six primary victims had their interviews conducted over two sessions and one primary victim had his interview conducted over three sessions. This was due to time constraints and the fatigue and distress of the interviewee who had requested these arrangements, but nonetheless wanted to proceed. Many of the interviews for primary and secondary victims lasted well over an hour. One interviewee wanted to interview the researcher first, to ascertain her personal reasons for conducting the research, to have her explain comprehensively the confidentiality design of the project, and, probably also to assess her trustworthiness.

2.5.3 Addressing risks for the researcher

There were also potential risks for the researcher. It is recognised that emotion for the researcher is a crucial part of the research experience.[25] Emotionally-charged interviews, such as those with victims of Catholic clergy sex crimes, did affect the author,[26] who vicariously experienced, to varying degrees, the victim interviewees' pain, anguish and frustration.

25 G Hubbard, K Backett-Milburn and D Kemmer, 'Working with emotion: issues for the researcher in fieldwork and teamwork' (2001) 4 *Social Research Methodology* 119, 119.
26 Ibid 120.

Forty-one primary and secondary victims officially contributed by way of interview to the research, and conversations were had with one hundred or more in an unofficial capacity. This continues to this day. Primary and secondary victims experience grief, despair, anger, frustration, hopelessness and deep hurt. Depression, anxiety and suicidal tendencies and thoughts are also reported. To honour and respect these people, and the effort it took for them to participate in the research, the researcher needed, and wanted, to fully engage.

It is now recognised that researchers working in a sensitive areas, such as clergy sexual assault, may need therapeutic support to deal with the issues that may arise.[27] Not surprisingly, there was a cumulative impact on the author and this became apparent at different times. Dealing with vulnerable people and listening to previously-untold stories can clearly impact on the researcher's mental and/or physical health. Support was sought and it was found to be extremely useful. Further, the need for support does not necessarily end with the completion of the formal interviews. Completing the thesis has required ongoing contact with many of the interviewees in terms of receiving clarification of certain parts of their testimonies. Victim interviewees consented to these contacts and were happy to be able to help with the research. Two primary victims did not want to read the quotes I was using and requested that they be read out, which addressed any anxiety they were feeling. Many primary and secondary victims have continued to make contact with the researcher, which has not raised any problems or concerns for the researcher. The fundamental issues for clergy sex victims do not disappear once the interviews are over. Neither do they disappear for the researcher.

It is nonetheless important, as noted by Gilbert, Dickson-Swift and others, that the researcher experience their research both 'emotionally' and 'intellectually'.[28] Recognising the epistemological usefulness of such experiences is pivotal and illuminating. As Hubbard et al observed:[29]

> … perhaps the greatest challenge facing researchers is not about developing research teams where emotional labour can successfully be managed, but about recognising that emotions have epistemological significance. Being emotional is a way of knowing about, and acting in, the social world and is just as significant for how we make sense of our respondents' experiences as our cognitive skills. By acknowledging the role of emotionally-sensed knowledge … we may be able to further our understandings of the social world.

The emotional impacts from the research have enabled a better understanding and appreciation of the importance of, for example, justice, and what that means for victims by pushing the author's epistemological, intellectual and emotional boundaries.

27 V Dickson-Swift et al, 'Researching sensitive topics: qualitative research as emotion work' (2009) 9 *Qualitative Research* 61, 74.
28 K Gilbert (ed), *The Emotional Nature of Qualitative Research* (2001) 9, cited in V Dickson-Swift et al, 'Researching sensitive topics: qualitative research as emotion work' (2009) 9 *Qualitative Research* 62.
29 G Hubbard, K Backett-Milburn and D Kemmer, 'Working with emotion: issues for the researcher in fieldwork and teamwork' (2001) 4 *Social Research Methodology* 119, 135.

The other potential risks for the researcher included personal safety. One way of managing such a risk, especially when interviewing people in their own homes, involved texting the supervisor for this research with the name of the interviewee(s), their address and the time of arrival and departure.[30]

Much thought and time were devoted to the ethical considerations of the research project and even though the complex recruitment process was based around the anticipated potential vulnerability of primary and secondary victims, it was unexpected and gratifying that so many victims actively volunteered to contribute to this research.

2.6 Data analysis

The data analysis drew on grounded theory, a widely-used qualitative research methodology originally developed by Glaser and Strauss.[31] Whilst providing a systematic approach, grounded theory also allows flexibility, which assists with the development of substantive explanatory models grounded in the empirical data.[32] That is, the primary purpose of grounded theory is to gain an understanding of the important issues in peoples' lives, their lived experiences and social interactions derived from, or grounded in, a close analysis of the original data. Grounded theory is inductive in nature in that there are no pre-conceived ideas to either prove or disprove.[33]

The key components of grounded theory are purposive sampling, as discussed above, an iterative study design and a system of analysis. The interview data, for example, were systematically collected and analysed using an iterative process.[34] This involved a series of data collection, by interview and analysis, which then informed the next round of data collection and/or analysis. That is, each repetition, or iteration, informed the understanding of the next cycle or round of analysis.

A central element of data analysis in grounded theory involves constant comparisons of the data, which is also an iterative process. The analytical codes and categories were created from repetitive analyses of the data themselves and systematic comparisons were constantly being made. For example, the findings from the legal advocates were analysed against those of the primary victims.[35]

Using grounded theory, the data were coded cumulatively and, making use of what is called reflective analytic memoing (see below), major categories were developed.[36] Inductive logic moved into abductive reasoning to understand the emerging findings from the data analysis.[37] Abductive reasoning was used, for example, when presented with an unexpected finding. That is, creative interpretations were needed to understand findings such as primary

30 At no stage was my personal safety at risk in these situations, although I did on one occasion get lost. The interviewees lived in the country, and because there was no mobile phone coverage in that area, I could not use google maps. I resolved this by asking a shopkeeper in a nearby hamlet for directions!
31 B Glaser and A Strauss, *The discovery of grounded theory: strategies for qualitative research* (Aldine Publishing, 1967).
32 A J Hutchison, L H Johnson and J D Breckon, 'Using QSR-N-Vivo to facilitate the development of a grounded theory project: an account of a worked example' (2010) 13 I*nternational Journal of Social Research Methodology* 283, 283.
33 J Morse, 'Situating grounded theory within qualitative inquiry' in R Schreiber and PN Stern (Eds), *Using grounded theory in nursing* (2001) 1-16.
34 M Makela and R Turcan, *Handbook of Research in Entrepreneurship Education: International Perspectives* (Volume 3, Edward Elgar Publishing, 2010) 123.
35 Hutchison, Johnson and Breckon, above n 32, 284.
36 Miles, Huberman and Saldana, above n 20, 8.
37 K Charmaz, 'Grounded Theory as an Emergent Model' in S Hesse-Biber and P Leavy (eds), *Handbook of emergent Methods* (2008) 155, 157.

victims being more concerned with accountability of the hierarchy of the Church than with accountability of the sex offender.[38] Several such unexpected findings emerged throughout the research.

With these key characteristics of grounded theory in mind, the management of the data, its analysis, interpretation and theory development will now be discussed.

2.6.1 Data management and coding

By the time the analysis commenced, 70 interviews had been conducted. This very substantial set of material required coding and categorising to allow thorough, valid and reliable analysis.

The transcripts of the interviews were managed by uploading them into version 10 of the NVivo coding system, a computer-assisted qualitative data analysis software program[39] and one of the most well-known, qualitative coding methods.[40] These word files were stored as 'internal sources' in NVivo.

Considerable time was spent reading and reflecting on the transcripts and recording and memoing initial impressions.[41] Having conducted the interviews, there was already a familiarity with the content of the transcripts, but at a very early stage further focused reading revealed common themes. For example, well before the data was coded, it was clear that all primary victim interviewees who had been through the Melbourne Response complaints process reported negative experiences.

Further exploration of the data involved the discovery of new concepts. For example, the impacts of the sexual abuse on secondary victims became much more apparent when all of the transcripts were read sequentially. Certain themes among the secondary victims also became apparent, such as their frustration and anger with the Church.

Coding was extremely useful because it assigned symbolic meaning to sections of the data, which prompted a deeper reflection on the data, producing what is called 'data condensation'.[42] Coding also assisted with the discovery of meaningful content.[43] Coding facilitates asking central questions of the data such as, 'So what? or What's going on here? or Why is that?',[44] questions that also prompt the comparison of one group of interviewees' responses to a particular question with those of another group of interviewees. For example, it became clear that it was more important for the legal professionals than for the primary victims that there be acknowledgement by the sex offender for the crimes he had committed. In contrast, it was more important for the primary victims than for any other group of interviewees that there be criminal prosecutions of clergy who had concealed the sex crimes.

Such 'comparative analysis' then prompted further questions. For example: 'Why was it that the primary victims were less concerned about accountability of the sex offender than were, for example, the lawyers?' Such a question prompted further investigation of the data, including, for example, whether the offenders of the primary victims were alive or dead, or had

38 Ibid.
39 Hutchison, Johnson and Breckon, above n 33, 284.
40 Miles, Huberman and Saldana, above n 20, 74.
41 Bazeley, above n 3, 14-15.
42 Miles, Huberman and Saldana, above n 20, 71-73.
43 Ibid 73.
44 Bazeley, above n 3, 130.

been convicted or not. That is, the process of comparison highlighted the distinguishing features of what was being considered and also assisted with ongoing theory development and findings.[45]

An ongoing challenge for the author was to avoid getting lost in the detail of the data and losing sight of the bigger picture. On reflection, Bazeley's advice should have been heeded and time taken out more regularly for a 'scholarly walk' or even a 'brief stroll', which could have provided the productive distraction that was needed.[46]

2.6.2 Analytic memoing

Analytic memoing is used to facilitate the processing of large amounts of qualitative data by documenting thinking processes and reflections.[47] As Bazeley notes, it also allows the researcher an opportunity to process it all and adds enormously to analytic thinking.[48] Much time was devoted to writing down ideas, thoughts and questions. Tables and flow charts helped solidify ideas and arguments and to progress the analysis. Developing structure was vital and the ongoing use of memos and other jottings helped cement such structures. Themes, patterns, categories and concepts also emerged more easily with the use of memos.[49]

2.6.3 Describing and analysing concepts

To reach the point of data transformation in the draft chapters, the data had already been condensed, clustered, sorted and linked.[50] But this process was not always a smooth transition. One bout of sorting and linking of the data would change as an overriding idea or concept became clear.

The descriptive component of a chapter required some background context to assist the understanding of the analysis.[51] For example, the chapter on the Melbourne Response and Towards Healing processes commences with, inter alia, some background information on these two processes and their underlying principles and the similarities of, and differences between, the two. A description of the four main themes of the chapter is then introduced followed by the number and breakdown of interviewees who had contributed to this part of the research. Each theme is then broken down into further sub themes. Examples are given to highlight the experiences of the interviewees. These are described by Miles et al as 'vignettes' or 'adaptations of stories embedded within interview transcripts' which 'capture significant moments' for the interviewee.[52]

During this process the differences across cases and the interviewee groups, as described above, were compared and questions were asked of the data about 'who, why, what and when?'[53] For example, questions such as, 'Is this theme occurring across different groups?' or 'How does it differ in different contexts?' or 'Is it expressed differently by different groups?',[54] all contributed to fuller understanding and analysis of the data. Categories and themes were also related and questions were asked such as 'What was it that made one group different?' Patterns in codes or themes across cases and between sets of codes were compared and contrasted.[55]

45 Ibid 254.
46 Ibid 15.
47 Miles, Huberman and Saldana, above n 20, 95.
48 Bazeley, above n 3, 102.
49 J Saldana, *The coding manual for qualitative researchers* (Sage Publications, 2nd ed, 2013) 49.
50 Miles, Huberman and Saldana, above n 20, 162.
51 Bazeley, above n 3, 16.
52 Miles, Huberman and Saldana, above n 20, 182.
53 Bazeley, above n 3, 16.
54 Ibid.
55 Ibid.

In summary, in order to address the main research question, an approach based in grounded theory fostered an openness and knowingness of what was happening for primary and secondary victims in their world. It was their lived experiences, and the professional experiences of the non-victim groups, that formed the foundation of the analysis and its subsequent findings.[56]

2.7 The research process: doctrinal method

One chapter of this thesis is devoted to the analysis of the case law on tort law in relation to employers of people who commit sex offences within institutions, including Catholic Archdioceses in Canada and the UK. The methodology employed for this chapter was the doctrinal method. The doctrinal research method developed within the common law. It is important and necessary that the researcher explains the methodology in an open and articulate way.[57]

There are two fundamental steps in the doctrinal method, the first being the locating of the sources of the law and the second being the interpretation and analysis of such law.[58] In this research, the first step involved locating and accessing Australian case law in the area of sexual assault and vicarious liability from several jurisdictions. This comprised about 30 cases from Australian and international jurisdictions including the Queensland and New South Wales Courts of Appeal and the High Court of Australia; the Supreme Court of Canada; the England and Wales Court of Appeal; the England and Wales High Court; the United Kingdom High Court and the United Kingdom House of Lords. Multiple secondary sources were also located via a library search and accessed in the form of journal articles, legal texts, parliamentary reports, Royal Commission reports, legislation, transcripts of proceedings, newspaper and online articles, Australian Catholic Church protocols and other online documents, and, finally, parliamentary documents.

The second stage of this doctrinal method involved comprehensive case analysis and discussion of the law around vicarious liability and non-delegable duty of care in relation to sex offences of employees in institutional settings. This also involved examining the historical beginnings of this legal doctrine such that it could be compared and contrasted with the current law. That is, the journey taken by the common law in this area highlighted its augmentation over time and across jurisdictions so that it can more readily address the changing societal attitudes and norms, although this is not yet the case in Australia in relation to vicarious liability for sex offences (see chapter 4). As Justice Brennan, writing extra-curially, points out:

> The scholarly and sensitive legal researcher is interested not only in the scope and current operation of the law but also in the direction of its development. As a collection of norms affecting a changing society, the law itself must change to remain serviceable.[59]

56 Charmaz, above n 37, 163.
57 T Hutchinson and N Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83, 109.
58 Ibid 110.
59 Justice G Brennan, '"In Review" Celebration of Scholarship', (Speech delivered at the Monash University Law Faculty 'In Review' Celebration of Scholarship, Melbourne, 17 October 2011, [11].

2.8 Limitations of the research

The researcher needs to think through 'the personal, practical and/or intellectual elements of [their] purpose in engaging in qualitative research'.[60] Apart from the main purpose of this research – discovering what victims require for justice and whether they were finding such justice – there was also a personal goal of wanting to bring about legal and other reform so that clergy sexual abuse victims could attain some justice.[61] Equally, there was an intellectual desire to understand the law in the area of clergy sex crimes and to gain an insight into what was going on, and why, and to be able to answer some of the questions that previous research had not addressed adequately.[62]

But potential limitations of the research need to be addressed. The potential for selection bias of the interviewees in this research is the first of such issues. Due to the ethical requirements to ensure that primary and secondary victims were not feeling compelled or pressured into participating in the research, they could not be approached directly. This may have meant that the interviewees who contacted the researcher were people who had the most grievances and/or felt very strongly about the issue of clergy sexual abuse and who had not attained justice. On the other hand, and as reflected in the interviews, many of the interviewees had volunteered for the research because they had thought very deeply about the issues and wanted to contribute to some future justice for all victims and their families.

Further possible consequences of recruiting victim interviewees via their legal or non-legal advocate, could be that these people do not represent those victims who have never even talked about their child sexual abuse, let alone sought assistance from professionals.[63] Equally, victim interviewees contacting the researcher as a result of reading her articles in the media would also represent a certain group of victims who have made conscious decisions to read about the issue of child sexual abuse and the Catholic Church. Both types of recruitment could indicate a degree of selective sampling and, therefore, a possibility that inferences are drawn from a nonrepresentative sample of cases.[64]

Another consideration in addressing the limitations of this study relates to the employment of the purposive sampling method, which involved the selection of 'information-rich' knowledgeable groups, discussed earlier, to ensure the specific goals of the research could be met. That is, this was necessary if the research questions were to be answered.

To address effectively the main research question, 'Are clergy victims finding justice?', the research had to be selective in these senses above. That is, the qualitative data in this research needed to uncover the meanings these people put on their lives and which connect them to the social world around them.[65] But this does not mean that this in-depth qualitative research claims representativeness or generalisability. It was selective in that it needed to capture the truth of victims' lived experiences. Although their accounts were rich and holistic, they cannot and need not be assumed to be the same as everyone

60 J A Maxwell, *Qualitative research design* (Sage Publications, 3rd ed, 2013) 28.
61 Ibid.
62 Ibid.
63 Miles, Huberman and Saldana, above n 20, 295-296.
64 Ibid.
65 Ibid 11.

who was sexually abused by clergy or even everyone who went through the Church's internal complaints processes.[66]

Further, to highlight the distinctions between the views and lived experiences of the different interviewee groups, and to see whether these views and experiences were more or less common, proportions have been used in the analysis. For example, if nine of the 12 legal advocate interviewees recommended that an apology to the victim was necessary for justice, the proportion, two thirds, is employed. Such proportions only refer to the interviewees in this research and, therefore, are not claiming representativeness.

The research design also can be impacted upon, inter alia, by the researcher's gender, age and personal and ideological motivations and concerns. This will now be spelt out so as to strengthen the credibility of the findings.[67] By practising reflexivity, the researcher had to examine closely how research agenda and assumptions, personal beliefs and emotions entered into this research[68] and she had to recognise, examine and acknowledge any preconceived perceptions both before and during the research.[69] This is imperative for qualitative research, says Hsiung, because it 'conceptualises the researcher as an active participant in knowledge reproduction rather than as a neutral bystander'.[70] Further, the researcher's personal characteristics such as her mature age, gender and extensive experience as a healthcare professional would necessarily bring an expanded view of life and impact such things as the original research design, the interview process (in terms of reflective listening and understanding) and an ultimately broadened and developed data analysis.[71] These researcher characteristics as well as the researcher being a 'person-oriented and friendly' person can also affect the interviewees' perceptions. This has been known to elicit more consistent data than researchers who are more task-oriented and business like in their manner.[72]

The author's goal was to give voice to the victims of clergy abuse. This was achieved by adopting a 'standpoint theoretical perspective'. That is, the author wanted to ensure that through the research design and analysis, the voices of the 'marginalised, misrepresented or subjugated' primary and secondary victim groups were heard.[73] This motivation has been explicitly articulated in both the formulation of the research and its analysis and writing.

The reliability and validity of the findings of this research can, however, also be tested using 'triangulation', that is, obtaining one or more independent measures against which to test the findings.[74] In this research, an example

66 N Mays and C Pope, 'Rigour and qualitative research' (1995) 311 *British Medical Journal* 109, 109.
67 N Mays and C Pope, 'Assessing quality in qualitative research' (2000) 320(7226) *British Medical Journal* 50, 52.
68 Ping-Chun Hsiung, 'Teaching Reflexivity in Qualitative Interviewing' (2008) 36 *Teaching Sociology* 211, 212.
69 Mays and Pope, above n 67, 52.
70 Hsiung, above n 68, 212.
71 A D Miyazaki and K A Taylor, 'Researcher Interaction Biases and Business Ethics Research: Respondent Reactions to Researcher Characteristics' (2008) 81(4) *Journal of Business Ethics* 779, 780.
72 D P McAdams, R Jackson and C Kirshnit, 'Looking, Laughing, and Smiling in Dyads as a Function of Intimacy Motivation and Reciprocity' (1984) 52 *Journal of Personality* 261, 263-264; A D Miyazaki and K A Taylor, 'Researcher Interaction Biases and Business Ethics Research: Respondent Reactions to Researcher Characteristics' (2008) 81(4) *Journal of Business Ethics* 779, 781.
73 Bazeley, above n 3, 26.
74 Bazeley, above n 3, 406; Miles, Huberman and Saldana, above n 20, 299.

relates to the finding that the experiences of primary victims who went through the Melbourne Response process was that the truth of what happened to them when they were sexually abused was minimised. This was also a finding arising out of the interviews of the non-legal advocates, legal advocates and secondary victims who had experiences with the Melbourne Response process. That is, this finding of the primary victims was reflected by at least three other groups.[75]

Further, the 12 legal advocates (litigation solicitors) who were interviewed in this research, between them, had represented over 2000 Catholic clergy sexual abuse victims. Their views on how the avenues of justice operated, based on their comprehensive collective experiences, firmly supported the victims' testimonies.

There is also external validation of the findings of this research from the findings of the Victorian Parliamentary Inquiry and the Royal Commission. See chapter 8 for a comprehensive discussion on these findings.

2.9 Conclusion

This chapter has outlined in detail the methodology used in undertaking this research project. In particular, it has discussed the project proposal, the sampling and recruitment methods and data collection methods. The methods of the data analysis were fully outlined, as was the doctrinal method used for the case law analysis. This chapter concluded with the limitations of the research.

The next chapter addresses the main research question, 'Are Catholic clergy victims in Australia finding justice?', by examining what 'justice' means for these people. It outlines and discusses the seven criteria identified by the interviewees that are necessary for the delivery of such justice.

75 Miles, Huberman and Saldana, above n 20, 299; Bazeley, above n 3, 406.

CHAPTER

3

JUSTICE FOR VICTIMS OF CATHOLIC CLERGY SEXUAL ABUSE IN AUSTRALIA

3.1 Introduction

In the previous chapter, the methodology for this research project was outlined. The key theories of justice pertaining to victims of crime, in particular victims of clergy sexual crimes, were examined in chapter 1.

In this chapter, the question of how victims and the interviewees themselves conceptualised justice is examined. This line of enquiry is necessary before being able to answer the overarching thesis question, 'Are clergy victims finding justice?' This discussion is underpinned by the different theories of justice, as outlined in chapter 1, although the criteria for justice identified in this chapter will stand alone. These criteria also provide the framework within which to evaluate the existing pathways to justice, such as criminal prosecutions, victims of crime schemes, civil litigation and the Church's internal complaints processes. This chapter, therefore, focuses on the interviewees' notions of what justice is for victims of clergy sexual abuse, including what might be required, in practical terms, for justice to be achieved.

There is no definition or direct reference to the term 'justice' in the protocols for the Melbourne Response and Towards Healing, and this includes the seven guiding principles upon which these processes base their responses and approaches to victims. However, the one principle that indirectly refers to justice, 'healing for the victims', clearly outlines that victims' needs must be heard and that any assistance given to victims is that which is 'demanded by justice and compassion'.[1] The only other indirect reference to justice in the protocols is that the response of Church authorities to the needs of the victim must also be done in such a way as 'demanded by justice and compassion'.[2] From the viewpoint of Towards Healing, the concept of justice is vague, other than being closely associated with 'compassion', which is not defined in the protocol. In other words, it appears that 'justice' is not viewed as a type of outcome for victims, such as, 'the Church will strive for a just outcome'; rather it seems to imply a way in which the Church authorities should deal with victims, such as, 'the Church should deal with victims in a just way'. The Melbourne Response does not use the word 'justice' at all in its protocol.

3.2 Criteria for justice

The question, 'What do you require for justice?' was put to the primary victims and the question 'What is required for a clergy sexual abuse victim to find justice?' was put to all other interviewees. The use of the term 'justice' was left open to encourage discussion from the standpoint of the interviewee. Some responded by saying, for example, there can be no justice as the offender had died or because there could never be adequate compensation. In these cases, the interviewee was asked to think about what justice might look like, hypothetically, regardless of whether or not it could actually be delivered. As outlined in chapter 1, this topic about what justice is for the victims of clergy sex crimes is a central inquiry of the thesis.

This question provoked a plethora of responses from the interviewees that clearly fell into certain categories. This data underwent repeated and exhaustive steps of coding, refining and analysis. Seven key themes or criteria were identified clearly as necessary for justice by the interviewees. They are:

1 Australian Catholic Bishops Conference and Catholic Religious Australia, *Towards Healing – Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church of Australia* (January 2010) s.19.
2 Ibid s.41.1.

1. The truth and its acknowledgement
2. Accountability of the Catholic Church and its hierarchy
3. Monetary compensation
4. Accountability of the sex offender
5. An apology
6. Counselling and other services
7. Prevention of further sex crimes

Not all interviewees felt they could answer this question. In total, 56 interviewees (18 primary victims, 13 secondary victims, 12 legal advocates, nine other legal professionals, three non-legal advocates and a Catholic priest) provided a response as to what they thought was required for a clergy sex abuse victims to find justice (see table 3.1).

	Primary Victims	Secondary Victims	Legal Advocates	Other Legal Professionals	Non-legal Advocates	Catholic Priest	TOTAL
Contributors to this chapter	18	13	12	9	3	1	**56**

Table 3.1 Number of people contributing to this chapter from each interviewee group

The 56 interviewees made a number of proposals about how justice for the primary victims might be delivered. It was from these proposals that seven main criteria for justice were identified. Further memoing, coding, rethinking and categorising of the criteria for justice data identified sub-categories for several of these criteria. For example, the theme of 'accountability of the offender' addresses two ways in which an offender may be held accountable: laicisation and criminal prosecution. 'Accountability of the Church and its hierarchy' addresses several ways in which accountability may be achieved, including criminal prosecutions and resignations of those members of the clergy or hierarchy who concealed the sex crimes.

There was variance both between and within the interviewee groups as to which and how frequently each of the criteria was raised. For example, the criteria financial compensation and accountability of the Church hierarchy were the most frequently proposed criteria for justice by the primary vicitm interviewees. However the criterion, accountability of the Church hierarchy, was the least proposed criterion of the legal professional interviewees. The most frequently suggested criteria across all the interviewee groups combined were the truth and its acknowledgement and accountability of the hierarchy. Interestingly, only a handful of interviewees raised acknowledgement by the offender as a necessary criterion for justice, of whom not one was a primary or secondary victim.

Secondary victims also deserve justice, as many of their needs reflect those of the primary victims. Justice for secondary victims is examined at section 3.10 below.

3.3 The truth and its acknowledgement

As discussed in chapter 1, knowing the truth about the sexual abuse, its impacts on the victims and the way it was dealt with by the Church is central to justice and without the truth, healing is delayed. The truth is also essential if victims are to be taken seriously and if perpetrators are to be held accountable.

Acknowledgement as defined by Govier is '… knowledge plus a kind of marking or spelling out or admitting as significantly related to oneself, of something that is known'.[3] Acknowledgement requires the truth and it may be complete or partial and implicit or explicit.[4] For example, if a Bishop explicitly acknowledges that a particular clergy offender sexually abused all of the altar boys in his church in a particular year, he would be implicitly acknowledging that each of those boys was a victim and therefore have a legitimate case for compensation.

If victims are to heal, including sex crime victims, then acknowledgement that those crimes happened is essential.[5] If there is to be any reconciliation between the victim and the perpetrator, acknowledgement is also imperative.

Cohen discusses ten methods or modes of acknowledgement, which are ways of 'converting the information exposed about the past into modes of current acknowledgement'.[6] These are truth commissions, criminal trials, lustration,[7] compensation, naming and shaming, criminalizing denials of the past, commemoration and memorialisation, expiation and apology, reconciliation and reconstruction. Just as truth commissions can provide an authoritative acknowledgement of state crimes,[8] it is argued that the hierarchy of the Catholic Church and/or its two internal complaint processes, the Melbourne Response and Towards Healing, could also provide a similar acknowledgement of the institutional sexual abuse.

Although Cohen's backdrop to acknowledgement relates to past human rights atrocities in post conflict states, several of his modes are relevant for the purposes of this thesis. These are acknowledgement by the Church of the truth, acknowledgement of the sex offences by the Church's hierarchy and/or its representatives and acknowledgement of the sex offences by the offender. These forms of acknowledgement will be examined and analysed below.

The truth and its acknowledgement by the Church hierarchy and the offender, along with accountability of the hierarchy (see below), were crucial elements of justice for the research participants. Some interviewees emphasised the importance of telling the truth about the crimes and the terrible harm caused by the crimes, as well as the need for the Church hierarchy to acknowledge that truth. Others wanted the offender to acknowledge his crimes.[9] If there is to be justice, according to the interviewees, it is also essential that the hierarchy of the Church tell the truth about its role in the sex crimes, the way it handled and responded to the sex offences, and any associated

3 Trudy Govier, 'What is acknowledgement and why is it important?' (May 15 1999) *OSSA Conference Archive*, Paper 1, 15. <http://scholar.uwindsor.ca/ossaarchive/OSSA/keynotes/1>.
4 Ibid.
5 Ibid 5.
6 Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering* (Polity Press, 2001) 226-240.
7 Ibid 231. Lustration in this context refers to a mode of accountability that bypasses the criminal justice system by removing or disqualifying categories of people from the government. Also termed as 'mass disqualification'.
8 Elizabeth Stanley, 'Truth Commissions and the Recognition of State Crime' (2005) 45 *British Journal of Criminology* 582, 587.
9 There were no female offenders involved in this study.

concealment. There were also several reasons why the truth needed to be told, including ending the many years of silence for victims and exposing the 'cover-up' and 'lies' of the hierarchy of the Church. The benefits of a victim impact statement as a means of the victim telling the truth were also discussed.

There were 28 interviewees – half of the interviewees who made proposals for what was required for justice – who raised the importance of the truth and its acknowledgement.[10] The discussion commences with the concepts of the victim's truth and the Church's truth, which is followed by the need for acknowledgement by the Church and the offender.

3.3.1 The victim's truth and the Church's truth

Years of silencing of victims underpinned several of the interviewees' proposals that the truth must be told and heard.[11] According to the interviewees, victims, who for so long have had no voice, could be empowered and liberated by telling Church authorities their account of what happened, the impacts of the sexual abuse and what they are feeling. This is especially so, observed one legal advocate, for Catholic clergy sexual abuse victims because they were brought up to believe that they could never speak out against the Church, even if what they were saying was true.[12] That is, it is really important for victims to no longer have a secret they can't tell. Speaking the truth could also be healing, said a prosecution solicitor, because feeling silenced was very harmful.[13]

A secondary victim whose son died prematurely of a heroin overdose tried to tell the truth of what had happened to her son wherever she went and to whomever she met. She too, wanted to break the silence. She put it this way:

> I never denied [my son], I'd say, there are three sons. I always said … he was abused by a Catholic priest, Father Pickering of Gardenvale. It didn't matter whether they were Catholics or not. I made sure that parish and that name kept going out there – from hairdressers to doctors, anyone who would ask. And I felt that helpful.[14]

Several interviewees referred to the benefits of a victim impact statement (VIS) as a vehicle for victims to tell their truth and have it acknowledged. A VIS can be used in criminal proceedings to present particulars of the impact of the offence on the victim and of any injury, loss or damage suffered by the victim as a direct result of the offence.[15] This includes secondary victims. The VIS may be considered by the Judge at the time of sentencing and is an important part of the recovery process for many victims. The victim can request that it be read aloud.[16] The use of VISs also '…accord with the public interest in ensuring victim satisfaction with the criminal justice system outcomes…',[17] reflecting the procedural justice principles outlined in chapter 1.

10 For a discussion on the Church's position on the importance of the truth and as part of its protocol for the internal complaints processes, the Melbourne Response and Towards Healing, see chapter 6.
11 V2-7, LP-2, LA-4, LA-10, LA-1.
12 LA-10.
13 LP-2.
14 V2-7.
15 *The Sentencing Act 1991* (Vic), s.8L.
16 Ibid s.8Q.
17 Rita Shackel, 'Victim Impact Statements in Child Sexual Assault Cases: A Restorative role of Restrained Rhetoric?' (2011) 34 *University of New South Wales Law Journal* 211, 248.

The VIS, according to three interviewees,[18] was a powerful means by which the victim could be heard. It was most effective if it were read out loud by the victim to the Judge, the court and the accused, and included the impacts of the crime and expressed the victim's anger and pain. A prosecution barrister also highlighted the benefits for victims in being able to tell the truth to both the offender and a Church representative. She said '… most complainants absolutely dream of … saying, do you [the offender] know what you did to me, and having the Church acknowledge it'.[19]

That the Church tells the truth was also of critical importance to interviewees, not least, they said, because the truth would expose the concealment and cover-up of the sex crimes by the Church hierarchy. Such truth-telling by the Church, and knowing that the lies have stopped, say the interviewees, are essential if there is to be justice. According to one interviewee, if there is to be any truth then 'full and frank admissions' must be made.[20]

A male primary victim, whose offender had escaped the country to avoid prosecution, said that the denials by the Church and their 'distortions of the truth' demanded that the truth be told to bring about openness and transparency.[21] One way of doing this, according to another, would be for the Church to publicise the names of all offenders with the details of their crimes.[22]

Several secondary victims[23] also proposed that the cover-ups and derelictions of duty by the hierarchy be exposed, with one suggestion that there be a public inquiry into the Melbourne Response process in order to achieve this.[24] The only justice one woman said she wants for her deceased son was for the Church to stop pushing things 'under the carpet' and to tell the truth.[25]

One female victim also wanted 'the facts' of what happened to her to be known for the benefit of her children who had suffered as a result of their mother being sexually assaulted and raped by a Catholic hospital chaplain. These assaults occurred over a period of several months when this woman was psychiatrically very unwell in a Catholic private hospital.[26]

DISCUSSION – THE TRUTH

All interviewee groups identified the importance of the truth in bringing about justice. The importance of the victims being able to tell their story, their truth, was addressed by the legal and non-legal professionals; while the importance of the Church telling the truth was proposed only by primary and secondary victims. For victims, this focus on the importance of the hierarchy telling the truth about their role in the management and cover-up of the sex crimes reflects the importance for victims of the hierarchy being held accountable (see section 3.4 below).

18 NLA-1, LP-1, LP-2.
19 PB-1.
20 V1-14.
21 V1-4.
22 V1-18.
23 V2-11, V2-5, V2-4, V2-19.
24 This has been achieved since the time of the interview, as described in chapter 1, with two inquiries into the Melbourne Response and Towards Healing – the Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Organisations and the Royal Commission into Institutional Responses to Child Sexual Abuse.
25 V2-19.
26 V1-7.

It is not surprising that only the legal professionals raised the advantages of the victim impact statement, as so few of the victim interviewees had had the opportunity of preparing such an impact statement (see chapter 5).

The benefits for victims being able to tell their truth included an end to possibly decades of silence, which had been forced on victims by a very powerful Church. Such a 'turning of the tables' of what had been an immensely unequal power relationship between the Church and the victim could result in healing and empowerment of the victims. This would be a major contribution to justice, according to the interviewees.

Another vital factor contributing to the healing and empowerment of victims would be for members of the hierarchy of the Church telling the truth about the way they responded to and managed the sexual abuse. If there is to be any justice, say the interviewees, exposure of the cover-up and concealment is essential. It was also clear that it was vital for victims that the truth set the record straight for future generations and family members. As discussed in chapter 1, truth recovery is essential if there is to be justice for the victims and their families.

3.3.2 Acknowledgement by the Catholic Church and its hierarchy

Several ideal features relating to acknowledgement by the Church and hierarchy were identified in the analysis. These included: first, the truths that needed to be acknowledged; second, why acknowledgement is so important; third, the type of acknowledgement that is required and by whom; and finally, the diverse ways in which acknowledgement might be achieved.

First, it was mostly the legal professionals[27] who stressed the importance for victims having the truth of the sex crimes acknowledged by the Church and its hierarchy, including the impacts on, or harm done to, the victims and their families. According to these interviewees, it was important that the Church acknowledge the harm done by those clergy members who failed to rescue and protect the victims and those who covered up the crimes. Interviewees also suggested that a victim's courage in coming forward should be acknowledged, especially when that victim had a history of being disbelieved and his or her complaint minimised.[28] Another pivotal area demanding acknowledgement by the Church, according to a victim, is the suicides and premature deaths of those who had a history of clergy sexual abuse.[29]

Second, according to several legal professionals, the salient reason for an acknowledgement by the Church and its hierarchy of the truth of the sex crimes was that the majority of victims would never 'have their day in court',[30] never have the opportunity to be heard by the court.[31] Further, say the interviewees, even if there had been a conviction with concomitant acknowledgement by the Judge, an acknowledgement by someone in authority in the Church is still required. Finally, this acknowledgement was vital for victims because they had lived for decades not being believed.

27 LB-2, LP-2, LA-8, NLA-3.
28 See chapter 6 for more detail on the minimisation of victims' accounts at the Church's internal complaints processes, the Melbourne Response and Towards Healing.
29 V1-4.
30 LA-10, LB-2, LA-6. See chapter 4 on limitations of the civil law for victims of clergy abuse.
31 See chapter 5 in relation to very low conviction rates and very high successful appeal rates for child sexual assault cases.

The third very important factor, according to half of the legal advocates, was that any acknowledgement by the Church hierarchy must be genuine, compassionate and be made by a person in authority.[32]

Finally, primary and secondary victims had multiple suggestions as to how an acknowledgment by the Church and its hierarchy might be achieved. These included promoting a special occasion upon which to mark the recognition for the crimes committed and the harm done, or a more permanent reminder such as a sculpture or documentary. An annual 'day of mourning', as a sign of acknowledgement, was one proposal.[33] According to a secondary victim, a 'day of atonement' or a 'sorry day' for victims and their families would be an effective way to acknowledge the harm done by the sexual abuse and its concealment.[34] This woman's brother died prematurely from alcohol-related illnesses and one of her concerns was the unknown number of victims of this same offender who had died before he (the offender) could be prosecuted. These victims too needed acknowledgement and an offer of help. She said:

> … [the offender] was a scoutmaster, a Cathedral choir master … the Cathedral altar boy master … the chaplain at Parade College. Don't tell me [my brother] was the only one! … other people … have come forward since. I would like some form of acknowledgement from the Church, like a national day of, not mourning, atonement, sorry day, for victims and their families, and for which they are truly sorry, and that I personally believe them … and they show they are sorry by acknowledging the pain the Church authorities have caused by more than glib rhetoric.[35]

This same interviewee also wanted a plaque or a memorial in every Church as an acknowledgement or a reminder of the pain suffered by the victims. This could also, she said, assist the Church and the public understand why victims feel the way they do.

A Victorian interviewee said that a rally attended by victims, their friends and families should be held at St Patrick's Cathedral, the main Catholic Church in Melbourne. This woman wanted the Church to acknowledge their failings and respect the victims. She said:

> … their names should be read out with respect … and they should also identify the perpetrator… say, we did the wrong thing. We didn't listen to complaints, we moved them [the offenders] around. Whether we were the ones in charge then, or our predecessors, but we still haven't made enough change. We haven't acknowledged responsibility.[36]

One primary victim was concerned also about prevention of clergy sex crimes. She wanted to ensure 'our stories are acknowledged, and the nation learns from the experience so no one has to go through it again'. To achieve this, this woman said there needs to be a documentary, a book or exhibition as a means of telling victims' stories publicly.[37] She also suggested a memorial for the dead victims that could be in the form of a garden or sculpture or permanent exhibit, situated on what 'was previously Church land'.[38]

32 LA-9, LA-10, LA-11, LA-4, LA-8, LA-1.
33 V1-15.
34 V2-11.
35 V2-11.
36 V2-7.
37 V1-14.
38 V1-14.

For the one Catholic priest interviewee there was pessimism. He had been supporting victims and their families for some years and trying to negotiate just outcomes with the Catholic hierarchy. He met with little or no support from his Church: 'I suppose my mixture of anger and frustration is that after all these years … over 30 years, it's still an uphill climb to get anyone to listen'.[39]

DISCUSSION – HIERARCHY ACKNOWLEDGEMENT

Acknowledgement by the Church and its hierarchy of what happened (the victim's truth and the Church's truth) was identified as important for achieving justice because it could provide an opportunity for the victim to be believed and possibly vindicated, at the same time recognising the physical, emotional and psychological impacts on the victims. Further, an acknowledgement could assist the Church, the community and family members to understand the impacts on the victims and how the victims feel. When a victim is understood, this can lead to empowerment of, and validation for, the victim, especially after very long periods of being silenced.

The significance of acknowledgement by the Church and its hierarchy of the sex crimes and their impacts was a priority for the vast majority of the legal professionals. However, it was not seen as a priority by most of the primary and secondary victims. This contrasts with the substantial importance for primary and secondary victims that the hierarchy tells the truth and be criminally accountable (see section 3.4). That is, the truth and exposure of the crimes of concealment of the sex offences, and punishment of those guilty of those crimes, were foremost for victims in their quest for justice.

For the legal professionals, acknowledgement required someone in authority in the Catholic Church to genuinely acknowledge the sex crimes, their concealment, the harm done and the courage of the victims in coming forward. These elements of acknowledgement mirror some of the requisite elements of an effective apology, as discussed below.

What was also significant for the primary and secondary victims were the different forms an acknowledgement might take. These two groups of interviewees displayed creativity in their suggestions for such things as annual occasions or permanent displays or memorials to acknowledge the victims, dead and alive, and their families.

3.3.3 Acknowledgement by the offender

Acknowledgement by the offender of the sex crimes was considered by some interviewees to be of utmost importance for the victim and necessary if there were to be justice. It is necessary, say the interviewees, because it helps vindicate the victim. No primary or secondary victims, however, prioritised acknowledgement by the offender, a point that will be discussed below.

Some interviewees[40] said that offender acknowledgement of the crimes was necessary for the victim because it would assist family members and others believe the victim and to accept what happened to him or her. That is, the victim would feel vindicated because, 'at the end of the day they want someone to say, yes, I did these things'.[41]

39 P1.
40 CCJ-4, CCJ-3, PB-2, NLA-3.
41 PB-2.

It was also suggested that an acknowledgement could be more important to victims than a lengthy jail term for the offender.

A significant point raised by County Court Judges was that a guilty plea, compared with a guilty verdict in a criminal trial, would be more effective for the victim in terms of acknowledgement by the offender.[42] One County Court Judge who had conducted a number of separate trials concerning one offender, and who previously was a defence barrister representing accused in sex trials, believed that acknowledgement by the offender was crucial for the victim, even if there had been a guilty verdict in the courts. He said:

> … until the offender acknowledges it, there is always a cloud over allegations … victims of sexual offending want everyone in their community to know that they are telling the truth … So I'm not sure that you even get that necessarily after you've had… a guilty verdict, because there will always be people who will say, well the accused always maintained their innocence even though the jury has found them guilty. Were they? Whereas if an accused is prepared to admit their offending, then it's there for everyone to see and I think that's incredibly helpful to victims.[43]

DISCUSSION – OFFENDER ACKNOWLEDGEMENT

Only five interviewees talked about acknowledgement by the offender as being necessary if there were to be justice for the victim: two County Court Judges, two non-legal advocates and one prosecution barrister.

Significantly, no primary or secondary victim raised acknowledgement by the offender as necessary. However, given that very few of the primary victim interviewees had found justice by way of conviction of their offender, admission of guilt by the offender might seem either too elusive or simply unattainable. Considering, also, the very low number of laicisations and the high number of offenders of this group of interviewees who had died or fled,[44] it is understandable that a victim was unlikely to consider the possibility of the offender acknowledging his crimes.

The same rationale would apply to the secondary victims, of whom not one nominated offender acknowledgement. That is, almost all of the offenders associated with the secondary victims had not been held criminally accountable.

As indicated above, when a primary or secondary victim said in the interview that there could be no justice, he or she was asked to hypothesise, or imagine, what justice might look like. Even in these circumstances, there was not one proposal by these interviewee groups that an offender acknowledge his crimes.

42 CCJ-3, CCJ-4.
43 CCJ-3.
44 See appendices 12 and 13 for offender data.

3.4 Accountability of the Catholic Church and its hierarchy

The truth, as discussed above, is very important in that it is a 'moral value' in itself[45] and it uncovers crimes and vindicates victims. The determination of such truth is also relevant in that it is 'directly tied to accountability'. That is, perpetrators are charged and prosecuted.[46] Such accountability does not just deal with the facts and truth of the crimes, it can also assist victims and their families in 'coming to terms' with the past.[47] As examined in chapter 1, sexual abuse victims and their families are suffering due to the impunity (lack of criminal prosecutions) of the Catholic hierarchy who concealed these sex crimes and protected the offenders. The clergy abuse victims are also being harmed by the impunity of those offenders who evaded prosecutions.[48] The sex crimes and the denial of the truth of those crimes, including the hiding of the perpetrators, are profoundly injurious, thus making criminal accountability central to the provision of justice.[49] Although criminal accountability of the Church hierarchy is paramount for the interviewees in this research, financial accountability is also of great import.

The theme of accountability of the Catholic Church and its hierarchy was addressed by a bit less than half of interviewees proposing criteria for justice. The greater majority of these interviewees were primary and secondary victims with the remainder being legal professionals. This criterion for justice was raised by 23 interviewees who nominated accountability of the hierarchy – a criterion for justice as important as the truth and its acknowledgement.

This section draws on the close analysis of the interview material about how the Church hierarchy could be held accountable. Four main approaches were clearly identified.

1. Criminal prosecutions for the crime of concealing clergy sex crimes.
2. Mandatory reporting to the police for clergy who suspect or know of child sexual abuse.
3. Establishment of a legal entity for the Church so it can be sued.
4. Transparent and fair Church processes for victims of clergy sex crimes.

There were some additional proposals for accountability of the Church and the hierarchy including public exposure of those who concealed the sex crimes and their resignations. The discussion here, though, focuses primarily on the four main approaches.

3.4.1 Criminal prosecutions for concealment

Half of the interviewees[50] who viewed accountability of the Church and its hierarchy as essential for justice wanted criminal prosecutions of clergy, including members of the hierarchy who had been involved in the concealment or cover-up of the sex crimes. This was important, they said, because the clergy, like the rest of the general community, must be held criminally accountable for the harm that has been done to victims and their families.

A strong concern for some of the interviewees was that the hierarchy acted outside the law. One barrister, who had prosecuted Catholic clergy sex trials, said members of the hierarchy who had protected clergy sex offenders

45 Cohen, above n 6, 227.
46 Ibid.
47 Ibid 125.
48 Diane Orentlicher, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1, 61st sess, Agenda Item 17, (8 February 2005) Principle 2.
49 Paz Rojas Baeza, 'Impunity: an Impossible Reparation' (2000) 69 *Nordic Journal of International Law* 27, 29.
50 V1-14, V1-15, V1-13, V1-3, V1-20, V2-16, V2-12, V2-10, V2-14, LA-2, PB-1.

must realise [the hierarchy] is 'not the ultimate authority'.[51] Similarly, other interviewees[52] called for prosecutions because, they said, the Church hierarchy operated outside the law and had failed in their duty of care of victims. One primary victim wanted the Religious Orders to be 'compelled at law to bring to the table all of their knowledge' in relation to the history of sex crimes and their concealment.[53]

Secondary victims also wanted the hierarchy involved in concealing the sex crimes to be criminally accountable. The mother of a son who was sexually assaulted as a young boy, said she wanted the veil of protection around the guilty ones of the Church to be replaced by the state's criminal laws, 'like any other criminal and be judged',[54] whilst another mother of a male victim who died prematurely in the years following clergy sexual assault said she was very clear that those who 'aided and abetted' in the crimes must be criminally accountable.[55]

3.4.2 Mandatory reporting

More than a third of the interviewees who addressed accountability of the Church and its hierarchy[56] argued for mandatory reporting to the police by any clergy who had suspicions or knowledge of child abuse, breaches of which obligation would carry criminal sanctions.[57]

3.4.3 Ability to sue the Church

The third approach for ensuring accountability of the Church and its hierarchy raised by the interviewees involved the Catholic Church becoming a legal entity so that clergy sexual abuse victims can sue it.[58] This would address what is currently a lack of equal access to the civil courts for victims, due primarily to the Ellis defence (see chapter 4).

One primary victim said that the Church was 'totally hypocritical in setting their business affairs up so they can't be sued',[59] whilst another proposed that if there is to be justice, compensation should be dealt with through a formal legal court process.[60]

A secondary victim argued that, because the Church is a workplace, the law of vicarious liability must be amended such that the Church can be held liable for the offending priests' crimes.[61] This was reiterated by a legal advocate who claimed that clergy must be considered to be employees of the Church,[62] thus addressing one of the two requisite legal elements for vicarious liability.[63]

51 PB-1.
52 V1-13, V2-14, V1-20, LA-12.
53 V1-20.
54 V2-16.
55 V2-19.
56 V1-16, V2-11, V2-15, V2-16, V2-12, LA-2, LA-11.
57 Members of the Catholic clergy in Victoria are not mandated to report suspected child sexual abuse to the police. This issue was addressed by the Victorian Parliamentary Inquiry, which recommended that the *Crimes Act 1958* be amended so that a person who fails to report a serious indictable offence involving the abuse of a child will be guilty of an offence (see chapter 8). Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust* (2013) xxxviii.
58 See chapter 4 in relation to what is known as the 'Ellis defence', a legal defence used by the Catholic Church to avoid being sued by clergy sex abuse victims.
59 V1-15.
60 V1-13.
61 V2-14.
62 LA-2.
63 See chapter 4 in relation to the legal doctrine of vicarious liability of employers for the wrongs committed by their employees.

3.4.4 Transparent and fair processes and procedures

Some interviewees also wanted the establishment of a victim-focused, fair and transparent complaints process for assisting and looking after victims and for dealing with the offender. This is the fourth approach identified from the interviews for making the Church and its hierarchy accountable. This reflects the existing problems within the Church's two internal complaints processes, which will be examined in chapter 6.

A legal advocate[64] recommended that the Church devote resources for victims and devise a clear process for dealing with offending clergy. He said this should be matched with a much more generous financial approach for victims and one that balances the financial efforts of the Church in paying for the legal expenses of offending clergy.[65]

One primary victim, who was more concerned about justice for others, asserted that the Church should be made accountable by looking after the 'kids who are badly affected' and those who 'copped it and had trouble'. Such care for the victims, he said, included looking after them psychologically and financially.[66] A County Court Judge proposed that there needs to be a 'fundamental re-think' from the hierarchy down involving a fully transparent process that looks after all the interests of victims and one that cooperates with the police.[67]

In relation to the existing internal complaints processes, the Melbourne Response and Towards Healing, several interviewees[68] said that they should either be completely overhauled or shut down because they put the needs of the Church before the needs of victims, which 'leads to shocking numbers of victims being sacrificed'.[69] Another victim interviewee explained it thus:

> … power is never given away. Power has to be taken away. And power needs to be taken away from the Church … There has to be a separate body established to handle all these cases, because … the Church cannot investigate themselves. They need an independent office … they were set up to look after themselves, not to help the victims.[70]

3.4.5 Additional proposals

There was a cluster of other proposals for achieving justice from interviewees about how the Church and its hierarchy might be held accountable.[71] Public exposure of the crimes of concealment was considered important by several interviewees. At the same time, any convictions for the crime of concealment should result in the offender losing his title and his standing in the Church by being laicised and/or resigning. This was considered important so that those guilty clergy 'in high places [didn't] just walk away from it'.[72]

Also raised by the interviewees were: regular external auditing of the Church; ongoing research into the sexual abuse crisis within the Church;

64 LA-2.
65 More than a $1 million were spent on defending Robert Best, a Christian Brother who ultimately pleading guilty to several of his crimes. See: Mike Hedge, 'Church sex case shows double standards', *The Sydney Morning Herald* (Sydney) 31 May 2011.
66 V1-2.
67 CCJ-2.
68 V1-15, V1-20, LA-2.
69 LA-2.
70 V1-4.
71 V2-12, V1-21, V2-10, V1-14.
72 V2-10.

the removal of diplomatic immunity from the Papal Nuncio;[73] ongoing responsibility of the Church for victims; more respect for victims by the hierarchy; and, finally, a much more proactive Church that actively seeks out victims who have not come forward.[74]

3.4.6 Discussion

As with the theme of the truth and its acknowledgement discussed above, there was a significant and equal number of separate proposals from interviewees addressing the importance of accountability of the Church and its hierarchy for achieving justice.

According to the interviewees, the most important consideration in relation to accountability of the hierarchy was that those who concealed or covered up the sex crimes be held criminally accountable. This was the most salient criterion for the primary victims. It is noteworthy that of the primary victims proposing criminal accountability of the hierarchy, the offenders of more than three-quarters of the victims had neither been prosecuted nor convicted. It is not surprising, therefore, that criminal prosecutions and convictions of those in the hierarchy guilty of concealing the sex crimes would be seen by them to address some of their justice needs.

Prosecution of those guilty of concealment was also very important for secondary victims. As with the primary victims above, there had been no such accountability for just about all of the offenders associated with the secondary victims. It is to be expected, then, that such unequivocal injustice would steer these interviewees to emphasise criminal accountability of the hierarchy as a means of finding some justice.

Successful prosecutions for the crime of concealing sex offences, as discussed in chapter 1, would further acknowledge the contribution of those guilty of concealment to the harm done to victims and their families. It would also highlight publicly the tragedy that unfolded for victims and their families in the parishes and schools to which a known offender was moved by the hierarchy without any forewarning of the prior criminal behaviour of the offender.

For primary victims, criminal prosecution for concealment was far more important than mandatory reporting, for example, which only one victim proposed. This is to be compared with almost a third of the secondary victims who contributed to this chapter who recommended mandatory reporting by those clergy who either suspected or had knowledge of clergy sexual abuse.

A third of the interviewees advancing accountability of the Church and its hierarchy wanted a legal entity for the Church that could be sued, especially for historical sex offences (see chapter 4).

73 The Vatican places its equivalent of an ambassador, a Papal Nuncio, in countries throughout the world. A 'nuncio' is an ecclesiastical diplomatic title. As a 'diplomat', the Papal Nuncio may claim diplomatic immunity in cases of criminal prosecutions and civil suits. An example of this related to Australia's Papal Nuncio, Archbishop Giuseppe Lazzarotto, who, in 2008, obtained a certificate of diplomatic immunity in a litigation involving sexual abuse in Ireland from 2003. He was the Papal Nuncio to Ireland until 2008. The case was thrown out. James Robertson, 'Archbishop used immunity in civil suit', *The Sydney Morning Herald* (online), 9 July 2012 <http://www.smh.com.au/world/Archbishop-used-immunity-in-civil-suit-20120708-21pkh.html>.
74 V2-11, V2-16, V2-4, V1-18, LA-2, LA-9.

3.5 Monetary compensation [75]

'Money is probably the most frequently used means of punishing, deterring, compensating and regulating throughout the legal system'. [76] As discussed in chapter 1, monetary compensation is embedded in the principles of corrective justice, in which an offender puts right the injury or other loss caused to the victim. This imposition of liability on the perpertrator is justified by what is considered a moral wrongdoing.[77] Monetary compensation is highly problematic for clergy sexual assault vicitms in Australia due to the legal defences used by the Church, as comprehensively discussed in chapter 4. Nevertheless, it was raised as a very significant criterion for justice by the interviewees in this research.

This section draws on an analysis of the interview data in which monetary compensation was raised by about half of all the interviewees proposing criteria for justice. Compensation was essential, said the interviewees. On further analysis, four main themes relating to compensation were identified: the necessity for compensation; the type of compensation needed; how and by whom compensation should be paid; and, whether compensation could heal the pain. Interviewees proposed that secondary victims should also be paid compensation.

3.5.1 Why compensation is necessary

Interviewees provided multiple reasons for financial compensation. First, they said it is necessary in order to repair the harms caused by the sexual assaults and their concealment. Second, compensation was necessary because most of the offenders had not paid for their crimes by way of conviction or by financial reparation. Third, there is a legislative right to compensation in the criminal jurisdiction and victims of crime compensation schemes. Finally, compensation is necessary simply because victims deserve it.

First, the harms caused by the sexual abuse and their subsequent concealment needed to be addressed. These harms included emotional and psychological harm, financial hardships and loss of educational, employment and career opportunities. According to one prosecutor, the victims should also be compensated for the loss of their faith. She said 'I reckon they should really go for it … [and] … I hope they get a lot of money'.[78]

That compensation was necessary for the financial losses and struggles of victims was addressed by many, but one male victim said that he wanted 'a whole lot more compensation from the Catholic Church' because he 'financially went down the sink hole' and struggled to sustain himself and his professional career suffered in the years following the sexual assaults.[79] A non-legal advocate said that clergy sex abuse victims are '… not the people they were meant to be in life. They've changed their path in life massively.'[80]

Another male victim, who had been a very successful businessman, explained that he lost everything when, at the age of about 40, his brain 'finally shut down'.[81] This man explained that he had become a workaholic in the years

75 See chapter 1 for a discussion on the options for victims claiming damages for injuries sustained from the clergy sexual abuse.
76 Pat O'Malley, *The Currency of Justice: Fines and Damages in Consumer Societies* (Routledge Cavendish, 2009) 1.
77 S Connell, 'Justice for Victims of Injury: The Influence of New Zealand's Accident Compensation Scheme on the Civil and Criminal Law' (2012) 25 *New Zealand Universities Law Review* 181; Justice K Mason, 'Fault, causation and responsibility: Is tort law just an instrument of corrective justice?' (2000) 19 *Australian Bar Review* 201, 201.
78 LP-1.
79 V1-3.
80 NLA-4.
81 V1-21.

following the sex crimes. This kept him distracted until he could no longer 'run away' from the abuse. It has taken this man about 11 years to try and regain his health. He is still unable to work.

The daughter and wife of another victim, who had also lost his very successful business, looked for compensation for justice because it was a financial battle for the entire family. His wife was trying to live on $200 a fortnight.[82] Compensation for victims such as these, according to the interviewees, should directly address their financial losses.

One primary victim reported that he was unable to focus on his studies after the sexual assaults and it is only now in his late fifties that he can just manage some formal tertiary education. Compensation for him should address this fact, but also, he said:

> I thought about the loss and the damages in terms of potential that had been attenuated by the consequences of the assaults on my sense of self and confidence and my capacity to focus. My capacity to feel part of and belonging to my school, and my education.[83]

Secondary victims not only called for compensation for the primary victims, they also insisted on the importance of compensation or reparation for themselves. The mother of a victim who had committed suicide was adamant that the Church must pay:

> They've got to pay. How can [they] walk away from this for centuries? Something's got to give …. They're trusted, they've got mates in high places. They get away with murder, basically, because they're holy men! … [they are] Above the law. It's got to change.[84]

Another secondary victim, whose brother had died prematurely of alcoholism, said that her costs (such as multiple trips from Perth to Melbourne and her brother's funeral) should be reimbursed as well as 'adequate and respectful compensation'.[85]

Second, it was proposed by some interviewees that compensation was necessary because the offenders had basically got away with their crimes because they were either impecunious or had deceased. Moreover, they said, the offenders neither had been prosecuted nor convicted and again had not 'paid' for their crimes. One primary victim, whose abuser had been convicted but not jailed, said this was unsatisfactory, as his abuser had paid very little. This victim wanted to be compensated 'what it is worth, in terms of the pain'.[86] The sister of a victim who died prematurely said the Church should pay compensation especially if the offender had died before being prosecuted, leaving the justice of seeing the offender punished unattainable.[87] A prosecutor, who supported this proposal, said that monetary compensation was particularly important if the victim did not achieve a criminal conviction.[88]

82 V2-18.
83 V1-20.
84 V2-10.
85 V2-11.
86 V1-24.
87 V2-11.
88 LP-2.

Third, interviewees pointed out that there was already a legislative right to compensation, such as the victims of crime compensation schemes [89] and the compensation provisions, for example, in the *Victorian Sentencing Act 1991*.[90] A Victorian County Court Judge referred to as a 'complete furphy' the notion that victims entered the criminal jurisdiction in order to receive compensation. She said 'it's raised quite often as a motive to make false allegations'.[91]

Finally, as well as a legislative right to compensation, other interviewees said that victims simply deserve corrective justice in the form of compensation, that they need it to rebuild and repair their lives.[92] For one male victim, any compensation amount was 'beyond my imaginings, well and truly'. This man could not put a figure on it and plucked the imaginary amounts of $25 million or $75 million from the air. For him, he wanted money not for himself but to aid and help other victims:

> I know with that sort of money I could make a lot of difference to a lot of other people's lives … and help them. They're being neglected all their bloody lives. If their life was half of what my life is, I could lay down and weep with them … They deserve a chance in life … The only thing it [the Church] can do is offer them money … If it gives them some sort of satisfaction, some re-empowerment in their lives, then good for them. [93]

3.5.2 Type of compensation needed

Interviewees also talked about the type of compensation that would be necessary to address adequately all of the above needs of the primary and secondary victims and how that might be determined. That is, say the interviewees, it is important to address the reasons why compensation is required in the first place. One legal advocate said that monetary compensation would be the tangible acknowledgement of the harms done. She said:

> … people need to feel that what happened to [victims] cost them and they need to feel that the acknowledgement or the reparation has to cost … the wrongdoers, and the money is the only way in our society [where] the cost [is the] bit that hurts.[94]

Another legal advocate remarked that any compensation (reparation or redress) paid by the Church had to 'hurt the Church' as such, this 'hurt' contributing to the sense of justice for the victim. He said that there needed to be 'some making good in a real material sense'.[95]

All but one of the legal professionals who advocated that some form of monetary compensation or reparation was necessary and important as justice for victims, stressed that any such compensation must be proper compensation in that it must adequately address the loss suffered by the individual victim. Another legal advocate said that the Church should reopen, overturn and reassess all its cases of compensation, which she described as insufficient

89 See chapter 5 and appendix 2 for information on Victoria's Victims of Crime Assistance Tribunal.
90 See chapter 1 in relation to a victim's entitlement to compensation from the convicted offender.
91 CCJ-4.
92 V1-14.
93 V1-12.
94 LA-6.
95 LA-9.

and inconsistent. Finallly, according to a non-legal advocate, although money '… can't make up for the injuries … proper recompense could address some of the things that they have lost, in a dignified manner…'.[96]

As well as financial compensation some interviewees also called for the availability of emergency financial assistance for victims, many of whom struggled on a day-to-day basis.

3.5.3 How the compensation is to be paid

The interviewees also discussed where this compensation should come from and how payments should be administered. There was consensus that the source of any such compensation was the Catholic Church itself, although, of course, as argued by one secondary victim, it should not be up to the Church to decide on compensation entitlements, because 'they are still hell-bent on preserving their image and reputation'.[97]

A couple of interviewees[98] proposed that the Church be taxed, or that it should sell some of its premium assets such as its prime real estate or Vatican artworks, the funds from which could be used to set up a trust fund for victims. The Church should 'put their money where their mouth is'.[99]

3.5.4 Compensation: Does it heal the pain?

Despite the focus on compensation, and agreement among interviewees that it was necessary, many made it clear that there is no amount of money that can match the suffering and damage to victims' lives, both primary and secondary. Compensation does not heal the pain and suffering. A legal advocate reiterated this, especially in the case of very damaged victims, and told of one of his clients who nevertheless committed suicide after receiving compensation for an horrific level of abuse.[100]

The sister of a victim, who killed himself as a young man, said monetary compensation is essential for victims but also for reimbursement for her and her family for things such as funeral costs and the suffering endured by the family, even though, in a way, she said, that one cannot pay for suffering because the damage is too vast.[101]

3.5.5 Discussion

A bit less than half of all the interviewee groups proposed that financial compensation is necessary if justice is to be delivered. Unexpectedly, the litigation barristers did not address the issue of financial compensation.

Reasons for compensation included the rebuilding and repairing of lives, addressing the loss of educational and employment opportunities, mental and physical health issues, financial difficulties and relationship problems. Interviewees were unanimous that the Church should fund this compensation and that such funding should 'hurt' the Church. Secondary victims should also receive compensation. It is noteworthy that at the time of the interviews, nearly three-quarters of the primary victims were not in paid work due to lost educational opportunities and/or lost careers.

The argument that compensation be paid because the offenders had not received criminal convictions – therefore providing no justice for the victims – reflects the situation of nearly all of the primary victims in this research.

96 NLA-5.
97 V2-9.
98 NLA-3, V1-15.
99 V1-15.
100 LA-10.
101 V2-15.

3.6 Accountability of the offender

More than a third of the interviewees who proposed criteria for justice, considered accountability of the offender to be necessary. The majority of these interviewees were primary and secondary victims, the remainder being legal professionals and one non-legal advocate.

Close analysis of the interview themes found that accountability of the offender was clearly identified as a different theme to acknowledgement by the offender, which was only raised by five interviewees, in that accountability involves a punishment or disciplining of the offender and/or a public recognition that the offender has committed a crime. That is, accountability of the offender does not depend on the offender being willing to do anything.

The two main processes considered necessary by the interviewees for offender accountability were prosecution and laicisation of the offender. Offender prosecution was identified twice as often as offender laicisation and is discussed first.

3.6.1 Prosecutions

Successful criminal prosecutions of the offender were seen by many of the interviewees as a very important and effective way of bringing the offender to account, providing vindication and some justice for their victims.

One victim said that he had been sexually assaulted over a period of years, all the while believing he was the only victim. He explained that it was not until he found out that his offender had also sexually assaulted other children that he believed that this offender must be 'accountable by law for his crimes'.[102]

Five legal professionals[103] said that a criminal conviction of an offender contributes to justice for victims in that it provides them with vindication and recognition of what they have been through. These interviewees saw this as offering victims a type of conclusion, which may also be cathartic for them.

One legal advocate said that for the victims of one particular offender, despite a predictable sense of anti-climax for the victims following a sentencing hearing, the fact that this particular offender would likely die in jail would be seen as justice by some.[104] Of the secondary victims proposing prosecutions for the offenders, one woman said the successful prosecution of her husband's offender was a 'huge victory'.[105]

Some participants felt there could be no justice in terms of accountability, especially where the offender was either dead or had fled the country. Instead these people tried to envisage what justice might look like. One female secondary victim, whose son had committed suicide at a young age following sexual abuse as a child by the parish priest, said she could only rely on a dream to imagine what justice would be for the unlaicised and unconvicted offender who fled to the UK, where he died. She said: 'My dream would be to have him [the offender] come off a plane … see him hand-cuffed … And so, not so cocky now, are you Ron? ... But they tell us he's dead'. [106]

102 V1-3.
103 LA-4, LA-8, LP-2, LP-1, LP-3.
104 LA-8.
105 V2-9.
106 V2-7.

The frustration of another secondary victim meant that he too had to imagine what justice might look like, because the offender of his partner had evaded prosecution by fleeing to Bali where he continues to live. He said:

> … I'd like to … track him down … [and tell him] … I have already alerted the authorities as to your activities in Australia … [and] have an expose in the newspaper … 'known paedophile running boys' choir in Bali' … Unrestrained … I'd stand up there and tell everything I knew. [107]

3.6.2 Laicisation

Laicisation of the offender, also referred to as 'defrocking', was a consistent theme in relation to accountability of the offender. Laicisation involves a priest losing his clerical state,[108] which means he can never again practice in ministry or perform the sacraments.[109] Laicisation was very significant for interviewees. They spoke with conviction about this issue, because, they said, it removed both the title of the offender and his priestly powers. It also meant he was denounced by his own Church and publicly lost credibility, thus, in the eyes of victims, making him accountable.

As well as defrocking offenders, a prosecution barrister said the offender should never be put in a position of authority again and should not be financially supported by the Church. She recommended that the Church 'kick them out of the order [and] they should never have a position where the Church financially supports them in any way [as] the complainant is all but denied that justice'.[110]

One victim was sexually assaulted by a hospital chaplain when she was a young nun and very sick in hospital. She said she wanted laicisations to be made public, to further augment the accountability of the offender. She said this would definitely provide some justice for her.[111]

Laicisation alone, according to some, did not necessarily address the potential problem of further and ongoing offending. A secondary victim, whose victim brother had died prematurely, insisted that the offending clergy be prevented from being free to move unsupervised around the country.[112] For a primary victim, laicised offenders should have all access to children removed.[113]

Some interviewees called for posthumous laicisation for those offenders who had died before they could, or would, be laicised. A secondary victim, whose two very young daughters were raped by their parish priest – and who had been successfully prosecuted and convicted for sex crimes against another primary victim – campaigned tirelessly to have him laicised; the offender died in prison before it could happen.[114] A primary victim said that if he and other victims were to receive justice, posthumous laicisation as well as

107 V2-5.
108 The clerical state is lost even though a priest's 'sacred ordination' can never be become invalid. The Code of Canon Law, c.290 <http://www.intratext.com/IXT/ENG0017/_PY.HTM>.
109 The Catholic Church recognises seven Holy Sacraments which were instituted by Christ and which are 'outward signs of an inward grace on people's souls'. The seven Holy Sacraments are Baptism, Confirmation, Holy Communion, Confession, Marriage, Holy Orders (Ordination) and the Last Rites. Code of Canon Law, Canons 840-1165.
110 PB-1.
111 V1-1.
112 V2-11.
113 V1-12.
114 V2-10. Then Archbishop of Melbourne, George Pell, refused to commence the laicisation process for this offender, despite firm requests from members of the parish community to do so.

conviction would be necessary. He explained it this way: 'The Church is very full of symbols and remembering the dead. It's 90% of their history … Let the civil society decide posthumously, now we're going to unsettle those bones. Unsettle them'.[115]

3.6.3 Discussion

Compared with offender acknowledgement (see section 3.3.3 above) in which there were no proposals by the primary or secondary victims, about a third of each of these two groups did nominate that offenders be accountable for their crimes.

Accountability of the offender by way of successful prosecution means the victim is believed, resulting in his/her vindication. It also brings recognition of what the victim has been and continues to go through. A conviction may also help bring a conclusion of the matter and may assist victims in moving forward. Criminal convictions also provide an acknowledgement by the community and family members that the victim is telling the truth. This is pivotal to victims. Finally, if juries have found the accused guilty of these crimes, there is an authentication at a very public level of the truth and integrity of the victim.

The responses from some interviewees about the possibility of some form of posthumous criminal accountability reflected the dilemma for most of the primary and secondary victims, in that a criminal prosecution was not possible due to the death or ill health of the accused and/or his escape from the country. In these cases, it was seen that justice had been wholly denied. Posthumous criminal accountability, whilst legally problematic, does reflect the deep frustration of victims and their desperate need for some accountability of the perpetrator.

The Church's internal complaints processes have upheld many allegations from complainants,[116] even though the perpetrator had not been prosecuted and/or had died. One example is the case of parish priest, Kevin O'Donnell, who, although convicted of a small number of offences, died whilst in custody following a guilty plea in 1994. It is alleged that O'Donnell was sexually assaulting and raping children for 50 years, from 1942–1992.[117] Most of the allegations against O'Donnell that were made to the Melbourne Response were made posthumously and were upheld by its Independent Commissioner.

Since the time of the interview, two offenders of two primary victims[118] who had been charged by the police for sex crimes and were awaiting court, died before their court cases commenced. The death of one offender was the night before the court hearing and the other offender's death was close to the hearing. These are the types of cases where victims and secondary victims would like to see some form of posthumous acknowledgement of the perpetrator's criminality. Whether those victims who have had their cases upheld posthumously by the Church in its internal processes feel they have received justice will be discussed in chapter 6.

115 V1-11.
116 For example, the Melbourne response has upheld 351 complaints overall for the Archdiocese of Melbourne between 1996 and April 2014. Of 77 accused, 42 were known by the Archdiocese to be deceased. Evidence to Royal Commission into Institutional Responses to Child Sexual Abuse, Melbourne, 19 August 2014, C4189 (Mr O'Callagahn QC).
117 <http://brokenrites.alphalink.com.au/nletter/page124-odonnell.html>.
118 V1-18, V1-23.

Laicisation of offenders, whether convicted or not, was particularly significant for primary and secondary victims who were brought up in the Catholic faith. A priest or member of a Religious Order was respected and revered and thought to be God's representative on earth. If a clergy offender is laicised, there is public acknowledgement by the Church, the community and the victim's family that the crimes did happen and that the victim is telling the truth. Laicisation also sends the message that the Church is taking these crimes seriously. That is, they believe the victim over and above 'one of their own'.

Even posthumous laicisation could address some of the needs of the victims. For an offender to be recognised in death as a sex offender against children, rather than glorified in death, would help acknowledge the crimes and the truth and vindicate the victim.

Of the 22 offenders of the 23 primary victims in this research (one offender had abused two victims) only one has been laicised. This means that for almost all primary victims, justice by way of laicisation has not been attained. Even the two primary victims of the same perpetrator did not find justice with the laicisation of their offender, because he was laicised at his own request, reportedly so he could marry.[119] That is, there was no display by the Church that it was being proactive in supporting the victims by punishing the offender.

3.7 Apology

Apologies are 'moral signifiers that convey clear messages of right and wrong'.[120] Like an acknowledgement, an apology confirms the truth. According to the Law Commission Canada's report, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*, the requisite elements for a meaningful apology include: acknowledgement of the wrong done; accepting responsibility for the wrong that was done; the expression of sincere regret or remorse; assurance that the wrong will not recur, and, reparation through concrete measures.[121]

The Australian Commonwealth Government's Senate Report into the 'Forgotten Australians' in 2004[122] and the Senate Report into the 'Forced Adoption Policies and Practices', in 2012,[123] both adopted the features of an effective apology as recommended by the Canadian Commission. Further elements were that an apology should be an attempt, in good faith, to respond to the needs of the survivor. Several things should be kept in mind: The apology, if possible, should be based on first-hand knowledge and involve an explicit naming of the harms suffered; it should be in the form that the person, or group, desires; it should be delivered by the most appropriate person, according to the recipient of the apology; if a one-on-one apology cannot come from the perpetrator, then one in a representative capacity from the highest

119 Barney Zwartz, 'Church removes guilty priests', *The Age* (Melbourne, Victoria) 6 April 2011.
120 Brent White, 'Say You're sorry: Court-ordered Apologies as a Civil Rights Remedy' (2006) 91 *Cornell Law Review* 1261, 1271.
121 Law Commission Canada, Restoring Dignity: *Responding to Child Abuse in Canadian Institutions*, Report of the Law Commission of Canada of processes for dealing with institutional child abuse (2000) 83-86.
122 Community Affairs References Committee, Parliament of Australia, *A Report on Australians who experienced institutional out-of-home care as children* (2004) 192.
123 Community Affairs References Committee, Parliament of Australia, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (2012) 197.

level of the organisation involved is preferable; apologies should be timely (especially considering survivors have waited many years) and must be culturally sensitive, and finally, it should be the survivor alone who determines whether the apology is meaningful.

Twenty-two interviewees not only proposed that an apology was a necessary criterion for justice, they identified the features that needed to be present for an effective apology. These are presented and discussed below.

Some interviewees proposed that secondary victims must also be the recipients of an effective apology. One interviewee submitted that every victim in Australia and his or her family should be personally invited by a senior Church representative, such as Cardinal George Pell, and given an apology.

3.7.1 Essential ingredients of an effective apology

Further coding, categorising and detailed analysis of the data relating to an apology led to the identification of key elements for an effective apology. According to the interviewees,[124] there are 12 such ingredients, which resonate strongly with the Canadian Commission's, and therefore the Australian Parliament's recommended elements, for an effective apology as outlined above:

An apology must:

1. Be unreserved and genuine.
2. Be given face-to-face to the victim, as opposed to a collective apology.
3. Be a complete display of regret.
4. Be given by a senior Church representative such as the (now former) Cardinal Pell[125] or an Archbishop, Bishop or Provincial of a Religious Order.
5. Be given by a senior representative, as above, if the offender does not apologise.
6. Be personal.
7. Address comprehensively the needs of the individual victim.
8. Include reparation or at least every possible attempt at reparation.
9. Include foundational pastoral care if the victim wants.
10. Be in a written form as well as a verbal form.
11. Include an acknowledgement of the crimes and the harm done to the victim.
12. Include the taking of responsibility by the person giving the apology for what has happened.

Fourteen interviewees proposed that a member of the hierarchy must give the apology, whereas only three wanted the offender to give the apology. This latter group included two prosecution barristers, one of whom said that even if an offender pleads guilty, he should still be required to apologise to the victim. The other prosecution barrister said: 'I'm talking about hauling the offenders out and making them apologise personally to the people who are involved'.[126]

124 NLA-3, LA-11, V2-5, LA-5, LA-8, V1-17, LB-2, V2-2, PB-2, V2-11, PB-1, V1-4, V2-7, LA-2, V1-7, LA-4, V2-14, V2-15.
125 In February 2014, Pope Francis promoted Pell to a new senior role at the Vatican as the Prefect for the Economy of the Holy See.
126 PB-1.

Although one secondary victim, whose son had killed himself, said she wanted an apology and acknowledgement from senior members of the hierarchy, she did not think it would be genuine because, in her view, 'they're cheats and liars and bastards'.[127]

Another mother of a victim, who had committed suicide as a young man, wanted a specific apology and acknowledgement of the fact that the Bishop at the time of the crimes had moved the offender from parish to parish without advising the new parishioners of the offender's known criminal history. The sister of a deceased brother said that a 'clear' apology to her mother would mean a lot to her mother, who was a dedicated Catholic.[128]

According to two legal advocates, the acknowledgement and apology become hollow if they are not backed up by monetary compensation,[129] which was seen as the 'tangible acknowledgement'.[130]

However, not everyone felt that an apology from a Church representative and/or the offender was either necessary or indeed welcome. One female victim said that a sincere apology could be of some value, but for her, finding some justice or healing was not dependent on an apology. She said she had wasted years trying to get an apology from 'God almighty's representatives'. She said:

> And the light went on, fuck you, I don't need your apologies at all to heal or to get on with my life. I'm a strong woman … This fighting for this so called apology is garbage. This brainwashing people into believing that they are going to remain hopeless and helpless unless they get this formal recognition … is so damaging … It's until you say, stick your apology up your arse, I'm in control, you can't, no matter what you do and what little tricks you come up with … you cannot take the truth away from me.[131]

One legal advocate felt that the victims of Catholic clergy had a particularly 'strong and more common desire' for an apology, compared with victims who were not raised in any particular faith. For example, many of the victims sexually abused by members of the Salvation Army homes in Victoria were not raised in that faith, and according to this legal advocate were, unlike the Catholic victims, mostly not interested in an apology and did not want any contact with either the abuser or the organisation.[132]

3.7.2 Discussion

Apart from the primary victim who was adamant that she neither wanted nor needed an apology from the Church in order to recover, and another who called for a 'national apology' from the Church, all other calls for an apology from primary victims were specific and targeted. Of all the proposals for an apology, three-quarters of the interviewees wanted a representative of the Melbourne Archdiocese or Cardinal Pell, as the figurehead of the Catholic Church in Australia (until May 2014), to apologise.

A few wanted the offender to apologise and one wanted any families that had rejected the victim, to apologise. The requirement that an apology to victims

127 V2-7.
128 V2-15.
129 LA-3.
130 LA-6.
131 V1-7.
132 LA-4.

be given by a senior Church representative is both understandable and appropriate. But, based on the experiences of the interviewees,[133] it seems unlikely that any such apology from the Church leaders would contain the requisite ingredients for an effective apology, as highlighted above.

The secondary victims not only wanted Cardinal Pell and Denis Hart, who replaced Pell as Archbishop of Melbourne in 2001, to apologise, they were also more specific in terms of the ingredients of an apology. The apology needed to be real, unreserved and specifically designed for the individual victim. A complete display of regret was required and the apology should come with reparation and pastoral assistance. There also needed to be an acknowledgement of both the original sex crimes and the subsequent concealment of those crimes.

The legal professionals and non-legal advocate also recommended an apology that was genuine, unreserved, face-to-face, personalised and fine-tuned to the particular victim. The apology could be in writing, which would make it more permanent and should be accompanied with pastoral care and be given by a Church representative and/or the offender. As well as an apology, the Church must take responsibility by conducting research into the sex crimes and the institutional response and their impacts on victims. For some victims, an apology from their families could also be needed.

That only three interviewees favoured an apology from the offender was not foreseen. That only one primary victim wanted an apology from the offender was even more unexpected and echoes the fact that not one primary or secondary victim proposed acknowledgement by the offender as necessary if victims are to find justice. The three-quarters of interviewees wanting a representative of the Catholic Church to give the apology contrasts sharply with the small number wanting an apology from the offender. These marked differences can be explained by several factors.

First, the sex crimes committed by the individual perpetrator were but one element of a more overarching and comprehensive crime involving the institution of the Catholic Church. The concealment of the sex crimes by the hierarchy[134] – that is, the attempts by members of the hierarchy to hide the crimes, to move the offender on and to enforce a crippling silence around those crimes – intensified the impacts of the original sex crimes on the victims. It was no longer just the perpetrator who was responsible for the depression and anxiety, the loss of self-esteem, the loss of education and employment opportunities, the breakdown in relationships, the drug and alcohol problems and the suicides: it was also the institutional Church.

Second, one of the consequences for both primary and secondary victims of these crimes, including the crime of cover-up or concealment, is a loss of faith in God and/or the institution of the Catholic Church. That is, the consequences for a Catholic victim of clergy abuse, compared with a victim of child abuse from a perpetrator who is not a member of a religious organisation, extend to include an additional level of betrayal, pain and harm at the spiritual level.

133 See chapter 6 for victims' experiences of apologies they received from the Church.
134 Evidence to the Family and Community Development Committee, Victorian Parliament, Melbourne, 27 May 2013, 11 (Cardinal George Pell); Evidence to the Family and Community Development Committee, Victorian Parliament, Melbourne, 20 May 2013, 12 (Archbishop Denis Hart).

Third, the trust that is broken by the offenders is multi-dimensional. Not only is there a breach of trust of a student-teacher relationship, a student-choirmaster relationship or a parishioner-priest relationship, there is also a breach of a sacred trust. Victims believed from a very young age that these priests or brothers were God's representatives. Not only were their physical bodies assaulted, so too were their young and developing minds. An apology from the Church itself, therefore, was prioritised by the victims.

3.8 Counselling and other services

The material in this section of the chapter emerged from an analysis of the interviewee data relating to the provision of counselling, psychological, medical and other services for primary and secondary victims. This was seen as a very important criterion for justice by 14 interviewees, most of whom were legal professionals and non-legal advocates.

Interviewees focused on the multiple, and often grave, impacts and consequences of child sexual assault that would require specialised services. They also discussed service providers and the requisite skills, qualifications and experience that would ensure effective treatment and support for the victims. Lastly, the interviewees provided ideas about how victims could be advised of the availability of such services.

First, the sorts of problems victims faced that require services, according to three interviewees,[135] included: lost opportunities in education and employment; drug and alcohol addiction; relationship and parenting difficulties; anger and self-esteem issues; inability to organise finances; physical injuries and mental health problems; and a lack of court support. For example, a legal advocate focused on the empowerment of the victim by way of psychological and spiritual healing and healing of 'their relationships with their loved ones'. She said that 'the journey of recovery is not just a successful legal outcome and counselling and medical services were needed'.[136] A Victorian County Court Judge said that as well as justice meaning a fair hearing on the merits of the case, victims also needed support as they went through trials due to the inherent stress of being a witness in a criminal trial and being cross examined.[137]

Second, interviewees called for specialised services to be provided by health and other specialists who have substantial experience working with sexual assault victims. A secondary victim, whose brother had died prematurely of alcoholism, talked about the services his brother could have benefited from which might have added another ten years to his life. This would have included adequate and complete specialised residential care for the remainder of his life, including pain management and psychological care. This victim did not receive such care.[138]

One non-legal advocate spoke of the need for a 'one stop shop' for victims that would be paid for, but not run by, the Church. Such a centre would, she said, offer multiple services such as financial advice, legal, medical, social work and counselling services, vocational guidance and drug and alcohol

135 V1-14, NLA-3, NLA-4, LA-1.
136 LA-1.
137 CCJ-1.
138 V2-2.

services. The centre would be run holistically, collaboratively and staffed by best-practice professionals.[139]

Other interviewees[140] also proposed that appropriately qualified, experienced, competent and caring professionals, who may also act as an advocate, be available for victims. A range of professional services and resources should be offered, all aimed at empowering the victim. Families should also be able to participate. Counselling or psychological assistance for primary and secondary victims should be free of charge and unlimited and the victim should be able to choose the counsellor.[141]

A primary victim recommended an equivalent to the Vietnam Veterans' Total Permanent Injury (TPI) card for the victims of Catholic clergy sex crimes. One of the main purposes for such a scheme, said this man, would be to help prevent further suicides of clergy victims because the harm and injuries sustained from the sex crimes are life-long, or even intermittent and unpredictable. The impacts never go away. This means employment can never be assured let alone employment being secure or long-term. Such a scheme, this victim suggested, would have the Church financially supporting victims when they were unable to work. It would be independently run, but entirely funded by the Church. 'That would [be] a very practical solution to make people feel that they have been acknowledged, recognised and they're supported. And that's really important'.[142]

Finally, concern was expressed about the number of victims who could be helped by such counselling and other services, but who did not know of their existence. One primary victim recommended advertisements, which had nothing to do with the Church, to encourage victims to come forward so they could receive the help they needed to recover.[143]

3.8.1 Discussion

According to the interviewees, counselling and other services for primary and secondary victims are essential. The many problems victims face and the illnesses they suffer mean that each person requires an individual and multi-faceted approach. The interviewees argued that such services should be provided by specialists with relevant experience and should be funded by the Church.

It was the legal professionals and the non-legal advocates who found this criterion for justice very important and provided nearly three-quarters of the proposals for this criterion. They included two County Court Judges, four legal advocates and all of the non-legal advocates. It is most unexpected that only two primary victims proposed counselling and other services, especially given that so few of the 18 victims who went through the Melbourne Response and Towards Healing processes were being funded by those processes for their counselling (see chapter 6).

Once again, these findings contrast sharply with, for example, the criterion for accountability of the hierarchy, which was prioritised by approximately 40 percent each of the primary and secondary victims. Clearly, accountability at an institutional level is uppermost, from the point of view of victims, if there is going to be justice.

139 NLA-1.
140 NLA-2, V2-11.
141 CCJ-3, LA-11, LA-2, LA-5, NLA-3.
142 V1-21.
143 V1-14.

3.9 Prevention of further crimes

The material for this section of the chapter emerged from an analysis of the interviewee data relating to the prevention of further sex crimes in the Catholic Church. This element of justice was raised by eight interviewees half of who were legal advocates. The interviewees' proposals focused specifically on reforms from within the Catholic Church.

Prevention of sexual abuse by clergy offenders, and its exposure, was seen as a duty and responsibility of the institution of the Church, by all of the contributors to this criterion of justice. The victims who talked about this theme spoke passionately about the importance of prevention.[144] Their empathy for, and consideration of, other children were unambiguous, such that one man said that he would 'die happily tomorrow' if it meant that all children were freed of this issue.[145]

Knowing that prevention is a priority and sound practices are in place, say the interviewees, would ease the suffering of existing victims. One victim wanted further research to be undertaken to help determine 'how these monsters operate and why they do what they do' and how to effectively prevent further crimes. She said, 'your suffering becomes less painful if it can be used to help future generations'.[146] Prevention was also important, said a legal advocate, because victims 'want to think that they're helping others to be saved from what they went through'.[147] One interviewee summed up the victims' message and said the Church needs to act now 'for the rest of the community, to protect them. That is justice … And that's what we demand'.[148] This person was also very troubled about the number of clergy sexual abuse related suicides and emphasised the importance of prevention.

The legal advocates[149] echoed the calls of the primary victims for the Church to reform itself, be proactive and reassure the existing survivor community and the families of existing and future generations of children that safety of the children will be a high priority of the Church.

3.9.1 Discussion

Despite being a clearly identified theme, this issue of prevention was not recommended as a requirement for justice by many. On the one hand, this is unexpected. But on the other, it may be due to the fact that interviewees were asked what justice might look like for the primary victim. Posing the question in this way does not directly ask the interviewee to consider future generations.

Having said that, those who did volunteer the issue of prevention of further clergy sex offending, did so with assurance. Knowing that future generations of children were being protected was of crucial importance to existing victims. With this in mind, if a specific question about prevention had been put to the interviewees, it might be assumed that many more would have addressed this issue.

Although the interviewees were not specifically asked about justice for secondary victims, several interviewees did volunteer this information. This is now discussed.

144 V1-12, V1-14, V1-6, V2-4.
145 V1-12.
146 V1-14.
147 LA-10.
148 V1-6.
149 LA-10, LA-9, LA-8, LA-11.

3.10 Justice for secondary victims

Justice for secondary victims – family members and partners of victims – was very important for some interviewees. That more interviewees did not address this issue is a reflection of the interview questions, which specifically asked participants about justice for primary victims. There was an urgent need for justice for secondary victims, said eight interviewees, because they also suffer a great deal as a result of the sex offences on the primary victims.

According to one legal advocate, the Catholic Church is not responding appropriately to these secondary victims, who are devastated by what has happened to their loved ones.[150] A primary victim said he wants acknowledgement of his wife's and family's suffering and made reference to what he would like to hear from the courts. He said:

> … the hours of worry and grief that she's had … and the impact it's had on the rest of the family … the judge will … say … What about his family, his spouse, his next of kin, who have been affected by this profoundly? They need to be acknowledged. … it's not just about me [the victim] … there is a ripple effect.[151]

One secondary victim wanted acknowledgement of the way he was mistreated by the Melbourne Response and the Archdiocese.[152] Another observed that being interviewed for, and taking part in, this research was a way of being acknowledged as a secondary victim. He said that being 'taken seriously' was very important.[153] That is, the impacts of the sexual assaults on secondary victims, say these interviewees, require the same acknowledgement and approaches to justice as the primary victims.

3.11 Conclusion

To answer the main research question, 'Are clergy victims of sexual abuse finding justice?', it has been necessary to first identify what justice means for primary victims. The in-depth discussions with the interviewees gave rise to seven specific criteria for justice. Such criteria for justice are complex in that they attempt to address the multiple yet varying needs of victims, and needs that will also vary over time.

The seven criteria for justice identified in this research broadly address the needs for victims to have a voice and be believed, vindicated, healed, compensated, released from shame and guilt and to be empowered. For example, telling the truth gives voice to a silenced victim and, as with acknowledgement, hearing the truth from the Church can validate the victim's truth. Accountability of both the sex offender and the hierarchy who concealed the sex crimes can bring about disapproval and condemnation by the victim's family, the community and the general public, thus vindicating and empowering the victim. Compensation should address pain and suffering and the multiple needs of those victims who could not continue with their education and/or those who could no longer participate in the workforce. The provision of counselling and other services can assist with the healing process.

Whether victims are finding justice, according to the above criteria, are examined in the following three chapters. Victims' lived experiences of civil litigation, the criminal jurisdiction and the Catholic Church's internal complaints processes are presented, analysed and discussed.

150 LA-1.
151 V1-11.
152 V2-2.
153 V2-5.

CHAPTER

4

CIVIL LITIGATION: LOOKING FOR JUSTICE I

4.1 Introduction

In the last chapter, the question 'What is justice for victims of clergy abuse?' was addressed. Seven criteria for justice were identified from the research data which will be used in chapter 7 to evaluate the existing pathways to justice for clergy victims.

As discussed in chapter 1, tort law provides several options for damages for victims of clergy sexual abuse. These include an action in 'trespass to the person' where the offence of battery would be the most likely action for clergy victims. This is a form of strict liability of the offender.[1] In cases of clergy sexual abuse, this action would be problematic as a means of obtaining compensation because priests and members of Religious Orders take a vow of poverty, rendering them impecunious. The other potential cause of action in tort is that of negligence, either as a result of the employers' own duty of care (which is not delegable to third parties) or as a result of their vicarious liability for employees' wrongs committed during the course of their employment. Very few causes of action in negligence, due to a breach of a duty of care, for child sexual abuse have been adjudicated in Australia, with limitation periods presenting a particular barrier.[2] Also discussed in chapter 1, equitable compensation could address the needs of victims trying to find justice if there has been a breach of a fiduciary relationship. But, to date, no such cases have been adjudicated in Australia for non-pecuniary losses due to such a breach.

Due to the inherent limitations above of an action based on the breach of a fiduciary duty, trespass to the person, and negligence of the Catholic Church based on a breach of its duty of care, this chapter focuses on the case law associated with vicarious liability of the Catholic Church. This will include discussion on non-delegable duties of institutions, as examined in the leading Australian High Court case of *NSW v Lepore*.[3]

As discussed in chapter 1, the other significant and controversial barrier to access to justice for clergy victims in Australia is the Ellis defence. This legal defence emerged from a NSW Court of Appeal case in 2007,[4] in which the Catholic Archdiocese of Sydney successfully argued that the only legal entity for the Church, a Property Trust enshrined in legislation, could not be sued for the sex crimes of the Archdiocese's clergy. This leaves victims of clergy sex crimes without a legal entity for the Catholic Church to sue, particularly in relation to historical sex crimes. This is also discussed in this chapter.

This chapter analyses, therefore, the current Australian law in relation to causes of actions in the tort of negligence based on a non-delegable duty and vicarious liability, particularly in light of the recent and relevant law in Canada and the UK.

Finally, some more recent international[5] developments are explored by analysing several UK cases. One finds a Catholic Archdiocese vicariously liable for the sex crimes of one of its priests.[6] Another finds the relationship

1 Strict liability, sometimes know as absolute liability, refers to liability for injury or damages even if the wrongdoer was not at fault or negligent.
2 Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Redress and Civil Litigation*, (January 2015) 208.
3 *NSW v Lepore* [2003] HCA 4.
4 *Trustees of the Roman Catholic Church v Ellis and Another* [2007] NSWCA 117.
5 *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256.
6 *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938.

between a priest and his Bishop as one that is akin to an employment relationship, and the third finds two Defendants liable, that is, there was dual vicarious liability of two institutions for sex offences committed by Christian Brothers.[7]

The Australian law in this area is now discussed and analysed.

4.2 Australian law

The precedent in *Lepore*[8] addresses, and ultimately leaves open, the question of whether sexual assaults by an employee can attract liability of the employer. Its effect is that employers (including school authorities) cannot be held liable, either through vicarious liability or a breach of a non-delegable duty, for his/her employee's criminal acts, such as rape or sexual assaults. As such, victims are left without a pathway to justice in the civil courts.

The High Court's rulings in *Lepore* on the non-delegable duties of state authorities in relation to sexual assaults by its teachers are addressed, as is the doctrine of vicarious liability. To help understand and put into perspective the extent to which Australian common law is out of step with the UK in this area, several international cases where an employer has been held liable for the sexual assaults of its employee are considered and analysed.

4.2.1 Current Australian position: *Lepore*

The case of *Lepore* is central to understanding the Australian legal position in relation to liability of an organisation or employer for the sexual assaults committed by one of its employees. The High Court case of *Lepore* involved three appeals heard together. One matter was from the NSW Court of Appeal[9] and the other two matters from the Queensland Court of Appeal.[10] All three cases involved sexual assaults of pupils by teachers in the State Education system.

The pivotal issues for the High Court were whether the State Education authorities were vicariously liable for sexual assaults by the teachers or, in the alternative, whether these authorities breached their non-delegable duties. That is, these two doctrines of tort were exposed to analysis and determination by the High Court. Unfortunately, there was ultimately inadequate resolution and no real guidance from the High Court on these issues.

The challenging journey of *Lepore* commences in the District Courts of NSW and Queensland, then the two state appellate courts before being conjoined at the High Court of Australia.

LEPORE – LOWER COURTS

Angelo Lepore was aged seven in 1978 when he attended a NSW state primary school and reported allegations of abuse by a teacher to police.[11] The teacher pleaded guilty to charges of common assault and resigned as a teacher. Lepore later sued the State of NSW as first Defendant, which joined with the teacher as second Defendant in the District Court of NSW for damages resulting from the assault.

7 *The Catholic Child Welfare Society and others (Appellants) v Various Claimants (FC) and the Institute of the Brothers of the Christian Schools and others (Respondents)* I [2012] UKSC 56.
8 NSW v Lepore [2003] HCA 4.
9 *Lepore v State of New South Wales* [2001] NSWCA 112.
10 *Rich v State of Queensland; Samin v State of Queensland* [2001] QCA 295; (2001) Aust Torts Reports 81-612.
11 The allegations included being hit on the bare bottom as punishment for misbehaviour and then being sent to a storeroom where he was indecently touched by the teacher. Other boys were present on some of these occasions.

In the first instance, the trial Judge dealt only with the issue of liability and found the teacher was liable for assault. However, the Education Department was found not to have breached its duty of care to the student.[12] This decision was appealed on the basis that the trial Judge did not deal with the issue of breach of the non-delegable duty owed to the student. Vicarious liability of the State of NSW was not argued at either the trial or at its subsequent appeal.[13] The NSW Court of Appeal allowed the appeal and set aside the original verdict. The majority of the Court of Appeal held:

> A school authority's duty to take reasonable care to ensure the safety of a pupil extends to protecting the pupil from physical and/or sexual abuse, at least where due care would have avoided it. There is no doubt that the State owed the appellant a non-delegable duty of care.[14]

The State of NSW appealed this decision to the High Court where it was joined by two cases from Queensland – *Samin and Rich*.[15]

SAMIN AND RICH – LOWER COURTS

Sheree Rich and Vivian Samin were pupils at a one-teacher state school in rural Queensland. The assaults on these girls, aged 7 and 10 years, were alleged to have occurred between 1963 and 1965. The teacher[16] was convicted of multiple counts of child sexual assault against girls and boys from multiple schools in Queensland in 2000 and sentenced to 14 years of imprisonment.[17]

Both *Samin* and *Rich* commenced as civil actions in tort against the State of Queensland, the Minister for Education of Queensland[18] and D'Arcy (the former teacher). The statements of claim alleged that the teacher sexually assaulted Samin and Rich at school, and that this constituted 'a breach of the duty owed by the school authority to the appellants'[19] – that is, a breach of a non-delegable duty that was owed by the school to the former pupils. Applications were made to the District Court of Queensland by the Defendants to have the plaintiffs' statements of claim struck out. These applications were unsuccessful. Further applications by the Defendants to the Queensland Court of Appeal were successful and the statements of claim were struck out,[20] although the Appellate Court did grant Samin and Rich leave to re-plead their matters.[21] The Queensland Court of Appeal did not follow the reasoning of the majority in *Lepore v State of New South Wales*[22] (as above), which favoured a non-delegable duty of the state, rather it preferred the minority ruling of Heydon JA, who favoured vicarious liability of the state.[23] This meant that there was a conflict of authority between the two intermediate courts of NSW and Queensland that necessitated a resolution by the High Court.[24]

12 The issue of damages, which were awarded against the teacher, was deferred to a second judge.
13 This is despite the view of the Chief Justice that, even on a narrow view, there may have been an arguable case based on vicarious liability. *NSW v Lepore* [2003] HCA 4, [12] (Gleeson CJ).
14 *Lepore v State of New South Wales* [2001] NSWCA 112, [5] (Mason P and Davies AJA).
15 *Rich v State of Queensland; Samin v State of Queensland* [2001] QCA 295; (2001) Aust Torts Reports 81-626.
16 The teacher, William D'Arcy, was later to become a Member of Parliament in Queensland, a position he held for 22 years. He resigned from parliament in January 2000. An appeal against further convictions for child sexual assault against D'Arcy in the District court in 2002, failed. See *R v D'Arcy* [2003] QCA 124 (21 March 2003).
17 *R v D'Arcy* [2001] QCA 325 (22 August 2001). This sentence was reduced to 10 years on appeal.
18 There was some confusion about the identity of the school authority.
19 *Rich v State of Queensland; Samin v State of Queensland* [2001] QCA 295, [4] (McPherson, JA).
20 Ibid [21] (McPherson, Thomas and Williams JJA).
21 Ibid [67] (McPherson, JA).
22 [2001] NSWCA 112, [5] (Mason P and Davies AJA).
23 *NSW v Lepore* [2003] HCA 4, (Gleeson, CJ).
24 Ibid.

As stated earlier, these three appeal cases were heard together at the High Court, which focused on the applicability of the elements of vicarious liability and non-delegable duty in cases of sexual assaults on students by teachers employed by the State. The High Court's analysis of non-delegable duties is examined first.

4.2.2 Non-delegable duties

The High Court delivered little clarity to the already 'confusing and little understood' doctrine[25] of non-delegable duties, which has its origins in late 19th century England in a case in which Lord Blackman stated that a master or landowner ('a person causing something to be done') with a duty owed, cannot delegate that duty to a contractor.[26] Generally speaking, the law of non-delegable duties has been applied in cases where the relationship or alliance has been one of hospital and patient,[27] school authority and pupil[28] (as is the case with these three matters) and employer and employee.[29] The High Court case of *Introvigne*[30] became Australia's 'signature' case on this doctrine of tort and was referred to on multiple occasions by the High Court in *Lepore*.

A non-delegable duty is a 'personal duty' which is more 'stringent than a duty to take reasonable care; it is a duty to ensure that reasonable care is taken' by others.[31] Each Judge in *Lepore* took a different view on whether this duty of care existed in these cases.

In relation to whether the NSW and Queensland State Educational authorities in Lepore owed a non-delegable duty to their students, Gleeson CJ in the leading judgment, argued that such a duty '… is too broad, and the responsibility with which it fixes school authorities is too demanding', as it would mean that an authority would be liable for any injury to a pupil by a teacher, accidental or intentional.[32]

Unlike the negligence, or negligent omission, of the Commonwealth in *Introvigne*,[33] the torts or wrongdoings in *Lepore* were intentional and criminal and therefore more than a mere failure to take care.[34] Gleeson CJ concluded that this therefore did not attract liability for the educational authorities.[35]

In contrast, according to Gaudron J, whether the educational authorities in NSW and Queensland owed a non-delegable duty, was not in issue for the High Court.[36] What was in issue though, was the 'nature of a duty of that

25 Jane Wangmann, 'Liability for Institutional Child Sexual Assault: Where does Lepore Leave Australia?' (2004) 28 *Melbourne University Law Review* 169, 177.
26 *Dalton v Angus* (1881) 6 App Cas at 829. This case expanded the earlier law (*Quarman v Burnett* [1840] EngR 182) to include independent contractors and not just servants of the master.
27 *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542.
28 *Commonwealth of Australia v Introvigne* [1982] HCA 40; (1982) 150 CLR 258.
29 *Kondis v State Transport Authority* [1984] HCA 61; (1984) 154 CLR 672.
30 *Commonwealth of Australia v Introvigne* [1982] HCA 40: (1982) 150 CLR 258. This case involved an injury to a 15 year-old pupil at a school in the ACT, after a flagpole fell on his head. The case was ultimately argued on the basis of the non-delegable duty of care owed by the Commonwealth to the pupil, despite being presented by the plaintiff at both first instance and the appellate court, as being based on vicarious liability. The issue for the High Court was the degree to which the Commonwealth was responsible for the negligence of teachers working in the state of NSW schools. It was held that the Commonwealth was under a duty to ensure reasonable supervision for the students and that duty could not be discharged or delegated to the State of NSW, which ran the school.
31 *NSW v Lepore* [2003] HCA 4, (Gleeson, CJ).
32 Ibid [34].
33 In this case, the Commonwealth was found to have breached its non-delegable duty of care by failing to provide reasonable supervision of the students in the playground and the Commonwealth was unable to delegate this responsibility.
34 *NSW v Lepore* [2003] HCA 4, (Gleeson, CJ).
35 Ibid.
36 Ibid [97] (Gaudron, J).

kind',[37] which Her Honour goes on to describe, narrowly, as a duty 'not extending beyond taking reasonable care to avoid a foreseeable risk of injury'.[38]

In his minority judgment, McHugh J states: first, that a State Education authority does owe a duty to its students to take reasonable care to prevent harm; and second, this duty cannot be delegated. His Honour goes further and argues that the liability of the education authority survives any intentional and criminal acts of the teacher, and on this basis, there is no necessity to argue the alternative issue of vicarious liability in these matters.[39] In extending the law in *Introvigne* (in which negligence breached the non-delegable duty of the Commonwealth) by including criminal acts of the teachers, McHugh J was at odds with his fellow Judges.

According to the joint judgment of Gummow and Hayne JJ, and in contrast to McHugh J, extending the non-delegable duty to include intentional or criminal acts was unacceptable because it would: first, 'sever the duty from its roots in the law of negligence… and make the employer…. an insurer of the employee… against any harm done' by the employee.[40] Second, it would do away with the need for the employer to avoid risk of harm.[41] Third, it would 'give no room for any operation of the orthodox doctrines of vicarious liability'.[42]

Kirby J argues that the High Court has an obligation to clarify the legal approach and establish the applicable principles of liability for this current case and other like cases, just as the House of Lords and the Supreme Court of Canada have done in *Lister* and *Bazley* respectively.[43] 'This Court should do no less', reminds Kirby J.[44]

As an 'exceptional principle of tortious liability'[45] and a 'disguised form of vicarious liability',[46] Kirby J argues that a non-delegable duty should provide a basis for liability in cases that do not satisfy the elements of vicarious liability. However, this form of liability was not designed to 'expand the content of the duty imposed' to the extent that it would be a strict liability or an insurance.[47]

Despite this comprehensive push to resurrect this doctrine, Kirby J ultimately concludes that the principle of a non-delegable duty should not be applied in this case, because the principle of non-delegable duty was developed over time to deal with 'specific circumstances'[48] and there were no such circumstances in this case. Kirby J concludes that the basis upon which the claims in *Lepore* should be argued is, instead, the doctrine of vicarious liability.[49]

37 Ibid [99].
38 Ibid [135].
39 Ibid [106] (McHugh, J).
40 Ibid [266] (Gummow and Hayne, JJ).
41 Ibid [267].
42 Ibid [269].
43 *Lister* and *Bazley* are discussed and examined under Vicarious Liability.
44 *NSW v Lepore* [2003] HCA 4, [284] (Kirby, J).
45 Ibid [289].
46 Ibid [290].
47 Ibid [291].
48 The circumstances in *Lepore* differed from that of *Introvigne* in that the wrongdoers in *Lepore* were direct employees of the educational authorities. This contrasted with *Introvigne* where the Commonwealth was ultimately responsible for the negligence of teachers who were employees of the State of NSW. *NSW v Lepore* [2003] HCA 4, [340].
49 *NSW v Lepore* [2003] HCA 4, [294]–[295].

Callinan J agrees with the Chief Justice in stating that the non-delegable duty of education authorities owed to pupils should not be an absolute liability, rather the ordinary standard of care, which is already a very high standard.[50] That is, if there is no fault on the part of the education authority, it cannot be personally liable in situations of sexual abuse by a teacher.

In summary, in relation to the application of a non-delegable duty owed by education authorities to its pupils for intentional torts, or sexual assaults, there is diverse opinion on the High Court. McHugh J argues that the liability of an education authority will survive intentional and criminal acts of the teacher, whilst Kirby J, despite urging the consideration of a non-delegable duty because it is a 'simpler and stricter test of liability' already established in Australian common law, [51] ultimately decides instead to extend the vicarious liability approaches expounded in Canada and England.

In relation to sexual abuse by a teacher of a student, six of the seven High Court Judges concluded that a school authority does not owe a non-delegable duty to its students. Whilst Gleeson CJ said: 'In cases where the care of children, or other vulnerable people, is involved, it is difficult to see what kind of relationship would not give rise to a non-delegable duty of care',[52] the High Court did not extend this duty to include intentional, or sexual crimes, as this would mean a responsibility for school authorities that far exceeded a failure to take reasonable care. It seems that a non-delegable duty of care 'as it has been conceived in Australia is a concept which may be on the wane' [53] or at least, as two co-authors pessimistically concluded, is 'under siege'.[54]

Focusing on the special needs of children, Wangmann argues for 'the recognition of a breach of a non-delegable duty in cases of child sexual assault by a teacher'.[55] This, she argues '… is more suited to school authorities (compared with relying on vicarious liability) … given its recognition of power disparities and the special vulnerability of children'. [56] This is compared with vicarious liability, discussed below, especially as decided in *Lepore*, which is limited by its focus on the relationship between the employer and the employee and the way in which the torts fit within that relationship, at the expense of leaving the injured person, the child, 'out of the picture'. [57]

4.2.3 Vicarious liability

If an individual or organisation employs a person who is negligent in the course of his/her duties, the employer may be held liable for that negligence or wrong, but on a vicarious basis.

Thus, vicarious liability is also referred to as a 'strict' or 'no-fault' liability, due to the absence of any fault of the employer. There are two fundamental limbs to the test for this tort doctrine. First, there needs to be an employment-type relationship, and, second, the tort needs to have been committed

50 The duties of an ordinary standard of care referred to by Callinan J include the engagement of reliable, and carefully screened, properly trained employees, and the provision of suitable premises and an adequate system for monitoring employees and an efficient system for the prevention and detection of sexual misconduct.
51 *Commonwealth of Australia v Introvigne* [1982] HCA 40; (1982) 150 CLR 258.
52 *NSW v Lepore* [2003] HCA 4, [36].
53 Prue Vines, 'New South Wales Lepore; Samin v Queensland; Rich v Queensland' (2003) 27 *Melbourne University Law Review* 612, 618.
54 Steven White and Graeme Orr, 'Precarious Liability: The High Court in *Lepore*, *Samin* and *Rich* on School Responsibility for Assaults by Teachers' (2003) 11 *Torts Law Journal* 101, 108.
55 Wangmann, above n 25, 200.
56 Ibid 200.
57 Ibid 199.

within the course, or scope, of employment. Whilst the second limb of the test has been historically the most legally challenging, recent international cases have involved the Catholic Church challenging the first limb by arguing there is not an employment-type relationship between a clergy offender and the Bishop, Archdiocese or other Church body.

The second limb, the 'course of employment' test, is discussed before analysing some international cases which have in the last decade found educational authorities vicariously liable for the sexual assaults of their employees based on the first limb of the test, the existence of an employer-employee type relationship. The High Court's findings in relation to vicarious liability in *Lepore* are then to be discussed and examined.

In the early 20th century the legal scholar, Salmond, formulated a test for determining what falls within the *course of a person's employment*. This test states that a wrongful act is deemed to be done by a 'servant' in the course of his employment if it is either a wrongful act authorised by the master, or a wrongful and unauthorised mode of doing some act authorised by the master.[58]

For a wrongful and unauthorised act to attract vicarious liability, it must be 'so connected' with the authorised acts that it may be regarded as a mode, albeit an improper mode, of doing the authorised acts.[59] The employer will not be held vicariously liable if the wrongful and unauthorised act is not so connected with the authorised act, as to be a mode of doing it. Instead, it would then be an independent act. [60]

In relation to sexual assaults by employees, the difficult, or limiting, aspect of this test relates to the unauthorised and criminal nature of the act. That is, until very recent times, criminal acts, especially sexual assault, have been found not to be in the course or scope of employment, as they were 'independent' and did not satisfy either limb of the Salmond test.

How is this test being applied by the High Court in the 2003 case of *Lepore*? To understand the High Court's reasoning, it is necessary to first explore some of the leading international cases in the area of child sexual assaults and vicarious liability. The three central cases are *Bazley v Curry*[61] and *Jacobi v Griffiths*,[62] Canadian cases, both judgments being delivered in 1999, and *Lister v Hesley Hall Ltd*, a UK case from 2002.[63]

BAZLEY v CURRY

This Canadian case was the first in the Commonwealth to find an employer (school authority) vicariously liable for the sexual assaults by one of its employees. The appellant, the Children's Foundation, operated two residential care facilities for emotionally troubled children. The staff were 'substitute parents' in that they performed all the normal duties of a parent, including 'intimate' duties such as bathing the children and tucking them in at night. Curry, who worked in the facilities as a childcare counsellor, was charged with 18 counts of gross indecency and two of buggery. He was

58 Salmond, *Salmond on Torts* (1st ed, 1907) 83.
59 M Davies and I Malkin, *Torts* (Lexisnexis Butterworths, 6th ed, 2012) 641-642.
60 Ibid.
61 1999 Can LII 692 (SCC); [1999] 2 SCR 534.
62 [1999] 2 SCR 570; (1999) 174 DLR (4th) 71.
63 [2002] 1 AC 215.

convicted on all but one count. Two of these convictions were in relation to Patrick Bazley, the respondent. Soon after the convictions, Curry died. Bazley sought damages from the Children's Foundation, arguing it was vicariously liable for Curry's conduct.[64]

At first instance, the appellant Foundation was found to be vicariously liable for the criminal acts of its employee, and this decision was upheld on appeal.[65] McLachlin, J of the Supreme Court, found the Salmond test to be restrictive as it did not assist the court in determining whether the sexual assaults of the employee were a mode of doing an authorised act or whether the employee was acting completely independently, or criminally.[66] That is, the Salmond test did not provide any criteria upon which to make the distinction between the two possible scenarios.

This Canadian case broadened the application of the law of vicarious liability by further considering and advancing the policies behind the concept of this doctrine. First, it was held to be a 'just and practical remedy to people who suffer as a consequence of wrongs perpetrated by an employee'[67] and second, 'deterrence of future harm'.[68]

To help achieve this, *Bazley v Curry* introduced the concept of 'enterprise risk'. For compensation to be fair, the imposition of vicarious liability on an employer for the wrong of its employee should also be fair. The Court reasoned that if an employer starts an enterprise that carries certain risks, it is fair that the employer bear the loss if those risks materialise.[69] That is, there must be a sufficient connection between 'the employment enterprise and that wrong that justifies imposition of vicarious liability on the employer for the wrong, in terms of fair allocation of the consequences of the risk and/or deterrence'.[70]

To assist with this determination, McLachlin J recommended that the Court be guided by the following principles:[71]

- Openly confront the issue of liability of an employer, rather than 'obscuring the decision beneath semantic discussions' of 'scope of employment' and 'mode of conduct'.
- Ask the fundamental question of whether the tort is '*sufficiently related* to conduct authorised by the employer to justify the imposition of vicarious liability'.[72]
- Consider several ancillary matters[73] to assist in the determination that there was a sufficient connection between the 'employer's creation or enhancement of the risk' and the employee's intentional tort.

64 *Bazley v Curry* [1999] 2 SCR 534.
65 Ibid.
66 Ibid [11] (McLachlin J). The Foundation argued that the employee's sexual assaults were not 'modes' of doing an authorised act, rather, they were independent criminal acts, and therefore, not in the course of the offender's employment. The victim of the assaults claimed they were a mode of performing the authorised acts of the foundation.
67 *Bazley v Curry* [1999] 2 SCR 534 [30] (McLachlin J).
68 Ibid [32].
69 Ibid [27].
70 Ibid [37].
71 Ibid [41].
72 That is, there needs to be a 'significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires'.
73 *Bazley v Curry* [1999] 2 SCR 534 [41] (McLachlin J). (a) The opportunity that the enterprise afforded the employee to abuse his or her power; (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee); (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise; (d) the extent of power conferred on the employee in relation to the victim; (e) the vulnerability of potential victims to wrongful exercise of the employee's power.

In summary, Her Honour said that:

> … the test for vicarious liability for an employee's sexual abuse of a client should focus on whether the employer's enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm. The test must not be applied mechanically, but with a sensitive view to the policy considerations ...[74]

The Foundation was held vicariously liable for the sexual assaults of its employee as the Foundation's enterprise 'created and fostered the risk that led to the ultimate harm'. This was the result of the 'special relationship of intimacy and respect the employer fostered, as well as the special opportunities for exploitation of that relationship it furnished'.[75]

JACOBI v GRIFFITHS[76]

This Canadian case was decided on the same day as *Bazley v Curry*, but was distinguished in that the employee for the recreational club for children, Griffith, sexually assaulted two children in his own home. Griffith was responsible for supervising and organizing an after-school program on the premises of the club and having a positive rapport with the children was part of his job. This did not involve, however, intimacy, parenting or nurturing, as it did with *Bazley*. In addition, the activities the employee pursued in his own home to 'groom' the children (such as providing videos), had nothing to do with the recreational club and were not part of his job.[77] Further, the recreational club had no authority over the children. Although the position at the recreational club provided the employee with the opportunity to abuse the children, the Court held that the recreational club, or its activities, did not significantly increase the risk of harm to the children, therefore, vicarious liability on the club for the sexual assaults of its employee could not be imposed. That is, the same test used in *Bazley* was applied in *Jacobi*, but with different conclusions on the facts.[78]

LISTER AND OTHERS v HESLEY HALL LIMITED[79]

Similar to *Bazley v Curry*, this UK case involved the sexual assaults of young boys with emotional and behavioural problems. A school and boarding annex were owned and managed by Hesley Hall Limited as a commercial enterprise. Hesley Hall Limited employed a husband (warden) and wife (housekeeper) to manage the boarding school and look after the children. The assaults occurred between 1979 and 1982 and were committed by the warden. Criminal charges were laid in the early 1990s and the warden was sentenced to seven years' jail. In 1997 the appellants brought claims for personal injury against the employers.

74 Ibid [46] (McLachlin J). It must be determined whether the employee's specific duties gave rise to special opportunities for wrongdoing and the existence of a power or dependency relationship, which on its own often creates a considerable risk of wrongdoing, should be addressed.
75 Ibid [58] (McLachlin J). McLachlin J said it would be difficult to imagine a job with a greater risk for the sexual assault of a child. [58].
76 *Jacobi v Griffiths* [1999] 2 SCR 570; (1999) 174 DLR (4th) 71.
77 Ibid [80].
78 The factors taken into consideration for determining this risk were the same as those considered in Bazely above. These factors were also relied upon in a 2010 English case *(Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256), which will be discussed later, especially in relation to the vicarious liability of a Catholic Archdiocese for the sexual assaults by one of its priests of a young boy in the parish.
79 *Lister and Others v Hesley Hall Limited* [2002] 1 AC 215.

The House of Lords,[80] in referring to the case at first instance, noted the trial Judge held the respondents vicariously liable, but not for the sexual assaults by the warden. Interestingly, the employer's liability was founded upon the warden neglecting his duty by not reporting the harm suffered by the boys. Such a breach of the warden's duty of care, it was held, was commensurate with negligence. This somewhat unusual and oblique approach to finding Hesley Hall Limited liable was overturned at the Court of Appeal. The Court of Appeal decision said that if 'wrongful conduct is outside the course of employment, a failure to prevent or report that wrong conduct cannot be within the scope of employment'.[81]

In prioritising 'legal principle' over precedent,[82] and perhaps echoing McLachlin, J's guiding principle to openly confront the issue of employer liability,[83] Lord Steyn declared it was time for the House of Lords to 'face up to the way in which the law of vicarious liability sometimes may embrace intentional wrongdoing'.[84] This would mean not always having to apply the Salmond test in a 'mechanical' way and not being preoccupied with the 100-year-old 'conceptualistic reasoning' of this test.[85]

The issue for the House of Lords was whether the warden's torts were *so closely connected with his employment*, that they could be considered to be in the course of his employment. It ultimately found that they were. Lord Steyn, in the leading judgment and with whom Lord Hutton agreed, said the correct test was:

> … whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable … After all, the sexual abuse was inextricably interwoven with the carrying out by the warden of his duties ...[86]

The majority of the court in *Lister* was persuaded by the approach to vicarious liability adopted by the Supreme Court of Canada in *Bazley*, making it the second case to find an employer vicariously liable for the sexual assaults of children by its employees.

Lister does not avoid the critical gaze of tort scholars who argue there is 'conceptual confusion' in the understanding of the important differences between vicarious liability and non-delegable duty of care, at best, or at worst, whether *Lister* 'can truly be viewed as an example of vicarious liability'.[87] Giliker refers to the multiple use of the terms in the judgments, 'duties entrusted' (to the warden by the employer) or 'delegated' (by the employer to the warden) in relation to vicarious liability, both of which are more suggestive of a non-delegable duty.[88]

LEPORE

Having examined the UK and Canadian case law in relation to vicarious liability, the divergent views of the High Court in *Lepore*, in relation to the

80 Ibid [8] (Steyn LJ).
81 Ibid [9].
82 Ibid [13].
83 *Bazley v Curry* [1999] 2 SCR 534 [41] (McLachlin J).
84 *Lister and Others v Hesley Hall Limited* [2002] 1 AC 215 [16].
85 Ibid. For example, if a bank teller defrauds a customer, the strict and mechanical interpretation of the Salmond test would lead to the 'absurd conclusion that there can only be vicarious liability if the bank carries on business in defrauding its customers'. Lord Steyn at [16].
86 *Lister and Others v Hesley Hall Limited* [2002] 1 AC 215 [28].
87 Paula Giliker, 'Making the right connection: Vicarious liability and institutional responsibility' (2009) 17 *TLJ* 35, 38.
88 Ibid 41.

use of vicarious liability in cases of sexual assaults by teachers in Australian State Schools, can now be discussed.

In adopting *Bazley* and *Lister*, Gleeson CJ says that it is not enough to say that 'teaching involves care', rather, the nature and extent of the care requires more precise investigation. If the teacher-student relationship 'is invested with a high degree of power and intimacy, the use of that power and intimacy to commit sexual abuse may provide a sufficient connection between the sexual assault and the employment to make it just to treat such contact as occurring in the course of employment'.[89]

Despite the apparent approval of the reasoning in *Bazely* and *Lister*, Gleeson CJ then finds there was nothing about the teacher's duties or responsibilities in the present case that could conclude that his sexual assaults could be considered to be in the course of his employment.[90]

Gaudron J approaches the imposition of vicarious liability for the sexual assaults of a teacher from a different perspective. In relation to a material increase in risk of an enterprise involving the care of children, Her Honour argues that such an increase in risk is directly relevant, but it has no bearing on liability if there is an absence of fault on the part of the employer. Her Honour looks instead to the ordinary law of 'agency' to justify the imposition of vicarious liability on an employer for the authorised acts of an employee or acts done within the course of their employment.[91] If an authorised act is done in an unauthorised way, the imposition of vicarious liability on the employer will result from the 'ostensible authority' of the employee.

McHugh J, who found the State Education Authorities had breached their non-delegable duty of care, claimed it was not necessary to determine the issue of vicarious liability, because the criminal acts of the teachers were not within the course or scope of their employment.[92]

Justices Gummow and Hayne, in finding that a school authority should not be held vicariously liable for the sexual assaults of a teacher,[93] fundamentally disagreed with the risk analysis in the Canadian case of *Bazley*, which their Honours state is a 'radical departure from what hitherto has been accepted as an essential aspect of the rules about vicarious liability. That is, the requirement that the wrongdoing be legally characterised as having been done in the course of employment'.[94] Further, their Honours argue that the rules 'governing vicarious liability exhibit the difficulty they do because they have been extended and applied as a matter of policy rather than principle'.[95]

Kirby J supports the direction of the law of vicarious liability as advanced in *Bazley* and *Lister* as necessary, due to the increase of reported instances of sexual and physical abuse of children by 'employees of organisations to

89 *NSW v Lepore* [2003] HCA 4, [74].
90 Ibid [78]. A new trial was ordered with non-delegable duty, which was relied upon at the trial, no longer being available. It was also found that the use of vicarious liability should only be considered if the relevant conduct 'amounted to excessive or inappropriate chastisement', thus re-enforcing the classic use of the Salmond test. At [79].
91 *NSW v Lepore* [2003] HCA 4, [128].
92 Ibid [166].
93 Ibid [240].
94 Ibid [223].
95 Whereas McLachlin J reasons that 'a focus on policy is not to diminish the importance of legal principle' rather policy lends certainty to the law and guides future application of the law and the best way to 'enduring principle may well lie through policy'. *Bazley v Curry* [1999] 2 SCR 534 [31].

whose care the parents and guardians of the children have entrusted them'.[96] The High Court should clarify the correct legal approach and establish the applicable principles because 'that is the obligation that the House of Lords and the Supreme Court of Canada accepted…' and 'This Court should do no less'.[97] In disagreeing with Callinan J and in arguing that the Salmond test is 'merely the starting point from which the law has developed', Kirby J looks to the benefits of the Canadian and English decisions.[98] He examines the 'close connection test' and observes that the way to determine if there is a relevant connection between the enterprise and the employee's conduct, is to comply with the risk analysis, as adopted in the Canadian and English cases.[99] In summarising his support for the development of the law of vicarious liability in Canada and England, Kirby J argues that it is not 'really feasible to apply the common law as stated in Salmond's first edition … as if decades of judicial decision … had not occurred'.[100] Kirby J also argued that the Court should not 'ignore the more recent authority … [of] the Supreme Court of Canada', and 'it is impossible to turn the vicarious liability clock backwards'.[101]

Callinan J rejects the Canadian approach by arguing that vicarious liability of an employer for its employee's sexual assaults are '… gross and improper departures from the proper performance of a teacher's duties'. To impose liability on the employer, in Callinan J's opinion, is therefore 'beyond anything that it should reasonably bear'.[102] His Honour unconditionally disagrees with the use of 'close connection' test, as adopted in *Lister*, because 'deliberate criminal conduct … is the antithesis of a proper performance of the duties of an employee ... and cannot and should not be regarded as being "inter-woven" with proper and dutiful conduct, let alone inextricably so'.[103]

SUMMARY – *LEPORE*

With Canada and the UK redefining the vicarious liability landscape in this area, the High Court in *Lepore* has missed the opportunity of providing '… a just and practical remedy to people who suffer as a consequence of wrongs perpetrated by an employee' and a 'deterrence of future harm'.[104]

Despite Gleeson CJ and Gaudron and Kirby JJ, finding that school authorities could be held vicariously liable for the sexual crimes of its employees, they left such a finding open. Gummow, Hayne and Callinan JJ did not accept that school authorities could be held vicariously liable for their teachers' sexual assaults. These decisions in *Lepore* not only fail to provide judicial guidance in the area of vicarious liability and sexual assaults of pupils by teachers, they further confuse the law around non-delegable duty and vicarious liability.[105]

96 *NSW v Lepore* [2003] HCA 4, [276].
97 Ibid [284].
98 Ibid [309] – [310].
99 Ibid [315].
100 Ibid [331].
101 Ibid [331].
102 Ibid [342].
103 Ibid [345].
104 The policies behind vicarious liability as cited in *Bazley v Curry* [1999] 2 SCR 534 [30 & 32]
105 See generally Prue Vines, 'New South Wales v Lepore; Samin v Queensland; Rich v Queensland: Schools' Responsibility for Teachers' Sexual Assault; Non-Delegable Duty and Vicarious Liability' (2003) 27 *Melbourne University Law Review* 612, 626; Jane Wangmann, 'Liability for Institutional Child Sexual Assault: Where does Lepore leave Australia?' (2004) 28 *Melbourne University Law Review* 169, 197; Steven White and Graeme Orr, 'Precarious Liability: The High Court in *Lepore*, *Samin* and *Rich* on School Responsibility for Assaults by Teachers' (2003) 11 *Torts Law Journal* 108.

The significance of *Lepore* is far reaching. It remains uncertain and unclear whether Australian students of religious, secular, private or state schools and whether day, boarding or residential schools are able to employ arguments based on vicarious liability or non-delegable duty to seek redress for sexual assaults by employees of those schools. This, therefore, deters victims from using these causes of action to obtain redress. See chapter 8 for a discussion on recommendations by the Victorian Parliamentary Inquiry in addressing this gap in the law.

4.2.4 The Ellis defence

The other impediment for victims of Catholic clergy sex crimes seeking justice through the civil courts is what is known as the Ellis defence. This very powerful legal defence leaves victims of clergy sex crimes without an appropriate legal entity to sue, particularly in relation to historical sex crimes.

In the case of *Ellis*,[106] the plaintiff alleged an assistant parish priest sexually assaulted him when he was an altar boy in the Bass Hill parish between 1974 and 1979. Proceedings commenced in the NSW Supreme Court in 2004.

The plaintiff sued three Defendants. The first Defendant was Cardinal Pell, Archbishop of Sydney, for and on behalf of the Roman Catholic Church in the Archdiocese of Sydney. Pell was appointed Archbishop of Sydney in 2001. The second Defendant was the Trustees of the Roman Catholic Church for the Archdiocese of Sydney (the Trustees), and the third Defendant was the alleged abuser, Father Duggan, a priest and a monk in the Order of Saint Benedict.[107] Father Duggan died in 2004 and the plaintiff discontinued proceedings against him and his estate. The Trustees of the Roman Catholic Church for the Archdiocese of Sydney is a statutory body corporate with perpetual succession established under the *Roman Catholic Church Trust Property Act 1936* (NSW).

At first instance, liability against the Archbishop was alleged under various grounds in tort, both directly and vicariously, and for a breach of fiduciary duty in equity. The plaintiff argued that the Archbishop had extensive control over the appointment, removal and day-to-day activities of an assistant parish priest. Ellis invoked the legal concepts of corporation sole as the basis for obtaining damages and compensation against the Archbishop. Liability against the Trustees was alleged under various grounds in tort both directly and vicariously.

The plaintiff's claim was statute barred in 1985[108] (see chapter 1) and an extension of time was sought as against the Archbishop and the Trustees. At first instance, an extension was granted as against the Trustees, but not as against the Archbishop, because the trial Judge held that there was no basis upon which the plaintiff's cause of action in tort could be maintained against the Archbishop either personally or as against a representative of members of the Roman Catholic Church in the Archdiocese of Sydney.

At first instance, the extension of time was granted in relation to the Trustees because it was held that there was an arguable case that the Trustees were liable in tort because the Trustees constituted the entity that the Roman Catholic Church in the Archdiocese of Sydney adopted as its permanent

106 *Trustees of the Roman Catholic Church v Ellis and Another* [2007] NSWCA 117.
107 Archbishop Freeman, who was in office between 1971 and 1983, appointed Duggan to his position at Parish Hill. Archbishop Freeman acted in consultation with the Archdiocesan Council, which is a separate body to the Trustees.
108 The plaintiff turned 18 years of age in 1979 with his claims becoming statute barred in 1985.

corporate entity. The Trustees appealed the orders of the trial Judge and the plaintiff cross-appealed.[109] On appeal in the NSW Court of Appeal, Mason P[110] upheld the Trustee's appeal, with costs, and dismissed the cross-appeal by Ellis, with costs.[111]

In relation to the alleged vicarious liability of the Archbishop and the Trustees, Mason P maintains that despite there being a factually and legally arguable case that Father Duggan's superiors might 'on some basis be vicariously accountable for his [Duggan's] intentional torts',[112] the relationship between members the Catholic Church and its individual office holders is too remote to attract vicarious liability[113] and the relationship between an assistant parish priest and the 'members' of the Catholic Church as a whole, is 'too slender and diffuse' to attract vicarious liability.[114] There was no evidence that Duggan was either engaged or employed by either the Trustees or the Archbishop, let alone by the 'members' of the Church in the Archdiocese during the relevant years of 1974-1979.[115]

In relation to the direct liability of the Trustees, Mason P held that there was no evidence that the Trustees were involved in pastoral activities at the time of the alleged torts and they were 'well removed' from matters relating to appointing priests and managing and disciplining priests around issues of sexual assaults. Rather, the Trustees were only involved in matters such as acquisition and development of property and legal matters around the purchase, sale and leasing of Church property.[116]

In relation to the direct liability of Archbishop Pell for the acts of his predecessors, it had to be determined whether or not the Archbishop is a corporation sole at common law.[117] There is also the 'ecclesiastical corporation sole' which emerged in the late Middle Ages in England,[118] and which allows the transmission of liabilities in tort across time and from one office holder to another. Mason P rejected the submission[119] of the plaintiff that Archbishop Pell 'is a legal person who *eo nomine* [by that name] is liable for the obligations of his predecessor because perpetual succession (with attendant liability in tort) is conferred upon that office'.[120] Mason P found that there is no statute or Crown grant constituting the Archbishop of Sydney a corporation sole[121] and 'there is nothing to suggest that Roman Catholics in Australia have ever conducted their property affairs on the basis of the Bishop of a Diocese being a corporation sole at common law'.[122]

109 *Trustees of the Roman Catholic Church v Ellis and Another* [2007] NSWCA 117.
110 With whom Ipp JA and McColl JA, agreed.
111 The appellate court examined multiple legal concepts and issues including vicarious liability in relation to sexual abuse by clergy; the nature of 'Church' membership; the tort liability of unincorporated associations; representative proceedings; the liability of corporate trustees; the legal status of 'corporation sole' in relation to the Archbishop, and, estoppel in relation to the Archbishop and the Trustees.
112 *Trustees of the Roman Catholic Church v Ellis and Another* [2007] NSWCA 117 [33]
113 Ibid [53].
114 Ibid [54].
115 Ibid [60].
116 Ibid [140] & [141].
117 A corporation sole is a corporation consisting of one person, and that person's successors to a particular position, where that person constitutes an artificial legal person in which title to property could be vested. Butterworths, *Concise Australian Legal Dictionary* (1997) 92.
118 *Trustees of the Roman Catholic Church v Ellis and Another* [2007] NSWCA 117 [158]
119 Ibid [154].
120 That is, the Plaintiff submitted that the Archbishop was a corporation sole, 'in which are vested the obligations to pay damages and/or equitable compensation that are sued upon, being obligations putatively incurred by a predecessor in the office'.
121 *Trustees of the Roman Catholic Church v Ellis and Another* [2007] NSWCA 117 [162].
122 Ibid [181].

The consequences of this decision are far reaching. Not only is it impossible to sue the property trust that holds and manages the Catholic Church's vast property and wealth, but the Catholic Church as a body is not a separate legal entity that can be sued in its own right. This is particularly significant because an offending priest, if alive, (and having taken a vow of poverty) is unlikely to have any funds. As Ellis' counsel, in his submission to the High Court, which ultimately refused leave to appeal, said:

> If the Court of Appeal's decision is correct, then the … Church in NSW and the ACT has so structured itself as to be immune from suit other than in respect of strictly property matters for all claims of abuse, neglect or negligence, including claims against teachers in parochial schools … That immunity, they say, extends to the present day in respect of the parochial duties of priests. We say such an immunity would be an outrage to any reasonable sense of justice and we say it is wrong in law.[123]

POST-ELLIS

The *Ellis* decision was applied in a 2011 Supreme Court of New South Wales case in which *PAO*[124] and other plaintiffs had taken action against the Trustees of the Roman Catholic Church for the Archdiocese of Sydney (the Trustees) and individual members of the Patrician Brothers. The plaintiffs argued that the Trustees 'operated, managed and controlled' the Patrician Brothers Primary School in Granville.[125] The court at first instance refused applications by the Trustees to strike out or summarily dismiss each of five proceedings against the Trustees.[126] On appeal to the Supreme Court, Hoeben J, applying the *Ellis* decision, disallowed the appeal and dismissed each matter.[127] He said: '… the Plaintiffs' cases against the Archdiocese Trustees are hopeless and should not be permitted to go further … there is no triable issue so far as they are concerned …'.

4.3 Recent developments

As Kirby J argued, the law of vicarious liability in Australia needs redefining and reshaping to adequately deal with the increase of reported instances of sexual and physical abuse of children by 'employees of organisations to whose care the parents and guardians of the children have entrusted them'.[128] The High Court in *Lepore*, though, failed to do this. It missed the opportunity to bring vicarious liability into the modern era by failing to apply the international legal positions and arguments as advanced in *Bazely* and *Lister*.

This next section examines three recent UK cases. One finds a Catholic Archdiocese vicariously liable for clergy sex crimes. Another makes a ruling that the relationship between a Bishop and his priest is one that is akin to an employment relationship. The third case finds that not only the employment relationship between a priest and his Bishop is akin to employment, but also that dual vicarious liability can attach to two Defendants.

123 Transcript of Proceedings, *Ellis v The Trustees of the Roman Catholic Church for the Archdiocese for Sydney* [2007] HCA Mr Morrison, 16 November 2007.
124 *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 (19 October 2011).
125 Ibid [4].
126 Ibid [5].
127 Ibid. [113].
128 *NSW v Lepore* [2003] HCA 4, [276].

4.3.1 Life after *Lister:* the 'Catholic cases' in the UK

Although the case of *Lister* found an educational authority liable for the sexual assaults of pupils by its employee, it was not until very recently that the England and Wales Court of Appeal expanded the tort principle of vicarious liability with a landmark decision resulting in a Roman Catholic Archdiocese being held vicariously liable for child sexual offences by one of its priests.

In the case of *Maga*,[129] the Birmingham Archdiocese of the Roman Catholic Church was found to be vicariously liable for the sexual assaults by one of its priests, Father Clonan, against a non-Catholic boy in the priest's parish. This case is noted for the rather curious acceptance, or concession, by the Archdiocese that an employment relationship *did* exist between the Archdiocese and the priest (although only for the purposes of this case and not as a general admission that a priest is, or is in the same position as, an employee of the Archdiocese).[130] This position of the Archdiocese could only make sense if viewed in light of the Archdiocese's argument that even if Clonan were treated as its employee, the 'Archdiocese should not, as a matter of law, be vicariously liable for his abuse of the claimant'.[131]

Maga, and its 'predecessors', *Bazely* in Canada and *Lister* in the UK did not, therefore, have to contend with the first limb of the vicarious liability test of whether there was an employment relationship. Rather, the main question for the Court was the issue of whether the criminal acts of the employee were within the course or scope of employment.

Conversely, *JGE*,[132] a 2011 UK test case, involved the determination of a preliminary, or pre-trial, issue of whether the Trustees of the Portsmouth Roman Catholic Diocesan Trust (standing in the shoes of the Bishop) and the alleged paedophile priest were in an employment relationship. *Various Claimants*[133] also determined this question in 2012, as well as deciding whether two Defendants can be held vicariously liable. The discussion of these two cases follows that of *Maga*.

MAGA

Maga, a non-Catholic, was sexually assaulted as a boy by a priest, Father Clonan. This occurred over many months in 1976.[134] Father McTernan was Clonan's superior and it was alleged in 1974 that the parents of another boy complained to Father McTernan about Clonan sexually assaulting their son. Father McTernan did not act on this complaint. Involving himself with the youth of the parish, Father Clonan set up a disco, a social club and other clubs and managed several football teams. He also created a community centre within the surrounds of the Church.[135] Maga was invited to the discos by the

129 *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256.
130 Ibid [36].
131 Ibid.
132 *JGE v The English Province of Our Lady of Charity and The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2011] EWHC 2871 (QB).
133 *The Catholic Child Welfare Society and others (Appellants) v Various Claimants (FC) and the Institute of the Brothers of the Christian Schools and others (Respondents)* I [2012] UKSC 56.
134 Clonan remained working in the parish until 1992 when he suddenly disappeared, after his multiple sexual assaults of multiple boys became public knowledge. Apparently he initially went to Ireland but then to Australia, where he seemed to have vanished. Father Clonan's mother and sister lived in Australia at that time.
135 Clonan was considered rather unusual in that he also ran a construction company business and owned at least two houses in the Coventry region. He drove a red sports car, a Triumph Stag, which attracted the attention of the young boys of the parish. Clonan also paid boys for doing odd jobs around the Church and presbytery and for cleaning his car and brushing the snooker table.

priest and ended up doing odd jobs around the presbytery.[136] Maga reported this to the police in November 2000 and in July 2006 a statement of claim was issued which used vicarious liability and negligence as the bases for liability.

In relation to the claim based on vicarious liability, and after considering a string of cases since, and including, *Lister*,[137] the trial Judge, Jack J, concluded that the Birmingham Archdiocese was not vicariously liable for the sexual assaults of Clonan and found that although youth work was part of Clonan's employment as a priest, and this role as a priest 'gave him the opportunity to abuse the claimant', it was not, by itself, enough to find the Archdiocese liable for the sexual assaults.[138]

Jack J reasoned that because Clonan's relationship with the claimant was founded on the chores, or jobs, that the claimant did for the priest (cleaning the car, ironing his clothes and so on), such employment of the priest was not a 'priestly activity' and had nothing to do with bringing or drawing the claimant 'into the activities of the Church … and was not part of evangelisation'.[139] Upon this basis, the trial Judge dismissed the claim based on vicarious liability.

In determining the closeness of the connection between Clonan's employment as a priest of the Church and the sexual assaults, the England and Wales Court of Appeal, through the leading judgment of Lord Neuberger MR, looked at several factors, which, when viewed as an amalgam, did persuade the Appeal Court that there was a sufficiently close connection to 'render it fair and just to impose vicarious liability for the abuse on his employer, the Archdiocese'.[140] These factors, or considerations, were:[141]

1. Clonan had a 'special role' involving trust and responsibility. His clerical garb identified him as a priest and this 'special role' and his 'moral authority' were enabled by his employment as a priest of the Archdiocese.

2. Clonan had a duty to 'evangelise' Catholics and non-Catholics alike and was 'obliged to befriend non-Roman Catholics ... to gain and be worthy of their trust'. As such, the priest was 'ostensibly performing his duty as a priest employed by the Archdiocese'.

3. When Clonan was 'effectively grooming' the young claimant, he was ostensibly carrying out one of the functions of his priestly duties – that of youth work.

4. The relationship with the claimant developed whilst the claimant was at the disco, which was on Church property. That is, Maga was 'drawn into the relationship through the medium of a Church-organised function'.

5. The claimant did unpaid work by cleaning the disco and other chores for Clonan. That is, the priest's role 'as priest in the Archdiocese gave him the

136 Maga also alleged sexual assault whilst he was at other special schools, all owned by one of the Defendants in this matter, Pitt House Schools Limited. There were other complaints about Clonan sexually assaulting many other boys and, following some publicity, the Birmingham Archdiocese released a statement in December 2000 stating that Clonan was a danger to children.
137 *Dubai Aluminium Co. Ltd.v Salaam* [2002] UKHL 48; *Mattis v Pollock* [2003] EWCA Civ 887; *Bazley v Curry* (1999) 174 DLR (4th) 45; *Jacobi v Griffiths* (1999) 174 (4th) DLR 71; *Gravil v Caroll* [2008] EWCA Civ 689.
138 *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256 [41] in citing the trial judgment of Jack J.
139 Ibid 256 [42].
140 *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256 [44].
141 Ibid [45]-[50]

status and opportunity to draw the claimant further into his sexually abusive orbit by ostensibly respectable means connected with his employment as a priest of the Church'.

6. The claimant also worked at the request of Father Clonan in the presbytery, which was property owned by the Archdiocese.

7. The opportunity that Clonan had to spend time alone with the claimant in the presbytery, and sexually assault him, arose from Clonan's role as a priest employed by the Archdiocese.

Lord Neuberger MR applies the test in *Jacobi*, discussed earlier, and published on the same day as *Bazley*, to establish vicarious liability.[142] That is, a claimant must demonstrate there was 'a material increase in the risk of harm occurring in the sense that the employment significantly contributed to the occurrence of the harm'.[143]

Lord Neuberger MR also employed five factors used in *Jacobi* to find that there was a material increase in the risk of the sexual assaults occurring, in the sense that Clonan's employment did significantly contribute to the sexual assaults of the claimant.[144] Four of these five factors applied to a significant degree, in that Clonan had status and his priestly functions (including that of evangelising) often involved one-on-one contact. He also had priestly functions in relation to the young and there was an apparent absence of any supervision by the head priest.

Longmore LJ, with whom Lord Neuberger MR agreed, and drawing on *Bazley* and *Lister*, reasoned that there was a close connection between the sexual assaults upon Maga and the authorised duties of Father Clonan.[145] Regardless of the general policy considerations, where there is no 'universal agreement as to what that policy is',[146] Longmore LJ argues that the Archdiocese is a Christian organisation 'doing its best to follow the precepts of its Founder'. It also concerns itself with the vulnerable and the oppressed and it claims to be 'the authoritative source of Christian values'.[147] Combined with the fact that priests are generally revered, they wear the clerical garb and are called 'Father', it is difficult to 'think of a role nearer to that of a parent than that of a priest'.[148] Clonan's priestly status and authority, therefore, were enough to provide the close connection between the sexual assault and Clonan's authorised duties,[149] and this connection was 'sufficiently strong to fit squarely within Professor Salmond's requirements for vicarious liability as approved in *Lister*'.[150]

Lady Justice Smith agreed with both Law Lords.

142 Ibid [53].
143 *Jacobi v Griffiths* [1999] 2 SCR 570; (1999) 174 DLR (4th) 71 [79].
144 'The opportunity afforded' by the Archdiocese to Father Clonan to 'abuse his power'; 'the extent to which' the sexual abuse of the claimant 'may have furthered the [Archdiocese's] aims'; 'the extent to which the [sexual abuse] was related to … intimacy inherent' in the functions of the Archdiocese of the Church; 'the extent of the power conferred on [Father Clonan] in relation to the [claimant]; the vulnerability of potential victims to the wrongful exercises of [Father Clonan's] power'. *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256 [53].
145 *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256 [84].
146 Ibid [81].
147 Ibid [82].
148 Ibid [83].
149 Ibid [84].
150 Ibid [88].

JGE [151]

The law in relation to vicarious liability and the Catholic Church, in particular the employment relationship, presents an additional legal hurdle for the victim of Catholic clergy sexual abuse. According to the Catholic Church, Canon Law dictates the terms of the relationship between a priest and his Bishop, such that there is no employment relationship. This position has been challenged recently in the UK case, *JGE*.

The Claimant in this case, a 47-year-old woman, alleged she was sexually abused and raped by Father Baldwin, now deceased, whilst she was resident at the Firs Children's Home in Waterlooville in Hampshire which was operated and managed by the English Province of Our Lady of Charity (the First Defendants) between May 1970 and May 1972. The Claimant was pursuing damages for personal injury. These matters were not, however, part of this determination, which addressed a preliminary issue of whether the Second Defendants (the Trustees of the Portsmouth Roman Catholic Diocesan Trust) might be vicariously liable for the alleged torts of Father Baldwin. From hereon, the Second Defendants will be called the Defendants and the Trustees of the Portsmouth Roman Catholic Diocesan Trust will be understood to be standing in the shoes of the Bishop of Portsmouth.[152]

Unlike *Maga*,[153] in which the Birmingham Archdiocese accepted that Father Clonan should be treated as its employee (but only for the purposes of that case), the Defendant in *JGE* 'hotly contested'[154] there was an employment relationship between Father Baldwin and the Defendant. In fact, it was argued that the relationship was not even 'akin to employment'.[155]

MacDuff J discussed the questions to be decided in relation to the two limbs of vicarious liability. These questions were, first: Was the relationship between Father Baldwin and the Defendant a classic employment relationship to which the principles of vicarious liability can apply? And, second: Were the alleged wrongs or criminal acts of Father Baldwin within the course or scope of his employment (or other relationship)?[156]

Whilst MacDuff J was to determine the first limb of this test in this pre-trial matter, His Honour, in citing a 2010 UK Court of Appeal case,[157] argued that, in doing so, '…it is a judgment upon a synthesis of the two (limbs) which is required'.[158] In many senses the definition of 'employment', or the existence of an 'employment relationship' between a Catholic priest and his Bishop, is dealt with for the first time (in the UK) in this case.

The Defendant in this matter argued that in accordance with the precepts of Canon Law, Father Baldwin was a 'holder of office' (rather than an employee of the Bishop) and he was 'appointed' by the Diocese with terms and conditions derived only from Canon Law. There was no formal employment

151 *JGE v The English Province of Our Lady of Charity and The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2011] EWHC 2871 (QB).
152 Ibid [1].
153 *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256.
154 *JGE v The English Province of Our Lady of Charity and The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2011] EWHC 2871 (QB) [14].
155 Ibid [5].
156 Ibid [7].
157 *Various Claimants, the Catholic Child Welfare Society and others v The Institute of the Brothers of the Christian Schools and others* [2010] EWCA Civ 1106 per Hughes LJ [7].
158 *JGE v The English Province of Our Lady of Charity and The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2011] EWHC 2871 (QB) [7].

contract between the Bishop and Baldwin; Baldwin could not be dismissed by the Bishop; the Bishop had little control or supervision over Baldwin, and Baldwin did not receive a wage, rather remuneration came mainly from the 'collection plate'.[159] Expert evidence from two Canon lawyers agreed that the requirements of an appointed priest are 'not akin to those seen in situations of managerial supervision in secular employment'.[160] MacDuff J did not disagree that such differences existed between the formulae for Canon Law employment, or appointment, and secular law employment.

In determining whether vicarious liability could nonetheless attach to the relationship that did exist between Baldwin and the Bishop, and one that necessarily differed in fundamental ways from a traditional employment relationship, MacDuff J looks predominantly to the Canadian case of *Doe v Bennett* and others.[161] This case was decided a couple of years after the UK case of *Lister*, in which the earlier Canadian cases of *Bazley* and *Jacobi* were cited, completing the trans-Atlantic circle of judicial approval. Bennett, a Catholic priest in Newfoundland, sexually assaulted many boys in several parishes over a period of nearly 20 years. The plaintiffs-respondents sued, inter alia, the Roman Catholic Episcopal Corporation of St George's (RCECS) and the Roman Catholic Church (the Church). The question for the Court was whether RCECS, which was equated with the Bishop, was vicariously liable. The trial Judge found the RCECS was vicariously liable and dismissed the claim against the Church. A majority of the province Court of Appeal found the RCECS directly liable, but not vicariously so. The dismissal of the action against the Church was upheld.[162]

At the Canadian Court of Appeal, Chief Justice McLachlin found that the relationship between RCECS (the Diocesan enterprise) and Bennett was sufficiently close. RCECS substantially enhanced the risk that led to the sexual assaults and it provided Bennett (the Priest) with 'great power' in relation to vulnerable victims and with the opportunity to abuse that power. The diocesan relationship between the Bishop and Bennett was not only spiritual, but also temporal. Bennett took a vow of obedience to his Bishop who also exercised extensive control over Bennett, including the powers of assignment, removal from his post and the power to discipline him. That is, the relationship was one that was akin to an employment relationship.[163]

It was found there was strong and direct connection between the conduct of RCECS and the sexual assaults. In upholding the dissenting view in the lower Court of Appeal, the RCECS was found to be vicariously liable and the appeal by the RCECS was dismissed.[164]

Returning to *JGE*, as much as there were multiple factors that did not reflect a formal contract of employment between Baldwin and the Bishop, MacDuff J argues there were other crucial features of their relationship that needed to be recognised. These were that Baldwin was appointed by and on behalf of

159 Ibid [29].
160 Ibid.
161 *John Doe v Bennett* [2004] 1 SCR 436.
162 Ibid [1].
163 Ibid [27].
164 Ibid [18] & [32]. Despite this finding, the Supreme Court of Canada did not rule on the liability of the Catholic Church. McLachlin CJ said that 'Without suggesting that the full organisational structure of the Roman Catholic Church and its relations with its various constituent organisations must be apparent on the evidence before a finding of Church liability could be made, I am satisfied that the record before us is too weak to permit the Court in this case to responsibly embark on the important and difficult question of whether the Roman Catholic Church can be held liable in a case such as this'. *Doe v Bennett and others* [2004] ISCR 436 [36].

the Defendants in order to do the work of the Defendants and to undertake the ministry on behalf of the Defendants for the benefit of the Church. Baldwin was given the full authority of the Defendant to fulfill that role and he was provided with the premises, the pulpit and the clerical robes. He was directed into the community with that full authority and was given free rein to act as representative of the Church and he had been trained and ordained for that purpose. He had immense power handed to him by the Defendants, and, finally, it was the Defendants who appointed him to the position of trust that (if the allegations were proven) he so abused.[165]

MacDuff J reasoned that the usual features of an employment contract[166] have relevance in a particular context, but 'not to the question of whether, in justice, the Defendants should be responsible for the tortious acts of the man appointed and authorised by them to act on their behalf'.[167] MacDuff J found that the relationship between Baldwin and the Bishop was one to which vicarious liability could attach, even though it differed from a typical employer/employee relationship. The above crucial features, the requirement that the two limbs of the vicarious liability test be viewed as an amalgam, and the 'infinitely extendable' nature of the doctrine of vicarious liability,[168] securely underpinned this finding.[169]

MacDuff J also employed the seven reasons used in the second limb of the test in *Maga*, as above, to stage one of the test in *JGE*, thus synthesising the two.

> The activities of Father Baldwin had been set in motion by the Defendants in pursuance of a relationship into which the Defendants had entered for their own benefit. It was their empowerment of the priest which materially increased the risk of sexual assault, the granting of the power to exploit and misuse the trust which the Defendants had granted to him. It was the Defendants who had introduced the risk of wrongdoing.[170]

The finding in *JGE* also mirrors the reference by Longmore LJ in *Maga* to the 'position' of the priest and not his employment.[171] Further, the claimant in this matter suggested that it was the fact that the wrongdoer was a priest that was the relevant factor and not that he was 'employed' as a priest.[172]

This decision was appealed by the Trustees of the Portsmouth Roman Catholic Diocesan Trust and was heard by Lord Justices Ward, Tomlinson and Davis of the Civil Division of the Court of Appeal.[173] In the leading judgment, Ward LJ questioned the efficacy of trying the preliminary issue (of whether Baldwin was an employee of the Bishop) in isolation.[174] That is, without viewing it in conjunction with the second stage of the vicarious liability test, whether Baldwin's acts were within the course of his employment. Each stage

165 *JGE v The English Province of Our Lady of Charity and The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2011] EWHC 2871 (QB) [35].
166 Formal agreement with terms and conditions and manner of remuneration.
167 *JGE v The English Province of Our Lady of Charity and The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2011] EWHC 2871 (QB) [36].
168 Ibid [37].
169 Ibid [42].
170 Ibid [38].
171 Ibid [20].
172 Ibid [20].
173 *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938.
174 Ibid [6].

of the test was fact sensitive, said Ward LJ, and ultimately, 'It is a judgment of the synthesis of the two [stages] which is required'.[175] To effectively determine the issue before the court, the nature of the relationship between the Bishop and the priest 'must have some effect on the ambit of the acts which are within the scope of that relationship'.[176]

Ward LJ was completely satisfied that there was no contract between Baldwin and the Bishop. 'The appointment of Father Baldwin by Bishop Warlock was made without any intention to create any legal relationship between them … their relationship was governed by the Canon Law, not the civil law … Father Baldwin was not the servant nor a true employee of his Bishop'.[177] Such a relationship cannot attract vicarious liability of the Bishop. But Ward LJ asked whether the doctrine of vicarious liability could be extended such that the relationship between the Bishop and the priest could be one that is *akin* to employment, thus making the Bishop vicariously liable for the priest's alleged wrongs. To determine this question, Ward LJ considered, first, McLachlan, CJ's finding in the Canadian case of *Doe v Bennett and others*,[178] that, inter alia, the relationship between a Bishop and his priest can be one which is *akin to an employment relationship*.[179] Second, several policy considerations that were relied upon in *Maga*, were considered by Ward LJ to be relevant and necessary in determining the question before the Court of Appeal in *JGE*.[180]

> … it may be necessary to have in mind the policy behind the imposition of vicarious liability. That is difficult because there is by no means universal agreement as to what that policy is. Is it that the law should impose liability on someone who can pay rather than someone who cannot? Or is it to encourage employers to be even more vigilant than they would be pursuant to a duty of care? Or is it just a weapon of distributive justice?[181]

According to Ward LJ, there is no single policy consideration that 'provides a complete answer for the imposition of vicarious liability'; rather, there must be a combination of policy considerations.[182] Finally, Ward LJ looks to legal principle as another guiding factor in the determination of whether vicarious liability should attach to the Bishop for Baldwin's torts, because an answer to such a question 'should not be a mere expedient reaction to the particular problem confronting the court at the time'.[183] To address legal principle, Ward LJ had to be satisfied that the relationship between Baldwin and the Bishop was one that is akin to employment (considering it is established that the relationship is not one of employer and employee). This would depend on whether their relationship is sufficiently close, so that, it is then fair and just to impose liability on the Bishop.

175 *Various Claimants v The Catholic Child Welfare Society and the Institute of Brothers of the Christian Schools & ors* [2010] EWCA Civ 1106 at [37] (Hughes LJ) cited in *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938 [6].
176 *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938 [6].
177 Ibid [30].
178 [2004] 1 SCR 436.
179 *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938 [33].
180 Ibid [50]-[51].
181 *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256 [81].
182 *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938 [53].
183 Ibid [56].

Ward LJ therefore poses three questions. First: 'Can the law be extended to relationships that are akin to employment?' Second: 'Is the close connection test appropriate?' Third: 'Is it enough that the result is fair and just?'

In adopting Professor Richard Kidner's four policy signposts for vicarious liability,[184] Ward LJ considered: first, the issue of how much 'control' the Bishop had over the Baldwin. Traditionally, this involved determining whether the employer can control not only what is done, but also how it is done. Ward LJ concluded that this traditional test of 'control' was now an unrealistic guide, as 'times had changed',[185] and it should be viewed more in terms of whether Baldwin is 'accountable' to the Bishop for the way he carries out his duties so as to enable the Bishop 'to supervise and effect improvements in [Baldwin's] performance and eliminate risks of harm to others'.[186]

Second, the 'organisation' test would consider how central Baldwin's torts were to the activity of the organisation (the Catholic Church), the main one of which was to spread the word of God, and Baldwin had a central role in meeting that goal. Ward LJ agreed with Kidner when he said: 'The more relevant the activity is to the fundamental objectives of the business, the more appropriate it is to apply the risk to the business'.[187]

Third, the 'integration' test asked whether Baldwin's role was wholly integrated into the organisational structure of the Church's enterprise. He decided that it was. Fourth, the 'entrepreneur' test failed as Ward LJ asked whether Baldwin was more like an independent contractor than an employee. Ward LJ found that Baldwin was in a relationship with his Bishop that was close enough and so *akin to an employer/employee relationship*, as to make it just and fair to impose vicarious liability.[188] It was 'just' because it struck a balance between the unfairness to the employer of imposing strict liability and the unfairness of leaving the victim without a full remedy for the harm caused by the Bishop in managing his Diocese in a way which gave rise to that harm even when the risk of that was not reasonably foreseeable.[189]

Davis LJ, in making up the majority, also dismissed the appeal by the Trustees of the Portsmouth Roman Catholic Diocesan Trust. As with Ward LJ, it was the Lord Justice's view that the relationship between Baldwin and his Bishop was one that was sufficiently *akin to that of employment*, but his reasons differed. Davis LJ said that the Bishop did have a sufficient level of control over Baldwin in his capacity as parish priest in that, under Canon Law, the Bishop had the power to remove or transfer Baldwin against his will or to deprive Baldwin of his position as a parish priest. He could also, under his own motion, suspend Baldwin.[190]

Davis LJ also considered that Baldwin, as a parish priest, was appointed and entrusted to further the Bishop's aims and purposes (in perpetuating the works of Christ in the Diocese) which included visiting and promoting the

184 R Kidner, 'Vicarious Liability: for whom should the 'employer' be liable?' (1995) 15 *Legal Studies* 47 as cited in *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938 [72].
185 *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938 [65].
186 Ibid [76].
187 Ibid [77].
188 Ibid [81].
189 Ibid.
190 Ibid [128].

wellbeing of parishioners, of which JGE was one.[191] That is, the appointment by the Bishop of Baldwin was designed to further that overall aim.[192] As such, vicarious liability could be attached to the Bishop, to produce a result that is just and reasonable. Interestingly, Davis LJ relied solely upon the provisions of Canon Law that governed the issues of control by the Bishop and the furtherance of the aims of the Bishop.[193]

Leave for the Trustees of the Portsmouth Roman Catholic Diocesan Trust to further appeal this decision was refused. The decision of the Court of Appeal in *JGE* potentially paves the way for victims of Catholic clergy sexual abuse in the UK to sue Catholic Dioceses and Religious Orders. It has put to rest, for now at least, the Church's argument that vicarious liability cannot be attached in these cases because there is no employment relationship between the priest and his Bishop (or the Trustees of the Diocesan Property Trust). But what was previously an uncontested position, that there is no employment relationship, has been circumvented and superseded by the concept of a relationship that is *akin to employment*.

VARIOUS CLAIMANTS

Various Claimants[194] is the third UK case addressing similar issues to *Maga* and *JGE*. It expands the doctrine of vicarious liability in that it not only finds a Catholic religious body vicariously liable in that the relationship between the offending Brothers and the religious body was akin to employment, but that vicarious liability can attach to two Defendants in the one matter. That is, there was a finding of dual vicarious liability.

The Court at first instance dealt with two groups of Defendants, the Catholic Child Welfare Society and others ('the Managers') and the Institute of the Brothers of the Christian Schools and others ('the Institute'). The Institute is an unincorporated association of lay brothers and was not sued in it own name, but in the name of its trustees. Hawkesbury J was asked to rule on a preliminary issue as to which body or bodies might bear additional vicarious liability.[195] Claims were brought by 170 men in relation to alleged sexual and physical abuse by teaching Brothers who were members of the Institute and taught at St Williams school ('the School') between 1952 and 1992. St Williams was a residential institution for needy boys in Yorkshire.[196] The alleged offenders at the School included Institute Brothers who were teachers and the headmaster; lay members of the teaching staff; non-Institute social work staff; domestic staff; a volunteer worker and a chaplain to the school.[197]

The School was founded in 1865 by a group of Catholic benefactors as a reformatory school for boys. In 1933 it became a school for boys who were convicted of custodial offences. In 1973, it became an assisted community home for children and was managed by the Middlesbrough Diocesan Rescue

191 Ibid [129].
192 Ibid [130].
193 Ibid [131].
194 *The Catholic Child Welfare Society and others (Appellants) v Various Claimants (FC) and the Institute of the Brothers of the Christian Schools and others (Respondents)* I [2012] UKSC 56. On appeal from [2010] EWCA Civ 1106.
195 *Various Claimants and The Catholic Child Welfare Society and others v The Institute of the Brothers of the Christian Schools and others* [2010] EWCA Civ 1106.
196 *The Catholic Child Welfare Society and others (Appellants) v Various Claimants (FC) and the Institute of the Brothers of the Christian Schools and others (Respondents)* I [2012] UKSC 56 [4].
197 *Various Claimants and The Catholic Child Welfare Society and others v The Institute of the Brothers of the Christian Schools and others* [2010] EWCA Civ 1106 [9].

Society, which was an unincorporated association, until 1982 when the Catholic Child Welfare Society, an incorporated charitable company (the Diocese of Middlesbrough) took over the management. These first Defendants will be collectively called 'the Managers'. From October 1973 until its closure in 1992, the school was constituted as an assisted community home under the *Children and Young Persons Act* 1969.[198]

In relation to any pre-1973 allegations, the Managers inherited any liabilities belonging to any management boards from earlier times, pursuant to an Order made by the Secretary of State in 1973.[199] The Institute never owned or managed the School. From 1912 the Managers of the school delegated the running of the school to the Institute under a formal agreement made with the Superior General of the Institute. This was operational until 1933 when the *Children and Young Persons Act* 1933 provided that St William's was to become an approved school whose staff became the direct statutory responsibility of the managers.[200] From this time on, the Managers contractually employed the teaching staff and the headmaster was responsible to the Managers for the efficient conduct of the school.

The Judge at first instance ruled that (the Boards of) the Managers, and those bearing responsibility for them, would be vicariously liable for the wrongdoing of the Brothers of the Institute, but the Institute itself would not.[201] In a unanimous decision, the Court of Appeal upheld this finding.[202] The further appeal to the United Kingdom Supreme Court required it to review the application of the principles of vicarious liability in the context of sexual abuse of children, in particular whether vicarious liability could be shared and attached to the Institute as well as the Managers. That is: 'Can there be dual vicarious liability?' The unanimous decision of the five Lord Justices of the Supreme Court overturned the Court of Appeal decision and held that the Institute would also be vicariously liable.[203] According to Lord Phillips, who wrote the judgment, the Court assessed closely the degree of control the Institute had over the Brothers. For example, the Institute controlled where the Brothers taught and determined who the headmaster would be. 'If a brother was sent to a school managed by a third party, the Institute's control over his life remained complete'.[204]

The Brothers were bound together by lifelong vows including poverty, chastity and obedience as well as being subjected to some very strict rules such as eating communally and other requisite communal activities. Brothers undertake to 'go wherever I may be sent and to do whatever I may be assigned' by the Institute.[205] Any earnings for the Brothers for teaching (such as at St Williams) were handed over to the Institute, which, in return, provided for the Brothers' needs.[206]

198 *The Catholic Child Welfare Society and others (Appellants) v Various Claimants (FC) and the Institute of the Brothers of the Christian Schools and others* (Respondents) I [2012] UKSC 56 [11].
199 *Various Claimants and The Catholic Child Welfare Society and others v The Institute of the Brothers of the Christian Schools and others* [2010] EWCA Civ 1106 [8].
200 *The Catholic Child Welfare Society and others (Appellants) v Various Claimants (FC) and the Institute of the Brothers of the Christian Schools and others (Respondents)* I [2012] UKSC 56 [11].
201 *Various Claimants and The Catholic Child Welfare Society and others v The Institute of the Brothers of the Christian Schools and others* [2010] EWCA Civ 1106 [3].
202 Ibid [64] and [89].
203 *The Catholic Child Welfare Society and others (Appellants) v Various Claimants (FC) and the Institute of the Brothers of the Christian Schools and others* (Respondents) I [2012] UKSC 56 [94].
204 Ibid [18].
205 Ibid [8] and [9].
206 Ibid [9].

In this case, both stages of the vicarious liability test were examined. The first stage considered whether the relationship between the Brothers and the Institute is one to which vicarious liability could attach. The second stage tested the connection that links the relationship between the Brothers and the Institute *and* the act or omission of the Brothers, thus synthesising the two stages.[207]

The Institute argued that the relationship of the individual Brothers to the Institute is insufficiently close to give rise (of itself) to vicarious liability. Rather, the Managers, who manage the school and employ the teacher Brothers in that school, will have a sufficiently close relationship such that vicarious liability should attach.[208] The Institute also contended that it could not be held jointly vicariously liable with, or in addition to, the Managers.[209]

It was the Managers' argument that the closeness of connection of the relationship between the Institute and the Brothers *and* the offences is supported by the fact that the Institute sent the Brothers to St Williams to further the purpose of the Institute. Also, that the status of the Brothers significantly increased the risk that Brothers would sexually abuse the children because they were in close physical proximity.[210] That is, there is a connection between the relationship and the acts of abuse.

In determining stage one of the vicarious liability test, Lord Phillips states that the broad policy objective underpinning vicarious liability is to ensure – insofar as it is fair, just and reasonable – that a Defendant with the means to compensate the victim bear the liability of any torts committed. It is for the courts to identify, therefore, 'the policy reasons why it is fair, just and reasonable to impose vicarious liability and to lay down the criteria that must be shown to be satisfied in order to establish vicarious liability'.[211] Lord Phillips identifies five such policy reasons. First, it is usually the employer who has the means to compensate the victim by way of insurance. Second, the wrong will have been committed as a result of activity being performed by the employee on behalf of the employer. Third, the employee's activity is likely to be part of the business activity of the employer. Fourth, the employer, by employing the employee to carry on the activity, will have created the risk of the tort being committed by the employee. Fifth, the employee will, to a greater or lesser degree, have been under the control of the employer.[212] These reasons reflect Ward LJ's use of Kidner's reasons in the case of *JGE* above.

In determining the test of control, and therefore whether there is dual vicarious liability, Lord Phillips adopts the approach of Rix LJ in *Viasystems*[213] who said that one was looking for a situation where the employee '… is so much part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence'.

Lord Phillips also drew on the approach taken by Ward LJ in *JGE*, in which control was no longer to be treated 'as the critical touchstone of employment' by asking whether an employer could 'tell the workman how to do his work'.

207 Ibid [21].
208 Ibid [23].
209 Ibid [25].
210 Ibid [24].
211 Ibid [34].
212 Ibid [35].
213 *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) and others* (2005) EWCA Civ 1151, [79].

Instead, the question to ask was 'whether the worker was under the management of and accountable to an "employer"'.[214] Lord Phillips found the case for vicarious liability to be much stronger in the present case than in *JGE*. He argued that the relationship between the teaching Brothers and the Institute had all the essential elements of an employer/employee relationship. First,[215] the Institute was subdivided into a hierarchical structure and conducted its activities as if it were a corporate body. Second, the teaching activity of the Brothers was undertaken because the Provincial directed the Brothers to undertake it; and they entered into contracts of employment with the Middlesbrough Defendants because the Provincial required them to do so. Third, the teaching activity undertaken by the Brothers was in furtherance of the objective, or mission, of the Institute. Fourth, the manner in which the Brothers were obliged to conduct themselves as teachers was dictated by the Institute's rules. Finally, the business of the Institute was to 'provide Christian teaching for boys', and 'all members of the Institute were united in that objective' thus strengthening the relationship between the Brothers and the Institute. As such, stage one was satisfied.[216]

The second part of the question being satisfied, the only question remaining is: 'In what circumstances can an act of sexual abuse give rise to vicarious liability?' The criteria to establish the necessary 'close connection' between the relationship and the sexual assaults are, according to Phillips LJ:

> Vicarious liability is imposed where a Defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the Defendant and the tortfeasor and the acts of abuse thus involves a strong causative link.[217]

Lord Phillips found there was a very close connection between the teaching Brothers' employment in the school *and* the sexual abuse they committed (or were assumed to have committed),[218] and was much closer to that of employment than the one between the Bishop and Baldwin in *JGE* and for the following reasons.

First, the hierarchical structure of the Institute and the way it conducted its activities meant it was more like a corporate body with the Brothers being under direction and supervised by the Provincial.[219] Second, it was the relationship between the Institute and the Brothers that enabled the placement of the Brothers at the school. Third, the Institute provided the headmaster who lived on the school premises, thus resulting in a very close connection between the relationship between the Brothers and the Institute and the employment of the Brothers as teachers at the school.[220] A further consideration was the exploitation of the extreme vulnerability of the boys in the school, which was diametrically opposed to the Institute's Christian

214 *The Catholic Child Welfare Society and others (Appellants) v Various Claimants (FC) and the Institute of the Brothers of the Christian Schools and others (Respondents)* I [2012] UKSC 56[49].
215 Ibid [56].
216 Ibid [56], [59] and [60].
217 Ibid [86].
218 Ibid [88].
219 Ibid [89].
220 Ibid [91].

objectives.[221] The placement of teaching Brothers at the residential school also greatly enhanced the risk of abuse by the offending Brothers.[222]

Lord Phillips, with whom all four other Lord Justices agreed, allowed the appeal and found that this was not a borderline case. On the contrary it was based on the satisfaction of the relevant criteria, one that was fair, just and reasonable for the Institute to share vicarious liability with the Managers.[223]

4.3.2 Discussion

In all Commonwealth countries before 1999, employers – including school authorities and Religious Organisations – could not be held vicariously liable for sexual assaults committed by their employees, whether teachers, lay workers or clergy. The Canadian case of *Bazley* changed this and in the process expanded the doctrine of vicarious liability by introducing the concept of 'enterprise risk'. That is, if an organisation carries certain risks, it is fair that the organisation bear the loss if those risks materialise. Ultimately it was held that there was a strong connection between the employee's duties (the risks created by the employer's enterprise) and the wrongful acts, thus attaching vicarious liability to the employer. The test used in *Bazley* was applied in another Canadian case that was decided on the same day in the Canadian Supreme Court, although, in *Jacobi v Griffiths* there was a different outcome on the facts of that case. Fast forwarding to 2002 in the UK, and the House of Lords in *Lister* was also persuaded by *Bazley* and found the owners of a school and boarding school vicariously liable for the sexual assaults of one of its employees. *Lister* became the second case to do so.

The three previous cases involved secular organisations. Cases involving the Catholic Church presented an additional challenge for the courts because, according to Canon Law, priests were 'holders of office' who were appointed by the Bishop and not in a typical employment relationship. Returning to Canada in 2004, the Canadian Supreme Court tackled just this issue in *John Doe v Bennett*. For the first time it was found that the relationship between the priest and his Bishop, although not an employment relationship per se, was *akin to an employment relationship*.

In 2010, the first case involving a Catholic Archdiocese in the UK, *Maga*, found a Catholic Archdiocese vicariously liable for the sexual assaults of one of its priests, although this case did not deal with the question of whether the priest was 'employed' by the Bishop. This latter issue was specifically argued at a pre-trial matter in *JGE*, which, on appeal, found that the relationship between a priest and his Bishop was one that was *akin to employment*.

Sustaining this gradual expansion of the doctrine of vicarious liability, it was found in *Various Complainants* in 2012, that not only was there a relationship between offending Brothers and their Religious Order, but also two separate Defendants could be found vicariously liable for the same offending.

The Canadian Supreme Court in *Bazley* set in place what is now a sound and balanced test to assist courts in determining whether sexual assaults by an employee can attach vicarious liability on the employer. Decades of strict judicial interpretation of the Salmond test of 'in the course of employment' was limited by what are now the defunct notions of 'master and servant'.

221 Ibid [92].
222 Ibid [93].
223 Ibid [94].

These legal principles were bravely re-evaluated in *Bazley* and, in many ways, brought the changing concepts of employment into modern times. Setting up a business or organisation carries with it certain risks for which the owner/employer must bear responsibility. The argument that an employee who commits a crime at work, or because of his work, is acting independently, was challenged in *Bazley*.

Bazley has been highly persuasive in all subsequent and relevant UK and Canadian cases. It has the stamp of multi-jurisdictional approval, except in Australia.

4.4 Liability in Australia

The decisions in *Bazley*, *Jacobi* and *Lister* were not enough to finally persuade the High Court in *Lepore* to follow suit. The decision as to whether vicarious liability should attach to the Education Department was left open in this case, despite a majority of four of the Judges agreeing that vicarious liability *could* be successful in cases of sexual assaults.

Even if *Lepore* had followed the earlier Canadian and UK cases and found an Education Department vicariously liable for the sex crimes of one of its employees, victims of Catholic clergy sexual assaults in Australia would still be legally challenged. First, the Ellis defence means that Catholic clergy sexual abuse victims have no entity that can be sued; and second, the Australian Catholic Church argues that there is no employment relationship between priests and other religious clergy and the Bishops and Provincials of Religious Orders.

Australia appears to be the only country in the common law world that denies a legal remedy for Catholic clergy victims of abuse.[224] To illustrate this point, it is worth noting the number of Catholic clergy cases that have reached adjudication in the civil courts in Australia. The 12 legal advocates interviewed for this research had represented, between them, about 2200 Catholic clergy victims of sexual abuse. Of these cases, apart from one matter in the late 1990s, every other matter had to be negotiated. This is due to the Ellis defence: that is, without an entity that can be sued, the substantiveness of liability cannot even be raised.

Half of the lawyers in this research said that they never issue proceedings. About a third of the lawyers very occasionally (between 1% and 15% of their cases) issue proceedings and only a few lawyers (less than a fifth) will issue proceedings with every matter. Interestingly though, regardless of whether proceedings are issued or not, the intransigent use of the Ellis defence by the Church continues to keep cases out of the courts.

224 Dr Andrew Morrison RFD SC, 'Compensation for child sexual abuse in religious institutions' (2013) *Precedent* 35, 39.

4.5 Conclusion

What this means at a national level is that there are possibly tens of thousands of clergy sex victims who do not have access to the civil courts. This limiting option for victims of Catholic clergy sex crimes in Australia to seek justice in the civil jurisdiction presents a mighty challenge. The Ellis defence, an '… outrage to any reasonable sense of justice',[225] only serves to further deepen the injustices for victims of clergy sex crimes. The Victorian Parliamentary Inquiry and the Royal Commission (see chapter 1) are facing this challenge, and recommendations are discussed in the final chapter of this thesis.

The international cases of *Bazely* and *Lister*, and the more recent cases of *Maga*, *JGE* and *Various Claimants* provide an augmentation of the law in the area of employer liability and child sexual assaults. Victims of clergy sex crimes need equal access to our laws, and thereby, the potential to seek redress and, ultimately, justice.

The next chapter examines criminal prosecutions and victims of crime schemes as the second pathway, or option, for victims finding justice.

225 Transcript of Proceedings, *Ellis v The Trustees of the Roman Catholic Church for the Archdiocese for Sydney* [2007] HCA Mr Morrison, 16 November 2007.

CHAPTER

5

CRIMINAL JURISDICTION: LOOKING FOR JUSTICE II

5.1 Introduction

In the last chapter it was argued that civil litigation did not provide justice for victims of Catholic clergy sexual abuse due mainly to the Ellis defence and the Australian position in relation to employer liability for sex crimes of its employees.

A second option for victims potentially finding justice is the criminal justice system, which involves reporting the sex offences to police with a view to a successful prosecution. The central question being addressed in this chapter is, therefore: Does the criminal justice system provide justice to victims of Catholic clergy sex offences?

A further criminal justice option involves victims of crime assistance schemes such as the Victims of Crime Assistance Tribunal in Victoria (VOCAT), which is part of the criminal justice system. Although, at the time of the interviews, none of the victims had made an application to VOCAT and only one had made an application to the NSW victims of crime compensation scheme,[1] this option for seeking justice will still be examined, especially that it does address several of the criteria for justice (see chapter 7).

With this background in mind, this chapter sets out to determine whether or not justice was delivered by the criminal justice system to the victims of Catholic clergy sexual abuse in this research. This potential pathway to justice is evaluated in chapter 7 against the criteria for justice identified in this research in chapter 3.

As discussed in chapter 1, there are multiple criminal provisions in the *Crimes Act 1958* for sexual offending which potentially provide retribution for victims. These include: rape;[2] indecent assault;[3] assault with intent to rape;[4] sexual penetration of a child under the age of 16 years;[5] indecent act with a child under 16 years;[6] and persistent sexual abuse of a child under 16 years.[7] Successful prosecutions for child sexual assault, however, are very low in number (see chapter 1). Criminal offences for the concealment of the sex offences by members of the hierarchy include: concealing offences for benefit;[8] being an accessory after the fact;[9] and failure to disclose a sexual offence committed against a child under the age of 16 years.[10] There have been no convictions of members of the hierarchy for these offences, as discussed in chapter 1.

To address specifically the central question, 'Does the criminal justice system provide justice to victims of Catholic clergy sex offences?', this chapter draws on an extensive analysis of the interview data relating to victim interviewees who had entered the criminal jurisdiction. The interviewees describe their experiences of the justice system, including their dealings with the police and the solicitors at the Office of Public Prosecutions (the OPP), and whether there was a successful prosecution. The data relating to the primary victims (who were associated with the secondary victim interviewees – see appendix 14) will also be considered. This chapter also draws on the interviews of legal professionals who discuss whether in their view, criminal convictions by way of a guilty plea or guilty verdict bring justice to victims.

1 *The Victims Rights and Support Act 2013.*
2 *Crimes Act 1958* (Vic) s.38.
3 Ibid s.39.
4 Ibid s.40.
5 Ibid s.45.
6 Ibid s.47.
7 Ibid s.47A.
8 Ibid s.326.
9 Ibid s.325.
10 Ibid s.327.

Careful analysis of this data has identified several topics: the outcomes for the primary victims who had entered the criminal justice system; the primary victims' experiences of dealing with the police and the prosecuting solicitors; whether convictions bring justice to victims; and finally, the outcomes of guilty pleas. VOCAT is also being examined as another potential criminal justice pathway for clergy victims even though it was not utilised by any of the victim interviewees.

5.2 Prosecutions

Of the 35 primary victims referred to in this research,[11] two victims reported they had each been sexually abused by two offenders. This means that a total of 37 offenders are referred to in this research. One of these offenders, however, was the same offender for two of the victims. In other words, there were 36 offenders for 35 victims, but 37 cases of abuse.

Overall, 17 of the 23 primary victims interviewed discussed the issue of going to the police about the sexual assaults. The remaining six interviewees said that they had not gone the police.[12] Of the 10 primary victims not interviewed, only one had been to the police (see table 5.1)

	Went to the police	Did not go to the police	Total
Primary victims interviewed – 23	17	6	**23**
Primary victims not interviewed – 10	1	9	**10**
Total			**33**

Table 5.1 Number of primary victims involved with police officers

Not one of the primary victims interviewed had been through a criminal trial, although five of the offenders had pleaded guilty to sex offences which resulted in four convictions. One of the primary victims not interviewed (the son of a secondary victim who was interviewed) had been through a criminal trial and his offender received a conviction for sex offences.[13] Of the 17 victims interviewed who had dealings with the police, there were five successful prosecutions. Of the 12 victims not interviewed, there was one successful prosecution. These matters are discussed below.

Three other victims were approached by the police but decided not to make a statement. The offenders of four victims died before charges could be laid and/or there was a trial. One victim was advised there was no prospect of charges being laid and he did not proceed with making a statement. Two victims withdrew from the prosecution case. One victim reported to the police, but no further action was taken. Finally, one victim made a statement to police in 2010, and, at the time of interview, the trial of his alleged offender was pending.[14] These additional matters that did not proceed are discussed below.

11 Eighteen secondary victims were interviewed. Six of the primary victims associated with these interviewees were also interviewed and are included in the 23 primary victims interviewed. This means there are 12 primary victims, who were not interviewed, but whose general quantitative data were analysed, based on the interview with the secondary victim. This results in a total of 35 primary victims whose data have been used for parts of this chapter. That is, there are 23 primary victims interviewed and 12 primary victims not interviewed that contribute to this data.
12 V1-2, V1-8, V1-17, V1-19, V1-10, V1-15.
13 A jury found this offender guilty of 16 sex offence charges for four complainants. He then pleaded guilty to separate charges for two more complainants. He was sentenced to six years imprisonment for all six matters.
14 V1-21.

5.2.1 Prosecution cases

The six prosecution cases resulted in five guilty pleas and one guilty verdict by a jury for sex offences (see table 5.2 below). One matter involved 12 complainants in which the offender pleaded guilty to 12 representative counts. The sentence of 33 months was reduced to 15 months. This offender died whilst serving time.[15] Of two separate prosecution cases for another male victim, one offender pleaded guilty. He was sentenced to two-and-half years' imprisonment. The second matter did not continue for this victim, as he was mentally unwell at the time and unable to give evidence in a court proceeding.[16] There were also two court matters, 15 years apart, for another male victim, although these were for the same offender. This offender pleaded guilty in the first matter in 1996 and received a good behaviour bond. No conviction was recorded. This victim and his brother were the complainants in both matters. There was one count of indecent assault for each of the brothers in the first matter (the interviewing police at the time only asked the victim for the particulars of one assault). In the second matter, there were 24 counts for this victim and four for his brother. On the morning of the committal hearing for this second matter, in December 2011, the accused died.[17] A male victim was one of seven complainants in which the offender pleaded guilty to seven representative counts. These had been reduced from 16 counts. The offender was sentenced to two-and-a-half years' imprisonment with parole after 18 months.[18] The last of the guilty plea matters involved a male victim who was one of seven complainants in which the offender pleaded guilty to seven representative counts and received a three-year suspended sentence.[19] In the final matter, the male victim was one of six complainants. The offender was convicted of a total of 16 counts – there were jury verdicts relating to four of the complainants and guilty pleas for the other two complainants. The offender received a six-year sentence with parole after four-and-a-half-years.

	Complainants	Guilty Pleas Convictions	Jury Verdict Convictions	Charges	Sentence
Offender 1	12	Yes	–	12 representative counts	33 months reduced to 15 months
Offender 2	1	Yes	–	Unknown	30 months
Offender 3	2	No conviction recorded	–	2 representative counts	Good behaviour bond
Offender 4	7	Yes	–	7 representative counts reduced from 16	30 months with parole after 18 months
Offender 5	7	Yes	–	7 representative counts	3 years suspended
Offender 6	6	Yes for 2 victims	Yes for 4 victims	16	6 years with parole after 4.5 years

Table 5.2 Breakdown of the six prosecution cases.

15 V1-11.
16 V1-16.
17 V1-18.
18 V1-22.
19 V1-24.

MATTERS THAT DID NOT PROCEED

The remaining 12 of the 18 matters that went to the police did not proceed for a variety of reasons. The three who had been approached by the police to give a statement decided, for different reasons, not to go ahead. One woman said:

> I wasn't going to put myself through that … If he's only going to be sweeping the paths … he's such a creep, he'd get out of it ... and he's such a slippery fish … He would get some … criminal lawyer and get himself off and make me look a fool … it would be more damn suffering for me, and I was going through enough with Carelink [part of Melbourne Response] and the Church [at the time].[20]

The second woman said she felt morally obliged and wanted to make a statement as this could help support other victims, but at the time of the interview she had not done so.[21] The third interviewee of this group decided he did not want to go forward to the police at that stage.[22]

Four interviewees discussed going to the police, but either before or whilst they were making statements or before court appearances, the offender died. One woman explained that she was in the process of making her statement when her perpetrator died.[23] The second man of this group spoke of his frustration and immense disappointment when his alleged offender died the morning of the committal hearing (see below).[24] The third man of this group said he had experienced much frustration in convincing the police to take a statement. His offender had been sent out of the country by his Religious Order, to Samoa. By the time the police did agree to take his statement, he said, the offender had died.[25] The fourth man's offender had escaped overseas just before the police were about to charge him and the victim was told that the police did not have enough resources to extradite the offender and that they needed more victims to come forward and make statements.[26] This offender, who was never charged, has subsequently died.

Police informed one victim that charges could not be laid. This man's offender had escaped overseas and because of the criminal provisions and his age at the time of the alleged offences, charges could not be laid. This victim spoke of the irony: '…if he had broken into your house and stolen your wallet all those years ago, we could still charge him now. But in this, the way legislation is, we can't press charges'. [27]

Two victim interviewees explained why their prosecution cases didn't continue. One woman said she had overcome fear and anxiety to make a statement to the police (to cope, she first had to write it out in the third person), but then the matter was withdrawn by the prosecutors.[28] The other interviewee, who had also fought hard to get the police to lay charges, said he withdrew a couple of days before the court hearing due to fear.[29]

A male victim, whose alleged offender had died, was very disappointed because he was hoping that a criminal conviction might open up the prospect

20 V1-1.
21 V1-5.
22 V1-20.
23 V1-7.
24 V1-18.
25 V1-23.
26 V1-4.
27 V1-3.
28 V1-14.
29 V1-6.

of a conviction of others for the concealment of those offences.[30] His offender had died before he went to the police. One man explained that his mother first approached the police in country Victoria about the sexual assaults by the parish priest, but nothing happened with this report. This interviewee said that he believed that the policeman was Catholic and that that was why the allegations were ignored.[31]

5.2.2 Discussion

Apart from the five guilty pleas (see below for further discussion) and the one guilty verdict, there were multiple reasons why prosecutions either failed or didn't go ahead in the first place. The most common reason preventing victims going to the police and potentially achieving successful prosecutions was that many of the offenders had died. Half of these offenders had died before the victim had the opportunity to go to the police and four had died after the victim had been to the police but before either charges were laid or there had been a trial. One victim's offender had died after a conviction.

To summarise, of these 10 deceased offenders, eight had never been prosecuted. Of the two who had been charged, one died the morning of the court hearing. Other impediments for victims included, first, the offender fleeing the jurisdiction, either domestically or internationally and, second, reluctance on the part of the police to extradite them.

The withdrawal of a prosecution case by the prosecutors,[32] the absence of the emotional and psychological wherewithal for the victim to deal with a prosecution, the prospect of further suffering, fear and mental health issues all worked to limit or impede some victims' opportunities or desires to enter the criminal justice system.

The number of successful prosecutions of those reported to the police, for the 35 victims in this research was about 17 percent, which is relatively high compared with the average of about 6.5 percent for all child sexual assault convictions in Victoria, as discussed in chapter 1. This may be related to the method of recruitment of victim interviewees, in that they may have been referred for this research by their legal or non-legal advocates. Such small numbers, however, are not representative. As outlined in chapter 2, this study does not claim representativeness, as the main aim of this research is to understand the lived experiences of the victims in their journeys looking for justice.

5.3 Victims' experiences of the criminal justice system

Victims of child sexual assault, either as children or later as adults, typically report negative experiences with the criminal justice system and the legal process in particular.[33] Legal professinals and police officers can hold 'erroneous expectations' about the behaviour of crime victims[34] and are often claimed to be 'unresponsive' to the needs of victims[35] who can feel 'blamed or depressed', especially after being questioned by police officers.[36]

30 V1-13.
31 V1-12.
32 Also known as a *nolle prosequi*. Since January 2010, an announcement by the prosecution to discontinue proceedings for matters committed to trial is called a 'discontinuance'. <http://www.opp.vic.gov.au/Glossary>.
33 C Back, P Gustafsson, I Larsson and C Bertero, 'Managing the legal proceedings: An interpretative phenomenological analysis of sexually abused children's experiences with the legal process' (2011) 35 *Child Abuse and Neglect* 50, 50.
34 K Ask, 'A Survey of Police Officers' and Prosecutors' Beliefs About Crime Victim Behaviour' (2010) 25(6) *Journal of Interpersonal Violence* 1132, 1144.
35 P Y Martin and R M Powell, 'Accounting for the "Second Assault": Legal Organizations' Framing of Rape Victims' (1994) 19 *Law and Social Inquiry* 853, 889.
36 R Campbell, 'What Really Happened? A Validation Study of Rape Survivors' Help-Seeking Experiences With the Legal and Medical Systems' (2005) 20 *Violence and Victims* 55, 65-66. See also: S. Ghetti, K Alexander and G Goodman, 'Legal involvement in child sexual abuse cases: Consequences and interventions' (2002) 25 *International Journal of Law and Psychiatry* 235-251.

Interestingly, police officers were considerably more likely to believe that reports of rape are false than for other types of crime.[37] The majority of victims are dissatisfied with the defence lawyers' performance because it was perceived that they accused the victim witness of lying; attacked what was said; used trick or leading questions and put words in her mouth. This was not the case however with prosecution solicitors.[38] The above observations and findings do indicate that there is a considerable degree of suspicion toward sexual assault victims, which may result in a secondary victimisation of the victims.[39]

These findings correlate fairly well with the experiences of the victim interviewees in this study, although there were many more positive experiences for victims who had dealings with the police officers in this study. This is particularly so in the last ten or so years as specialist sex crime units have been established within police forces and the courts (see chapter 1).

Thirteen victim interviewees discussed their experiences dealing with police. Three of these victims had interactions with two police officers and one victim had interactions with three police officers. That is, victims' experiences dealing with 18 police officers are discussed. The victims' experiences overall ranged from excellent to good to bad.

Twelve of the 18 experiences with police officers were rated as good to excellent, and six were rated as bad. The almost 20-year period in which these police interviews were undertaken was from 1995 to 2014.

Interviewees[40] whose experiences of dealing with the police were good, described those officers as: 'sensitive', 'knowledgeable', highly professional', 'good listeners', 'sympathetic', 'supportive', 'sincere', 'compassionate', 'respectful', 'dignified', 'empathetic', 'excellent' and 'understanding'.

Interviewees[41] who reported bad or negative experiences provided the following descriptions of the officers: 'no good', 'didn't do their job', 'no action was taken', 'disgusting', 'offhand', 'indifferent', 'insincere' and 'frustrating'.

One female victim who had been sexually assaulted by her parish priest when she was nine years old and another priest when she was ill in hospital at the age of 28 years, finally found the courage to go to the police some 35 years later. Although she ultimately did not go ahead with the charges, her experiences of two female detectives from the sexual offences unit of Victoria Police were very positive and she was very happy with their professional and caring approach. She said: 'They were very good. I was very impressed by them. I think they were a bit disappointed that I didn't go to the Criminal Court'.[42]

A male victim who was sexually assaulted when he was 14 years of age also gave very positive feedback about his experiences with a police officer from country Victoria. He said: '… he was very pro-active and I was very impressed

37 Ask, above n 34, 1145.
38 M Kebbell, C O'Kelly and E Gilchrist, 'Rape Victims' Experiences of Giving Evidence in English Courts: A Survey' (2007) 14 *Psychiatry, Psychology and Law* 111, 117.
39 R Campbell and S Raja, 'The secondary victimization of rape victims: Insights from mental health professionals who treat survivors of violence' (1999) 14 *Violence and Victims* 261, 261-2.
40 V1-1, V1-4, V1-7, V1-14, V1-18, V1-21, V1-22, V1-23, V1-24.
41 V1-4, V1-6, V1-7, V1-12, V1-18, V1-21, V1-22.
42 V1-1.

with what he did … and he's been giving me updates every two or three months … I have been very happy with the way he's been on the telephone and how he has been giving me updates'.[43]

In some cases, interviewees had mixed experiences. For example, one male victim who reported to police in Brisbane in about 1996/1997, said that the police were 'really good cops' and were very sympathetic and supportive. But there was another side. The offender had escaped to the UK and the police officer told this victim that:

> … it's not exactly murder, it's only a minor thing, it's not worth us pursuing, the cost factor about sending another cop to England to nab him and bring him back, to extradite him. We're not going to do that … I didn't like what he said. To me it was the greatest crime you can possibly think of. I thought it was just another way of me being prevented justice…[44]

A female victim who also had mixed experiences said she was very happy with the first female detective, although she felt the detective did not understand the trauma involved in being a rape victim. This woman's matter was then passed on to a more senior male detective from the Criminal Investigation Unit who was a member of the armed robbery squad. She said he attended her house on his own on about three occasions, during the day and at night.

> He was put onto rape … So I'm here, by myself … [and] it was night. And very gruff sort of guy, overcoat. I felt exceptionally uncomfortable, because I was alone with this chap, and given the subject matter.[45]

Some time after these interviews, the alleged offender died. Despite this, the senior male detective inexplicably contacted this victim to say that he was going to Sydney to arrest the offender. A further upset for this woman occurred, she said, when she applied for her police file through FOI and found it contained a 'scathing attack' on her by this officer. She explained it thus:

> 'He didn't even have his facts right … he put up motives, it was like I was this crafty, cunning woman just doing this to get money … It was just bull shit … he didn't believe what had gone on'.[46]

According to another victim, the police said that there wasn't enough evidence to charge the offender. Feeling 'quite angry' because 'not every stone had been turned', this interviewee said that the police had to be pressed to expand their investigation and interview other potential witnesses. With this ongoing insistence, further investigations were carried out and the accused was eventually charged.[47]

One male victim reported two very different experiences with the police, about 15 years apart. The victim (and his brother) first went to the police in 1996. According to this interviewee, the sexual and psychological abuse by the parish priest went on for years. His experiences with Hawthorn police, he said, were 'cursory … disgusting [and] daunting'. He reported that he and his brother sat in a public area within earshot of other police whilst they

43 V1-22.
44 V1-4.
45 V1-7.
46 V1-7.
47 V1-6.

tried to explain, amid many interruptions, the highly personal and embarrassing details of the sex offences. He said he and his brother had to pretend that they couldn't hear each other's statement and they were so humiliated and stressed they only managed to particularise one sexual assault each, despite having told the police officer there were many more incidents of sexual abuse. This interviewee reported that he did not receive a copy of his statement. The police officer, he said, showed no empathy and appeared bored.

This negative experience contrasted with this victim's second investigation at the Knox sexual offences unit in 2011 by a very hard-working female detective, which this man said was done really well and was 'extremely therapeutic'. Interviews and investigations were highly professional, collaborative and very thorough. He said:

> I felt, wow! Who'd bother to do that? And she said … I've been to [the accused's] house where he abused you, seen the rooms, and said your statement came alive. That's pretty incredible that they would go to [that extent] … and that was fantastic … All the others had been lazy… She did her job.[48]

PROSECUTING SOLICITORS

Three interviewees discussed their dealings with solicitors at the OPP. For one interviewee, the prosecutors were 'very kind and very good',[49] but the experiences for the other two victims were reported as problematic.

In one case, in which there were 12 complainants, the victim interviewee said that 'things were dragging on' prior to the trials and the defence lawyers were calling for adjournment after adjournment. The prosecutor told the victim there was nothing that could be done. The delays caused the complainants anxiety as they didn't know when and if the trials would occur. Ultimately, two complainants attempted suicide during this period. The prosecutor had to be asked on multiple occasions to call the defence team and explain, off the record, that the stress of the adjournments would soon cause a death. Very soon after, the priest pleaded guilty.[50]

Another victim said that the solicitor at the OPP should 'never be allowed to have any access to victims. She was a nightmare … she traumatised me'. She explained it this way:

> [The prosecutor came] down like a ton of bricks on me to try and put me in my place and tell me that she is basically not here to help me. I am not working for you, I am not your solicitor, I'm working for the Crown, you're just a witness, you have no rights, and you will do as you're told and shut up and behave yourself … It was a very, very bad experience with the DPP …[they] were atrocious, absolutely atrocious.[51]

5.3.1 Discussion

For the third of victims whose experiences with police officers were negative, the reasons for such experiences could be attributed to the lack of specialist sexual offences training in the years before around 2000 (see chapter 1). Other reasons for the negative experiences with police officers also impact on why the prosecution failed. For example, the victim whose police officer

48 V1-18.
49 V1-6.
50 V1-11.
51 V1-14.

commented that child sexual assault is 'not exactly murder', not only felt the seriousness of the offences were not acknowledged, but that a prosecution was impeded because the police officer did not think the offences were worthy of investigation. Similarly, the woman whose police officer was from the armed robbery squad, felt that his lack of expertise in the field of sexual assaults, and his apparent indifference in the matter, meant that he did not take her or the matter seriously. His planned arrest was delayed by some months, by which time the offender had died.

The remaining victims who reported positive experiences with the police officers emphasised that they had good listening skills and that they were very professional, sympathetic, empathetic, compassionate, supportive, dignified and hard working. These positive experiences, by far the majority, occurred in the years since about 2000, compared with the 1990s. This is to be expected as specialist training for police in the area of sexual assaults has continued to develop over the last 15 or so years. Such positive changes address the criterion for justice – the truth and its acknowledgement – in that victims need to tell their account of what happened to them, their truth, and have that acknowledged by being listened to and treated fairly and with respect. Changes within Victoria Police sex offences units also contribute to accountability of the offender – another important criterion for justice (see chapter 1).

5.4 Convictions: Do they bring justice?

Ten interviewees discussed the issue of whether a successful prosecution brought justice to the complainants. They were four County Court Judges, three prosecution solicitors and two prosecution barristers and one non-legal advocate who had previously worked as a police officer (the primary and secondary victims were not asked to address this question). The legal professionals spoke at length about the criminal trial process and its outcomes and the impacts on the victims of clergy sex crimes. This included discussions on the impacts of guilty pleas compared with guilty verdicts by juries.

For these interviewees, whether successful prosecutions bring justice to the victim was seen to depend on: whether the accused was found guilty of all or some of the charges; whether the accused pleaded guilty, and if so, to what charges and how this impacted on the sentencing; whether much of the complainant's evidence was withheld from the jury and how this impacted on the complainant; and what the status of the complainant's mental health was at the time. That is, many of the responses from the interviewees about whether convictions bring justice to victims were conditional.

There was, however, general agreement from all the interviewees that a conviction of all or most of the serious counts did bring varying degrees of justice to the complainants. Such outcomes were seen to include: vindication for the complainant; the complainant being heard and believed; public acknowledgment of what happened and the courage of the complainant in coming forward; it being a cathartic experience; and finally that there was punishment and retribution.

Vindication for the complainant, as a result of a conviction, was broadly accepted by most of the interviewees as the most common positive outcome. According to a non-legal advocate (an ex police officer and informant in Catholic clergy sex abuse cases), a conviction resulted in a '… massive load off their own guilt and shame… [for many it was the first time they could say]

… I'm not to blame, it wasn't my fault, people believe me'.[52] Not only was there vindication for the individual complainant, also, according to a prosecution solicitor, there was a 'broader, representative' vindication for the families of those whose victim loved one had committed suicide, and those who had not been able to come forward and report to the police.[53] Also, said this interviewee, there was additional vindication for the complainant because there had been denial by the accused right through the trial.

The next reason many of the interviewees said justice was delivered by a conviction was because complainants were heard and believed[54] by an independent jury whose verdict was reached based on the highest level of proof, beyond reasonable doubt.[55]

> Because they'd been heard, and as a result of being heard, something had actually happened. There was a declaration of guilt and punishment and ... I think that that can help … it's part of a process to help.[56]

Complainants' experiences of a successful conviction were also described by some of the interviewees as cathartic,[57] and this was especially so when the Church had been denying the offences for so long. A prosecution solicitor explained it this way:

> …there's this massive sense of relief and it's sort of a cathartic experience of having the Church emphatically deny, deny, deny, deny, deny, deny, deny, and then finally … causing the Church to acknowledge that these things have happened.[58]

Several interviewees observed that a guilty verdict also provided public and family acknowledgement and recognition of the crimes that happened to the complainants, thus adding to their sense of justice.[59]

> … it's the acceptance of their version that carries so much …The acknowledgement … And whether that is by a plea of guilty or by a verdict of guilt. Probably more vindication when there's been a denial right through and then a verdict of guilty … if a successful trial is counted as a verdict of guilty on the principal offences, or all of them or most of them, then I think that would certainly give a great deal of comfort to the complainants.[60]

A conviction also provided, said some interviewees, acknowledgement of the courage and strength of the complainants who had come forward to give evidence, which in turn empowered these complainants.[61] Other indicators that justice was delivered to the complainant were seen as including punishment and retribution,[62] and a sense of pride for the complainants because they had stood up to their offender.[63]

These interviewees also noted, however, that there was a variety of reasons why convictions may bring only partial, if any, justice to complainants.

52 NLA-4.
53 LP-2.
54 CCJ-2, LP-1, LP-2, PB-1, PB-2.
55 LP-2, LP-3, PB-1.
56 CCJ-2.
57 CCJ-4, LP-2, LP-3, PB-2.
58 LP-2.
59 CCJ-4, LP-2, LP-1.
60 CCJ-4.
61 CCJ-4, LP-2, PB-1.
62 CCJ-2.
63 LP-2.

That is, although a conviction is a good thing for the complainant, there is still a price to be paid. Reasons proposed by the interviewees include: evidentiary rules limiting what a complainant can tell the jury; delays and adjournments; cross-examination; a high probability of an appeal; and finally the lack of an acknowledgement by, or apology from, the offender unless there is a guilty plea.

First, evidentiary rules that limit what a complainant can tell the jury may make the trial process, even with a conviction, very difficult for complainants to accept. As a prosecution barrister explained.

> … the whole process is just so artificial … we often have to stifle their evidence in part … they've made a statement that's 20 pages long that has everything in it … you can't talk about an aspect of that … Half of their statement, two-thirds of it, you can't talk about this person, you can't talk about that. It's so stifling. And what's the point then. It is so artificial.[64]

Second, the criminal justice process can also brings delays, adjournments and long waits for trial dates,[65] negatively impacting, said some interviewees, on the complainants and perhaps minimising the sense of justice experienced when the accused is convicted. One County Court Judge talked about delays being particularly problematic in the rural areas. He said:

> … we have a lot of difficulty getting things on from time to time and you might fix something for a hearing, particularly in the country … things go wrong, everyone's geared up to begin, the complainant is ready to give evidence and it's called off. Problems for the complainant … You can't blame the accused for that so [the complainant] had been a victim of the system, if you like, because things had been delayed ...[66]

Third, according to another County Court Judge,[67] the criminal justice process itself, particularly cross-examination, can 'crush' the complainant even if there is a conviction. Also, the process of giving evidence to a group of strangers with the accused listening, reported two prosecution barristers, is traumatic for the complainant.[68] Other factors that curtail a sense of justice for complainants when a conviction is achieved, according to interviewees, included a jury verdict that involved an acquittal of some of the counts.[69]

However, probably the most difficult hurdle complainants must confront is the very high probability of an appeal against the conviction.[70] Several interviewees talked about this issue with concern for the complainants.[71]

64 PB-2.
65 This is despite the establishment of the Sex Offences List at the County and Magistrates' Courts in Victoria, which, as indicated in chapter 1, attempt to avoid long delays for complainants by listing trials as quickly as possible, especially for children and adults with cognitive disabilities. This is a challenging task for these courts because, for example, more than 50 percent of all criminal matters at the County Court of Victoria are sexual offence cases, of which slightly less than half involve a child or cognitively impaired adult witness. Department of Justice Victoria, *Sexual Assault Reform Strategy: Final Evaluation Report*, (2011) 128.
66 CCJ-3.
67 CCJ-4.
68 PB-2, PB-1.
69 LP-3, PB-1.
70 As indicated in chapter 1, more than half of the convictions of child sexual assault in Victoria are appealed, of which more than half are successful.
71 LP-3, PB-1, PB-2.

One prosecution barrister expressed it this way:

> … the problem comes when you say, oh I'm sorry there's been an appeal now … And that's two-and-a-half to three years away, and we don't know what will happen at the end of it and you might have to do it all over again … And even if they don't have to do it all again, three years waiting for the end result, which may or may not be right … complainants … feel ripped off.[72]

Finally, another concern of this prosecution barrister was that a conviction does not include an acknowledgement by the offender of his crimes or an apology.

> … the fact that there is a criminal trial in the first place means that the very person who did it … has not acknowledged what they have done … that person never says sorry. No one ever says sorry … and I think they want an apology as much as they want the person to be punished.[73]

A County Court Judge said that whilst a conviction is a very good thing and certainly brings some justice for the complainant, it does not bring closure. He said: '[The criminal trial] is a bruising process which probably doesn't in the end help very much. It may … that closure which they all talk about … this process, my sentence is not going to bring closure'.[74]

Despite the above potential drawbacks for victims of the criminal trial process, a conviction at trial, according to one prosecution barrister, can be very empowering for the victim. He described it thus:

> They spend their entire lives in their social circles quite often, their upbringing, their families, everyone believes that the clergy can do no wrong … And when they finally tell their story, particularly to a bunch of strangers, they're believed and they're believed to the highest standard that the law knows. That's an incredibly empowering thing.[75]

5.4.1 Discussion

Overall, a criminal conviction, according to the legal professionals, did bring some justice to complainants. But the degree of justice was often conditional on the individual circumstances of the case. The outcomes of a criminal conviction for victims depended on such things as whether there was a jury conviction, a guilty plea, a withholding of the complainant's evidence from the jury, delays, appeals, and the mental health of the complainant at the time.

5.5 Guilty pleas

Plea bargaining, a well-established practice in the Victorian criminal justice system, involves negotiations between the accused and the prosecution with the aim of securing a guilty plea to charges in exchange for withdrawing other, usually more serious, charges. An example might involve a guilty plea to a sexual assault charge in exchange for the prosecution dropping a charge of rape. Advantages of plea bargaining include expediting the matter through the courts, resulting in considerable savings to the community. Further, the accused will usually receive a lesser sentence and the victim/complainant will not have to give evidence in a trial.[76]

72 PB-1.
73 PB-1.
74 CCJ-2.
75 PB-1.
76 The general principles to be considered in plea bargaining include a resolution that is satisfactory to both parties; the plea should properly reflect the true criminality of the offending; the settlement should only occur if the prosecution is not satisfied that convictions would be secured on the more serious offences that are being withdrawn, and, the complainant has been consulted by the prosecution. Judicial College of Victoria, *Sexual Assault Manual*, Plea Bargaining, 5.9 <http://www.judicialcollege.vic.edu.au/publications/sexual-assault-manual>.

There is an inherent tension within the plea bargaining process with the accused seeking to plead to the least serious offence available, whilst the prosecution is attempting to secure appropriate convictions.[77] According to Flynn, victims face injustice as their needs and interests in the plea bargaining process, are 'for the most part overlooked'.[78] This is especially so because the process lacks public accountability and transparency leaving the plea deal 'shrouded in secrecy' with justice not seeing to be done.[79] A plea bargaining process, which '… suits lazy or under-resourced prosecutors and lazy defence lawyers', also involves very little judicial scrutiny of the evidence; no scrutiny about the methods of obtaining the evidence, and, a reliance on coercion or improper inducements.[80] On the other hand, Seigman and Freiberg argue that, although not perfect, the practice of plea bargaining benefits both the accused person and the criminal justice system.[81]

In justifying the lessening of charges as part of a guilty plea, a County Court Judge explained:

> … whether it's for all of the offending or part of it is often not the critical thing … the charges can become very artificial … because … people are often charged with multiple offences when the offending might have been ten times that … [an] acknowledgement that the victim is telling the truth is [what is] important.[82]

As outlined above, the offenders of the five victims interviewed in this study pleaded guilty to a variety of sex offences. The impacts of these guilty pleas were discussed by these interviewees and by five legal professionals. The impacts of the guilty plea and the sentence, as discussed by the primary victims, ranged from feeling as though justice was delivered to there being no justice at all.

One male victim said he did receive justice and was: '… vindicated, justified. It's true. This is true now'. This sense of justice was heightened, this man said, because the pretrial comment made by the then Archbishop of Melbourne, George Pell, about the impending court case, was proved to be injudicious. He said: '[The accused's] case hadn't gone to court yet, and George Pell had the audacity to say … you can't believe everything that the media says and there's a lot of rumours and gossip floating around…'.[83]

For another male victim, his offender's guilty plea was a very negative experience. Pleading guilty to one charge, when there had been many years of sexual abuse, did not represent the seriousness of what happened to this victim. This interviewee's offender was given a good behaviour bond and no conviction was recorded. He had 'basically escaped Scot-free'. Also, said this man, his offender had resigned from the priesthood before the trial, which meant his new status of 'retired priest' could not, and did not, attract any further penalties from the Church. It seemed there was no sanction at all.[84]

77 Ibid.
78 Asher Flynn, 'Bargaining with justice: victims, plea bargaining and the *Victims' Charter Act 2006* (Vic)' (2011) 37.3 *Monash Law Review* 73, 73.
79 Ibid 96.
80 P Darbyshire, 'The mischief of plea bargaining and sentencing rewards' (2000) *Criminal Law Review* 895, 901.
81 R Seifman and A Freiberg, 'Plea Bargaining in Victoria: The role of Counsel' (2001) 25 *Criminal Law Journal* 64, 74.
82 CCJ-3.
83 V1-11.
84 V1-18.

> … I was still reeling from it all, and that then continued to have a big, big effect on me, psychologically, in my work life, everything. And so the whole impact of it didn't go away, and I became unwell again …[85]

Shock, disbelief and happiness were the experiences of another male victim when he heard his perpetrator would be pleading guilty to the more serious of two charges. He explained that it was a huge relief and he was 'elated' especially given that he had doubted there would be any progress with the prosecution.[86]

Another male victim, whose offender was a Marist Brother, said that the offender received a three-year suspended sentence after pleading guilty. This interviewee said he did not think justice was delivered. He was one of six complainants in this matter. His level of frustration with the criminal justice system prompted him to say that: 'The judge was probably an old Kilmore boy or something!', meaning the Judge was probably Catholic and educated by the Marist Brothers, and that this would have explained the very light sentence.[87]

The legal professionals who discussed this issue of guilty pleas comprised three County Court Judges, one prosecution solicitor and one prosecution barrister.[88] They were giving their own views and talking from their own experiences, and their comments were not at all related to the five victim interviewees above.

According to these interviewees, the benefits of a guilty plea include a public acknowledgement of the guilt of the accused and that the complainant is telling the truth. That is, the complainant is believed. Other specific advantages for the complainants, in the view of these legal professionals include: the fact they do not need to give evidence in a trial and be subjected to cross-examination; the offender will still, most likely, be put on the Sex Offender's Register;[89] punishment, usually, is still achieved; and finally the complainants often find a guilty plea therapeutic and a relief. For some, there may also be an apology.

One County Court Judge commented that, in general, the accused in sex matters would rather be convicted by a jury than plead guilty, because 'they can turn around to everybody who knows them and say I wasn't guilty. And the friends and family will believe them because they want to believe them'.[90] A further advantage, therefore, of the guilty plea, according to this interviewee, is that it is an explicit admission of guilt by the offender. He explained it this way: '[The complainants] want to hear an acknowledgement by the perpetrator of the guilt … But if they actually admit their guilt, they have to admit to the people they don't want to admit to that they're guilty'.[91]

85 V1-18. It was this victim's offender who was facing a second prosecution case in the courts in December 2011, when he died the morning of the court hearing.
86 V1-22.
87 V1-24.
88 CCJ-1, CCJ-3, CCJ-4, LP-3, PB-1.
89 *The Sex Offenders Registration Act 2004* (Vic), which came into operation on 1 October 2004, provides for a Register of Sex Offenders and requires registrable offenders and offenders who are subject to a sex offenders registration order to report personal details for inclusion in the Register and to also report to police as directed.
90 CCJ-1.
91 CCJ-1.

These interviewees also acknowledged the disadvantages for the complainants including: the accused receiving a discounted sentence; the original charges being removed from the records (the complainant, therefore feeling robbed); and most of the time there is no apology. A prosecution barrister pointed out that many complainants ask the question: 'Why should this person get a discount because they've finally acknowledged what they've done?' She also said:

> … there is a limit to how much justice you can get in the justice system … the complainant kind of feels like you're negotiating away some of the things that they've said … The victims still end up being shaken and bashed every which way …[92]

5.5.1 Discussion

The above observations on guilty pleas by the legal professionals reflect in many ways the experiences of the victims whose offenders had pleaded guilty, particularly in relation to reduced charges and sentences. There are advantages and disadvantages with the plea bargaining process which impact on the degree to which victims find justice in the criminal justice system. Accountability of the offender, an identified criterion for justice from this research, was only partially addressed for the five victims interviewed who achieved guilty pleas from their offender, as is the criterion for justice of the truth and its acknowledgement. Retributive justice, therefore, is also only partially achieved by these victims. Of course for the remaining victims whose offenders evaded prosecution, there is no retributive justice and there never can be for those offenders who have died or fled the jurisdiction.

5.6 Victims of Crime Assistance Tribunal

The Victims of Crime Assistance Tribunal (VOCAT) is an integral part of the Victorian criminal justice system. VOCAT aims to change the focus of criminal injuries compensation by being more responsive to the needs of victims. It provides 'affordable, timely and targeted assistance to help victims recover from the psychological and physical effects of violent crime' (see appendix 2).[93] As discussed above, at the time of interview none of the primary or secondary victims had made applications to VOCAT and only one had made an application to the equivalent scheme in NSW.[94] Nevertheless, these schemes provide a potential pathway for justice for clergy victims and will be evaluated in chapter 7 against the main criteria for justice as outlined in chapter 3.

The objectives of the *Victims of Crime Assistance Act 1996* are to assist victims of crime to recover from the crime by paying them financial assistance for expenses incurred by them as a direct result of the crime.[95] VOCAT also provides a forum within which victims of crime 'can have their say', and receive some acknowledgement of their loss and suffering.[96]

92 PB-1.
93 Victims of Crime Assistance Tribunal, *Annual Report* (2011-2012) Victims of Crime Assistance Tribunal, 3 September 2012, 4.
94 NSW Victims Services. Applications for restitution may be made under the *Victims Rights and Support Act 2013* (NSW).
95 *Victims of Crime Assistance Act 1996* (Vic) s.1(2). This financial assistance is 'a symbolic expression by the State for the community's sympathy and condolence for, and recognition of, significant adverse effects on victims of crime'. Also, such financial assistance is not intended to reflect the level of compensation to which victims of crime may be entitled at common law. S.1(2)(b) and (3).
96 Victims of Crime Assistance Tribunal, n 93, 4.

Further, VOCAT can help to validate victims' experiences, restore a sense of dignity and provide financial help to assist a victim's recovery.[97]

A primary victim of a violent crime,[98] a secondary victim[99] and a related victim[100] can apply to VOCAT for assistance. A Magistrate will hear the matter. Because access to justice for victims of crime is of uppermost importance, VOCAT usually covers the reasonable cost of a lawyer's fees to assist the applications.[101] If a contested hearing is required, VOCAT will also generally meet the costs of legal representation for the alleged offender.[102]

VOCAT and other victims of crime compensation schemes provide a very important service for victims of crime, especially that victims are, for the most part, marginalised in the criminal justice system.[103] These tribunals offer Magistrates the insight into the impacts of crime on victims. Even though none of the interviewees had made an application for compensation at VOCAT, it nevertheless offers important elements of restorative and distributive justice, as will be discussed in chapter 7.

5.7 Conclusion

Despite many legal and evidentiary reforms and reforms to the courts and police practices in the area of sexual assaults, including child sexual assaults, many problems remain for complainants entering the criminal justice system. Very low reporting and conviction rates, very high attrition and successful appeal rates, the stress of cross-examination and the inherent evidentiary problems associated with delay in reporting these crimes, plus the fact that many alleged offenders have died by the time the victim is able to report, all combine to dissuade or prevent the victim of child sexual assault from either entering and/or attaining justice in the criminal justice system. Nearly three-quarters of the victims in this study who did go to the police faced one or more of the above impediments to successful prosecutions.

It is noteworthy that only one victim made an application to a victims of crime compensation scheme, compared with 18 victims who made complaints to the Church's internal complaints processes. This raises the question as to why victims go back to the very institution that abused them and protected the offender. Close analysis of the criteria for justice, as outlined in chapter 3, indicate that it is very important that clergy victims receive acknowledgement of the truth of what happened from those responsible for the crimes, in particular, the hierarchy of the Catholic Church.

The next chapter examines the two Catholic Church's internal complaints processes, the Melbourne Response and Towards Healing, as the third and final potential pathway to justice for victims of clergy sexual abuse.

97 Ibid 8.
98 *Victims of Crime Assistance Act 1996* (Vic) s.7.
99 A person who is injured because he or she is a parent of the primary victim child or a person who was present at and witnessed the crime. Ibid s.9.
100 A close family member, a dependent of the victim or a person in an intimate personal relationship with the victim. Ibid s.11.
101 Ibid s.46.
102 Victims of Crime Assistance Tribunal, above n 93, 10.
103 Ibid 7.

CHAPTER

6

AUSTRALIAN CATHOLIC CHURCH'S INTERNAL COMPLAINTS PROCESSES, TOWARDS HEALING AND THE MELBOURNE RESONSE: LOOKING FOR JUSTICE III

6.1 Introduction

In the previous two chapters, I argued that the civil and criminal jurisdictions (excluding VOCAT) in Australia offer very few viable options for victims of Catholic clergy sexual abuse seeking justice. Victims are faced with multiple obstacles including finding a Catholic Church entity to sue. There are also the shortcomings with the criminal justice system of very low conviction rates and very high successful appeal rates. Such legal impediments mean that clergy victims have had to rely on the Catholic Church and its internal complaints processes in a final attempt to find some justice.

This chapter focuses on the Australian Catholic Church's two internal complaints processes for allegations and complaints about Catholic clergy sexual and other abuse. In 1996, Cardinal Pell, Archbishop of Melbourne at the time, established the Melbourne Response, which deals with allegations about priests within the Archdiocese of Melbourne. Towards Healing, established by the Australian Catholic Bishops Conference and Catholic Religious Australia, also in 1996, deals with complaints from the rest of Australia.

According to the foundational document,[1] the primary aim of Towards Healing and the Melbourne Response is to bring healing to victims. Such a goal is to be achieved by offering victims a pastoral process in which the truth will be honoured and victims' needs addressed. To inform and guide their dealings with victims and support the implementation of the above goals, both processes adopted the same seven foundational principles: the truth; humility; healing for victims; assistance to other persons affected; a response to those accused; a response to those guilty of abuse; and prevention. The principles relating to the truth and healing for victims state that:

> The truth: The Church is committed to seeking to know and understand the full extent of the problem of abuse and its causes, especially abuse that is committed in a community that professes the values of Jesus Christ. It is also committed to seeking to know the truth, so far as possible, about individual allegations of abuse. Such commitments are made because to conceal the truth is unjust to victims, a disservice to accused people and damaging to the whole Church community.[2]
>
> Healing for the victims: The Church authorities accept they have a responsibility to seek to bring healing to victims of abuse and that a sensitive and compassionate response must be the first priority, even when the allegations are unproven.[3]

The protocol for both processes adopts an explicitly victim-focused, pastoral approach to complaints of clergy abuse that would also attend to the truth and victims' needs and in which healing of the victims is foremost. These values reflect several of the criteria for justice as identified in chapter 3 and which will be discussed further in chapter 7.

At the Melbourne Response, the Independent Commissioner receives complaints and allegations of sexual abuse and investigates the matter so he can make a determination on the basis of the evidence. Victims can then be referred to Carelink and/or the Compensation Panel. These two latter components of the Melbourne Response process do not have investigatory

1 Australian Catholic Bishops Conference and Catholic Religious Australia, *Towards Healing – Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church of Australia* (January 2010).
2 Ibid 9.
3 Ibid.

roles.[4] That is, it is the Independent Commissioner who makes the final decision or finding about the complaint. At Towards Healing, one or two assessors investigate the complaint by separately interviewing the complainant and the accused. Towards Healing must invite the complainant to have a support person.[5] The accused must be invited to have either a support person or a legal adviser present during the interview.[6] They may interview other people to aid their investigation. A finding about the truth of the complaint is made on the balance of probabilities. For a detailed outline of the Melbourne Response and Towards Healing processes, see appendix 3.

In assessing these guiding and foundational principles of the Church's processes, and determining whether victims interviewed in this research were finding justice by engaging with these processes, four clear themes were identified. These themes developed from a comprehensive and iterative process of coding, categorising and careful analysis of the interview data.

1. The truth and its acknowledgement

2. Healing for victims

3. Pastoral approach

4. Decision-making and compensation.

6.2 The four themes

All categories of interviewees, who had experiences with Towards Healing and the Melbourne Response, were asked about those lived experiences. Of the 23 primary victims interviewed, 18 had experienced the Church's processes, of which 10 attended the Melbourne Response and seven attended Towards Healing. One primary victim attended both processes. Of the 12 legal advocates, five had worked with both processes, six had worked with Towards Healing, and one had experience only with the Melbourne Response. Of the 18 secondary victims, six had dealt with the Melbourne Response and three with Towards Healing. The remaining nine secondary victims had not been involved with either process. Three of the five non-legal advocates had experience with both processes, one had experience with the Melbourne response and one had not experienced either process. See table 6.1. The other legal professionals, County Court Judges, prosecution solicitors and barristers and the criminal barristers, are not included in this table, as they did not have direct experience with the two processes.

	Melbourne Response	Towards Healing	Both Processes	Neither Process	TOTAL
Primary victims	10	7	1	5	**23**
Secondary Victims	6	3	0	9	**18**
Legal Advocates	1	6	5	0	**12**
Non-legal Advocates	1	0	3	1	**5**

Table 6.1: Number of interviewees who attended or were involved with Melbourne Response and Towards Healing.

4 Catholic Archdiocese of Melbourne, *Sexual and Other Abuse. The Melbourne Response* Catholic Archdiocese of Melbourne <http://www.cam.org.au/Portals/0/Documents/Melbourne-Response-2012-brochure.pdf>.
5 Australian Catholic Bishops Conference and Catholic Religious Australia, above n 1, 22.
6 Ibid 23.

Twenty primary victims contributed to this chapter, even though only 18 attended the Church's internal complaints processes. Eleven spoke about the Melbourne Response process and nine about Towards Healing. See table 6.2. In total, 45 interviewees, nearly two-thirds of all interviewees in this research, contributed to the data on the Melbourne Response and Towards Healing. Ten of these interviewees contributed to the data on both of the Church processes.

MELBOURNE RESPONSE					
	Total Number of Contributors to the Data	Theme One	Theme Two	Theme Three	Theme Four
Primary Victims	11	8	8	10	11
Secondary Victims	6	5	6	4	4
Legal Advocates	6	5	3	6	3
Non-legal Advocates	3	1	3	1	2
Other	0	0	1	0	0
Total Melbourne Response	**26**	**19**	**21**	**21**	**20**
TOWARDS HEALING					
	Total Number of Contributors to the Data	Theme One	Theme Two	Theme Three	Theme Four
Primary Victims	9	6	6	5	6
Secondary Victims	3	0	1	0	1
Legal Advocates	11	5	9	10	6
Non-legal Advocates	3	0	3	1	3
Other	2	1	0	0	1
Total Towards Healing	**28**	**12**	**19**	**16**	**17**

Table 6.2: Number of contributors from each interview category to the four themes for Melbourne Response and Towards Healing

The interview data about Towards Healing and the Melbourne Response were examined separately, but because the resultant themes were so similar, they are most appropriately presented together. The interviewee responses arose unprompted. Where the discussion raises experiences and views unique to one or the other process, these will be identified separately.

6.2.1 Differences between the Melbourne Response and Towards Healing

In comparing and contrasting the two processes, several factors need to be considered. An important difference relates to the structure and personnel of the two processes. In addition, Towards Healing is a national process and includes complaints from all Australian Dioceses, Archdioceses and Religious Orders whereas the Melbourne Response only deals with complaints associated with the Archdiocese of Melbourne.

At Towards Healing, there are as many individual Bishops and Provincials (Church authorities) dealing with victims as the approximately 140 Religious Orders and Dioceses that constitute that process. Victims meet with the Church authority at the facilitation meeting stage of the process. This means outcomes within the Towards Healing process would be, theoretically, less predictable compared with the Melbourne Response, due to the individual discretion that is exercised by up to 140 Church leaders (see section 6.6 below

for further discussion on the discretionary decision-making powers of these Church authorities). There is less diversity, though, with the lay personnel at Towards Healing, such as the Director of Professional Standards, the contact person, the facilitators and investigators. These personnel are more of a constant feature in each State and Territory.

At the Melbourne Response, regardless of the offender, all victims deal with the same personnel: the Independent Commissioner, to whom a complaint is made; the Carelink employees, who arrange counselling and other services; and the Compensation Panel that determines matters of financial reparation.

The main difference between the two processes is that the Melbourne Response employs a Compensation Panel to determine the compensation amount, whilst the individual Bishop or Provincial of a Church authority within the Towards Healing process will decide on compensation amounts.

Despite these differences in structure, there are similarities between the processes such as the employment of investigators. Whilst the Independent Commissioner is the investigator at the Melbourne Response, Towards Healing employs lay investigators in each state and territory. At the Melbourne Response, it is Carelink that makes decisions about addressing the needs of the victim in relation to counselling and other services, whilst at Towards Healing the Church authority will make these decisions.

6.2.2 Themes

The four main themes emerging from the Towards Healing and Melbourne Response interview data, which reflect the guiding principles of these processes as discussed above, relate to whether: first, the truth was honoured; second, whether healing was achieved; and third, whether a pastoral process was adopted. The fourth theme addresses the matter of financial compensation, apology and counselling and the decision-making processes utilised by each process. The analysis of these four themes will address the pivotal issue of whether victims are finding justice at these two Catholic Church internal complaints processes. As mentioned earlier, in order to determine if justice is being delivered, these Church processes will be evaluated against the seven criteria for justice as examined in chapter 3. This evaluation is discussed in chapter 7.

The presentation of the data is followed by a discussion of the findings.

6.3 Theme one: The truth

This first major theme emerging from the interviews about the Melbourne Response and Towards Healing processes, relates to victims' needs to be able to tell their story, be heard, understood and taken seriously. Interviewees wanted the truth about the sex crimes, their subsequent impacts on victims and their families, and their cover-ups to be told and acknowledged by the Church authorities. Refer to chapters 1 and 7 for further discussion on the truth and its denial.

As discussed above, a core principle to which the Australian Catholic Church is committed, is striving for the truth. First, it is committed to seeking to know the truth, as far as possible, about individual allegations of abuse. Second, it is also 'committed to seeking to know and understand the full extent of the problem of abuse and its causes … especially abuse that is committed in a community that professes the values of Jesus Christ'.[7]

7 Australian Catholic Bishops Conference and Catholic Religious Australia, above n 1, 9.

From a victim's perspective, the truth involves two elements. Victims say they want to be able to tell their story, their truth, and have it acknowledged. They also say they want to hear the truth about what happened in relation to the crimes committed, from the offender and/or the Church hierarchy. That is, they want a two-way exchange of the truth. As interviewees observed, the truth can be told, listened to and acknowledged; it can be stifled or quashed; or it can be told but not heard effectively and, therefore, not acknowledged. Also, according to the interviewees, lies or untruths can be told. This section examines the interviewees' lived experiences of, and views on, the truth and its acknowledgement at the Melbourne Response and Towards Healing. Their lived experiences highlighted not only the significance to them of the truth, but whether it was honoured at each of these processes.

The theme of the truth and its acknowledgement was raised in the interviews of nearly half of all interviewees taking part in this research. This consisted of nearly three-fifths of the legal advocates, who between them had represented about 1400 Catholic clergy victims of sexual assault. More than four-fifths of the primary victims who had attended the internal complaints processes highlighted this issue, as did five secondary victims, one non-legal advocate and one prosecuting solicitor (see table 6.2).

This section draws on the detailed analysis of the interview data relating to the truth and its acknowledgement, which, from detailed reading and further categorising and analysis, fell into four clear sub-themes that were of significance to the interviewees. First, the minimisation of primary and secondary victims' accounts of the sexual assaults and their impacts; second, the misinformation given to victims about the offenders; third, the concealment or containment of the truth of the victims' accounts and the offenders; and fourth, that victims felt silenced by the compensation agreements and the personnel within the processes.

6.3.1 Minimisation of the truth

For the truth to be acknowledged by the Church requires the Church to acknowledge the victim's full account of what happened in relation to the sexual assaults and their impacts on the victim. Many interviewees believed these accounts were minimised at the Church's processes.

Further analysis of the interviews found that minimisation of the truth occurred in several areas: victims' accounts of what happened; victims' needs; the impacts or harm to the victims; and the severity of the sex offences. There was also concern expressed by some interviewees about minimisation of the truth as a result of the investigations and the burden of proof used, and the standard and thoroughness of the investigation. Finally, interviewees reported that minimisation of the truth occurred when victims' files were prematurely closed by the Melbourne Response and Towards Healing. Each of these observations is discussed in turn.

VICTIMS' ACCOUNTS

According to four victims and a legal advocate, lack of acknowledgement of victims' accounts generally,[8] or minimisation of that truth, took many forms. These interviewees reported that victims' accounts were dismissed, curtailed, misunderstood or not understood at all, by one or more personnel at the

8 V1-11, V1-18, LA-3, V1-21, V1-3.

Melbourne Response and Towards Healing, including the Archbishop of Melbourne who did not genuinely engage with victims. Victims reported that they were not listened to and that their voices were stifled. One of these victims observed that he was neither encouraged nor embraced by Towards Healing when he first called them on the telephone. He felt he was 'a problem to be dealt with and how dare I ring up'.[9]

One male victim, who had a very difficult journey through the Towards Healing process, did say that when the Religious Order acknowledged that the crimes did happen, 'to that extent the Towards Healing process was effective'.[10]

A female victim said that a person at Towards Healing was responsive and she felt she 'could talk to him … [he] was really good [and] at least he understood that [child sexual assault] is … harmful to children'.[11] Other than this experience, this woman said that she found the Towards Healing experience stressful.

VICTIMS' NEEDS

Several interviewees perceived their needs as being minimised by being ignored or shunned. They described these needs as wanting to make sure the offender was not free in the community and offending against other children, and that offenders be laicised, prosecuted or otherwise not held up as good men of the Church.

A primary victim, who had been sexually abused by the parish priest over a period of about six years, explained that the Vicar-General failed to acknowledge his request to take action and do something about the offender who remained unsupervised in the community. Instead, the Vicar-General 'had the nerve to say, I'll pray for you. I said, don't fucking pray for me, do something about it. I don't need your prayers.[12]

A secondary victim, whose victim brother had died prematurely of alcoholism-related diseases, talked about her brother's final request to remove a dedicatory plaque with an inscription of the offender's name that was in a place of honour adjacent to the high altar in the Archdiocese of Melbourne Cathedral. She said her brother did not want money, rather the removal of this plaque that honoured the priest who raped him, and that the priest is stripped of his papal honours. The victim's sister, who also had asked the Archbishop to remove the plaque, received a letter from the Archbishop denying there was such a plaque. It took two years and intervention by the Papal Nuncio before this plaque was removed. The victim had been dead for 18 months.[13]

Another example from a secondary victim involves a woman whose son had committed suicide as a young man. She said she wanted to talk with Towards Healing about what the offending priest had done to her son and that he, the offender, needed to be held accountable for his crimes.

9 V1-21.
10 V1-13.
11 V1-5.
12 V1-18.
13 V2-11.

> [They were] [s]ort of caring, but very minimising the issue … for me it was huge … I can't believe that this priest has done this, he needs to pay [for] the crime, something has to be done with this priest … [but] [t]here was never going to be action about the abuse. No. Didn't go near it.[14]

MINIMISING OF HARMFUL IMPACTS ON VICTIMS

Two primary victims and three secondary victims talked about minimisation of the harmful impacts of the sexual abuse. According to them, their grief, depression and post-traumatic stress disorder were neither noted nor acknowledged by the Melbourne Response.[15]

One of these primary victims expressed concern that the assessments and evaluations by the Compensation Panel were cursory and, as such, the harmful impacts of the sex offences could not be understood and acknowledged. She said, 'How can these total strangers make a fair and proper evaluation of events in a couple of hours?'[16]

An assessment of a victim by the Psychiatrist at the Melbourne Response, according to this victim's brother, did not refer to any previous psychiatric reports of the victim, of which there were many.[17] This, said the interviewee, misrepresented the clinical status of his brother as the report was inaccurate and misleading because it did not represent or reflect the severity of his brother's mental health problems. This victim died very soon after his case was settled by the Melbourne Response.

The parents of a victim who had committed suicide at a young age felt that the Independent Commissioner at the Melbourne Response trivialised and minimised their grief and suffering. They said they were told by the Independent Commissioner '… to try and forget the past, I know you've suffered, get on with your life. This crap!'[18] and 'Bleed some more and get over it. They didn't put it like that, but that was the aim of the exercise'.[19]

This same secondary victim, the mother, wanted her son's offender (the son had committed suicide) to be returned to Australia from the UK where he had fled just as the police were about to lay charges. The Independent Commissioner at the Melbourne Response told this woman that the police would not extradite the offender as it would be too costly and 'he was an old paedophile and it happened a long time [ago]'. This woman said: 'Why did they have to rely on the police? Why doesn't the Church – they've got lots of money … send someone over to accompany him back. Or pay for the police to do it'.[20]

SEVERITY OF THE SEX OFFENCES

Six primary victims, a legal advocate and a secondary victim described what they saw as minimisation, or a downgrading, of the sex offences.[21] They said this was exhibited by a resistance and/or reluctance to accept and document their accounts of what happened to them.

14 V2-16.
15 V1-7, V2-2, V2-6, V2-7.
16 V1-7.
17 V2-2.
18 V2-6.
19 V2-7.
20 V2-7.
21 V1-7, V1-8, V1-13, V1-21, V1-6, V1-18, LA-5, V2-2.

One example is of a primary victim who had been anally raped over a period of two years whilst he was at a boarding school at the ages of 12 and 13. This man reported that the offences against him were incorrectly classified which resulted in a downgrading of the offences from 'rape' to 'indecent assault',[22] or from a penetrative offence to a non-penetrative offence.

Several victims described ongoing attempts by Church personnel to minimise the overall wrong that was done, meaning the severity of perpetrators' offending was greatly diminished. This occurred at the Melbourne Response and Towards Healing.

There are several examples of interviewees saying that the severity of the sex offences was minimised by the Independent Commissioner at the Melbourne Response. One female victim, who had been raped by a Catholic priest when she was a heavily-medicated patient in a Catholic private hospital, said that the Independent Commissioner accepted her as a victim but would not accept that she was raped. She said this determination was made without a hearing being held and without the Independent Commissioner speaking with any other witnesses. The victim said, 'This is not the truth … once again it is not allowed to come out'.[23]

Another case involved a female victim whose life at the time of the sexual assaults was in disarray. She went to the parish priest for help. She became pregnant to this priest. This woman said that the Independent Commissioner referred to her daughter as 'the product of your affair with Father xx'.[24] For this victim, whose marriage had been failing at the time, it was not an affair. It was sexual assault.

The family member of a victim was very troubled by what he reported as being a blatant minimisation of the sex offences, and their severity, against his brother.[25] He indicated that a transcript of the Independent Commissioner's interview with the victim was provided to the Compensation Panel in place of the requisite full report and that this interview transcript did not include any facts or details of the sex offences. Also, according to this secondary victim, the psychiatrist and psychologist at Carelink did not perform an adequate psychiatric assessment of this same victim in that the interview did not include:

> … any numeration of the crimes … they weren't even described … There was no, that's a case of sexual assault, putting his hand up your shorts is sexual assault, trying to masturbate you is sexual assault, masturbating himself in front of you is sexual assault, and that was rape. [There was] [n]o evaluation or definition of the criminological content of what happened.[26]

Another example, as told by a non-legal advocate, involved a case in which Victoria police pursued only one charge in the criminal courts against a particular offender. This was subsequently reflected, said this advocate, in a paltry amount of compensation for the victim even though the Church 'knew [the sex crimes] had gone on for years and years and years and there had been multiple rapes'. [27]

22 V1-23.
23 V1-7.
24 V1-8.
25 V2-2.
26 V2-2.
27 NLA-1.

A victim claimed that the coordinator at Carelink told him that what the parish priest had done was not sexual assault. This occurred, said this man, despite the police having laid multiple sexual assault charges against this priest.[28]

PREMATURE CLOSURE OF FILES

Ten interviewees,[29] mostly primary victims, raised concerns about feeling pressured or coerced into prematurely accepting compensation, so their file could be closed. These interviewees expressed significant disquiet about the reluctance and resistance of the Church's processes to properly listen, acknowledge and document their needs, and accounts of the offences and their impacts. Victims felt as though the Church wanted to get rid of them as quickly as possible. There was particular concern about this with Towards Healing.

A Catholic priest echoed the experiences of victims when he said:

> [The Church] is prepared to say, oh yes, we must do something about this for the future, but the people whose lives have been devastated by the past, oh no, we don't want to know about them. Or, if we do, we will try and get rid of them and get them out of the way as quickly as we can.[30]

In relation to the Melbourne Response, a victim summed up the approach thus: 'It was like, they've won, they've controlled this … tick, another one off the list … Pay them out, get rid of them, on our terms, not their terms, they've got no say … Problem solved. And that is the problem'.[31]

With respect to Towards Healing, the examples given by the interviewees involved the Victorian facilitator and several other Church authorities, such as the Christian Brothers. One male victim, who was seeking clarity, acknowledgement and justice, said he was instead faced with pressure by the facilitator at Towards Healing to ask for money because '… this is what this is about. You have to get money so we can resolve this and close it'.[32]

Another male victim reported that he was not emotionally ready to meet with the Provincial of the Christian Brothers. Despite this he said the facilitator coerced and even threatened him to do so. The speed at which his claim was being processed did not allow, he said, his needs and concerns to be addressed, let alone heard and acknowledged. This man said that he was feeling suicidal and wanted to make sure his offender was not abusing other victims and that the Church was putting preventative measures in place. He also wanted to understand more, move forward and get better. But, he said, the facilitator threatened to withdraw support and cease the counselling sessions unless or until he agreed to have the meeting with the Christian Brothers and discuss money, so the case could be closed. This victim told the facilitator:

> I'm still in a bad spot. I'm having trouble being around people I love let alone the representative of the Church that abused me as a kid … [I have a] fear that I'll fly across that table and rip that collar and that throat out of the bloke that's sitting there. I'm frightened for him and I'm frightened for myself. I need more time … [I'm] in a really, really vulnerable spot.[33]

28 V1-6.
29 V1-11, V1-3, V1-21, V1-23, V1-24, V1-22, V2-2, V2-18, LP-3, P1.
30 P1.
31 V1-11.
32 V1-3.
33 V1-21.

According to another male victim who was repeatedly raped at a boarding school when he was a boy, the Church authority would neither listen nor talk to him about his major and central concerns, such as the degree of sexual offending and the life-long impacts on him and his family. According to this man, the Church authority wanted to settle his matter that day and initially offered him $7000. Expressing his anger and frustration the man said:

> This offer was made after I found out they had just moved [the offender] out of Australia ... and they were now confident they had him safely tucked away and I could do nothing … my loader would just fit inside the front of the Cathedral. 22 pillars. You start knocking down pillars, that place would just cave in you know. Just do donuts on the marble floor! Fuck.[34]

BURDEN OF PROOF AND STANDARDS OF INVESTIGATION

At Towards Healing, assessors, who are also called investigators, are responsible for investigating the victim's complaint and a 'finding about the truth of the complaint' must be based on the civil standard of proof, 'on the balance of probabilities'.[35] Two primary victims and a legal advocate[36] raised concerns that the civil standard of proof may have been replaced, or merged with, the higher criminal standard. For example, they pointed out that the Towards Healing investigators in Victoria, both former policemen and Catholic, had previously only worked with the higher criminal standard of 'beyond reasonable doubt'. If this higher standard was being applied, even if unwittingly, there was concern, said the interviewees, that victim accounts may not have been accepted and, thus, not acknowledged.

In relation to standards of investigations, a primary victim reported that a NSW Church authority did not cooperate with the investigator, as bound by the protocols to do, and did not provide the names of potential witnesses. At this stage, said this interviewee, there was no other evidence that the sexual assaults happened, other than his word.[37] In addition, he said the Church authority was cognisant of a 'dark era'[38] at the school involved during the same time this victim was sexually assaulted.

A legal advocate said that truth finding at Towards Healing could be impacted upon during the investigation process if the standard of the investigation was poor and not comprehensive. According to this lawyer, who has about 20 years' experience working with victims of clergy sexual abuse and Towards Healing, the assessors don't do a proper investigation. She said:

> The investigations where the Christian Brothers were involved were clearly manifestly inadequate, not identifying other complaints against the same offender, nor revealing knowledge about systemic sexual offending … [It is] [d]eeply disturbing that [Towards Healing] asserts that it investigates matters … as far as I'm concerned, [they] are a sham, not very thorough.[39]

34 V1-23.
35 Australian Catholic Bishops Conference and Catholic Religious Australia, above n 1, s.40.9.
36 V1-6, V1-13, LA-7.
37 V1-13.
38 The 'dark era', according to this interviewee, represented a time at that school when primary school students were being sexually assaulted.
39 LA-7.

Significantly, minimisation of the truth was a crucial concern for nearly all of the primary victims who attended the Church processes. This number, more than the number of primary victims addressing all the other elements of the truth, is indicative of the importance for victims of being able to tell the truth and have it acknowledged and documented. A bit less than half of the secondary victims also addressed this issue of minimisation of the truth.

It was the primary victims who discussed the minimisation of what happened to them and the subsequent downgrading of the sex offences. It was also the primary victims who were concerned about the potential for the Towards Healing investigators to make determinations based on a higher, criminal burden of proof. But, interestingly, it was mainly secondary victims who spoke to the issue of minimisation of the harmful impacts on primary victims. Their testimonies suggested more of a systemic problem, particularly at the Melbourne Response, where they found that investigatory, psychiatric and clinical reports of victims were deficient in their content, thus minimising the truth.

Of import is that the needs of primary and secondary victims that were minimised were not needs for them, rather, needs of other at-risk children. They all wanted the offender held to account to prevent further offending.

With respect to premature closure of files, more than half of the victims who had been to Towards Healing reported being pressured to settle quickly their claim so the file could be closed. This is not what victims wanted. Instead, they wanted a more pastoral approach in which the Church authority would listen and document the horrific details of the offences and the debilitating and life-long impacts of those offences on them and their families. What they got, according to the interviewees, was an outcome-driven and aloof process in which their truth was minimised and dismissed.

Whilst the observations about minimisation of victims' stories and the offences referred to specific individuals at the Melbourne Response, the Towards Healing data were more generic, involving multiple Church authorities.

6.3.2 The truth about the offender

The second sub-theme of the truth, relates to the truth being told about the offender. According to interviewees, many believed that they were the only victim of their offender when this was often not the case, and the Church personnel did not inform them otherwise. That is, say some interviewees, the truth about the offender was either withheld or an untruth was told.

This aspect of the truth relates to information about offenders that is held by the Archdiocese of Melbourne, the Church authorities and/or the Melbourne Response and Towards Healing. This issue was of considerable import to 10 interviewees[40] including four legal advocates who had represented about 1200 clergy clients between them.

Two legal advocates[41] reported that either the Church personnel did not correct the victims' misperceptions that they were the only victim, and/or lied by telling the victims they were the only one to come forward about

40 V1-4, V1-11, V1-6, V2-7, V2-10, LA-5, LA-12, LA-1, NLA-1, LA-7.
41 LA-5, LA-12.

that particular offender. According to these two lawyers, victims were also told that the Church personnel had never before heard of the offender, when clearly they had. Even though these two legal advocates, between them, had represented dozens of victims of the same offenders through the Church's process, they said that some victims were told they were the only one to have come forward.[42] One of these legal advocates described Towards Healing as 'really misleading' because when one of her client's claims was upheld, neither she nor the victim was informed of the many other allegations against that same offender and the fact he had previously received a conviction.[43]

Another legal advocate claimed that the allegations of some of her clients could not be substantiated at Towards Healing, even though, to her knowledge, Towards Healing had processed and accepted claims for other victims of that same offender.[44]

Two primary victims,[45] who wrongly believed they were the only victims of their offenders, reported that the Independent Commissioner at the Melbourne Response did not inform them otherwise, even though, according to them, he was in possession of contrary information. One victim said the Independent Commissioner claimed that the Melbourne Response had only had one complaint against a particular offender, when there were many.[46]

One victim[47] said he thought he was his offender's only victim. He later found out that the Independent Commissioner and the coordinator of Carelink at the Melbourne Response both knew of other victims of this same offender. The offender was continuing to work as a parish priest, raising concerns for the victim that others could be at risk of abuse.

There was also discussion from some interviewees about offending clergy being moved by the Church from parish to parish, interstate or overseas to avoid accountability. One secondary victim's frustration and anger was apparent as he talked about his deceased son's offender being moved around by the Church:

> [The offender] didn't start in our parish. He'd been in several others, and mea culpa, mea culpa, bull shit, bull shit. And then shifted to another one. Then shifted to another one. Oh be a good boy. Yeah, sure. A sabre across the gut, be a good boy. A katana [a sword] to finish his problems.[48]

A non-legal advocate told the story of a mother of a victim who complained about her son's sexual abuse to the Melbourne Response when the offender was about to be moved on from his parish. Two Carelink employees, including the coordinator, instructed the mother on what to say to people in her parish and community about the priest. According to this advocate, the instructions were written down for the mother: 'Say that Father xx is ill and you hope he's getting the help he needs'.[49]

Another mother of two victims, whose offender was moved from parish to parish over almost five decades, described the behaviour of the hierarchy in their protection of offenders:

42 LA-5, LA-12.
43 LA-5.
44 LA-1.
45 V1-4, V1-11.
46 V1-4.
47 V1-6.
48 V2-6.
49 NLA-1.

> … like criminals, aiding and abetting child rapists, and thinking nothing of it! No big deal, doesn't matter, just kids … and there are those who enabled [the paedophiles] to stay there. And history shows it time and time again … Complaints to the hierarchy about a paedophile and he's moved on. Oh well, don't tell anyone, we'll fix it up. Whatever story, whatever lie – they just move them on … [and] where's the pile of thrown-out priests for doing this? … they're all contained and left in there … Look at what this organisation has done to children … Where is their disgust? They all just let it be. Why? Where's the decent man among them?[50]

DISCUSSION

Providing or confirming the truth about the offender was a pivotal element of the truth being told, not least because victims needed to know that they were not the only victim of their offender. For Church authorities to withhold or misrepresent such critical information creates a distortion of what happened to the victims and by whom. That is, according to the interviewees, it was either by commission (victims were told they were the only victim) or omission (they were not told they were not the only victim) that these untruths were told. A third of the interviewees who discussed this issue were legal advocates who verified the victims' testimonies that both Church processes misled some victims in this regard.

6.3.3 Containment of the truth

The third sub-theme of the truth, which was explored by 10 interviewees,[51] mainly primary and secondary victims, refers to the ways in which the Archdiocese of Melbourne and the Melbourne Response contribute to the Catholic Church's cover-up of clergy sexual abuses. Put another way, both the Archdiocese and the Melbourne Response were viewed by these interviewees as keeping some sexual abuse cases out of public view, as a form of damage control by the hierarchy.

The parents of a victim who took his own life as a very young man were, atypically, contacted by the Melbourne Response. The parents believed they were being called to assist with an inquiry that would help bring their son's offender back from the UK (where he had escaped) to Australia, where he would face the courts. Their other expectation, they said, was that the Melbourne Response would be gathering information from the parents of many other victims, with a view to extraditing the offender. This did not happen. The mother of the victim said that the information they supplied to the Melbourne Response was purposefully obtained as part of a 'fact-finding mission … They were just getting the information out of you but giving nothing back. No reassurance, no empathy … it was very painful, very distressing'.[52] She said she thought it was going to open it all up, but instead it closed it all down.

> [The Melbourne Response would] know how you're feeling and if you're intelligent, angry, whatever. If you're even coping, are you a mess? But I think most of all, are you a loose canon? … [they have] taken all the information [they] want. [They] know who we are … what we feel … what we think … where we are, and [they've] got our tapes locked away in [their] cupboard.[53]

50 V2-10.
51 V1-13, V1-4, V1-7, V1-18, V2-6, V2-7, V2-10, V2-2, LA-2, NLA-1.
52 V2-7.
53 V2-7.

Interviewees reported a 'policy' of containment and controlling within the Melbourne Response.[54] A female secondary victim, who had battled with the Archdiocese of Melbourne trying to get some justice for her daughter (who eventually committed suicide), concluded that the Church was 'trying to close it all down, keep it quiet … there was this war going on with their arrogance and propaganda, and us, with the truth'.[55]

There was also concern that the Melbourne Response deliberately kept information about the offences and victims away from the hierarchy at the Archdiocese of Melbourne. Alternatively, if the information were passed on to the Archdiocese, it was then contained, contrary to what victims wanted, which was for the hierarchy to act on the victims' information and bring offenders to account: '… the hierarchy has outsourced the problem, called it the Melbourne Response [and] all of the nasty stuff stays in there'.[56]

The Independent Commissioner, according to another male victim, was discouraging and disinterested. He explained it this way:

> [He] caged me in every way he possibly could … every angle I tried to come from … where I could get some sort of acknowledgement from the Church, some understanding, he was able to put a lid on … He discouraged me in every way possible … [c]ame out of there thinking there was no point me doing anything as there is no way I can get any resolution.[57]

One legal advocate concluded that the Melbourne Response was designed to specifically manage what the Church saw as a problem and 'keep it quiet and make sure it doesn't escalate to threaten the Church'.[58]

DISCUSSION

It was mainly the primary and secondary victims who raised the concerns about the truth of their stories and accounts being contained within the Church's process. Several victims said they wanted to work collaboratively with the Church's process in bringing the offender to justice and they assumed, wrongly it seems, that the information they provided would be used to assemble a dossier on the perpetrator to assist with possible prosecution and conviction, for which the Church would be grateful. That is, victims handed over this information to the Church personnel in good faith, only to be left feeling exploited and very disappointed.

6.3.4 Victims silenced

The final element of the truth emerged from the data of several interviewees[59] who had experience of the Melbourne Response. They discussed problems with the personnel of this process advising them not to go to the police and not to go to the media with their stories. It was also reported by some interviewees that the confidentiality clauses in the Deeds of Release used at the Melbourne Response functioned as a means of buying victims' silence.

A male victim, whose offender had fled to the UK, described his experience as feeling 'blackmailed' because although he had a right to go to the police, he was told he was 'an idiot' if he did. This man said he was threatened by being told that he would not be eligible for counselling services and compensation if he went to the police.

54 NLA-1, V1-7.
55 V2-10.
56 V1-18.
57 V1-13.
58 LA-2.
59 V1-10, V1-4, V1-7, V1-6, V2-7, LA-6.

> … you're wasting your time, it's going to harm you, you're not going to get your compensation, you're not going to get your counselling, which is probably what [I] need above everything … there's no point in complaining because the police aren't going to put him through [a prosecution].[60]

Two secondary victims, whose son had committed suicide, said they were told directly by personnel at the Melbourne Response not to go the media about their story. They felt they were being dismissed: 'You disappear back into the suburbs, into the woodwork. That's what they want, that's what they're all about'.[61]

Another victim reported that he was warned not to go to the media by Carelink, whose personnel, he said, were fully cognisant of the offending priest and his type of offending.[62] This warning was without cause, as he had never thought about going to the media.

Five interviewees talked about the impacts of the Deeds of Release associated with their compensation pay out.[63] These Deeds released the Church, or the Archdiocese of Melbourne, from any further claims. They also prevented any further claims being finalised in relation to the alleged and/or any other offender. Until recent years, these Deeds also included confidentiality clauses, which, according to a legal advocate, made victims feel that 'their silence had been bought' and that the Melbourne Response and the Church were still in control.[64]

Another female victim argued that the Church used the confidentiality clauses to intimidate victims and to keep them quiet because it was concerned that primary and secondary victims might pose a threat to them in the future. If a victim is making a fuss, she said '… give them their 30 pieces of silver, and off with their heads.[65]

One female victim, who had been told several times by the chair of the Compensation Panel that she did not need a lawyer to look at her Deed of Release, said:

> [I was sent] … this really official, officious letter. The crux of it was if you sign this deed you will be relinquishing any right to ever approach the Melbourne Response again with any other complaint about anybody else. So, in other words they have found another way to make people be quiet and shut up.[66]

6.3.5 Summary: Theme one

The findings from the analysis of the interviewee data in this section on the truth are at variance with the Melbourne Response and Towards Healing's undertaking that the Australian Church is committed to striving for the truth. The minimisation and/or concealment of the truth of victims' stories, information about offenders and the Church's role in the sex crimes, further harm victims and their families as well as the Church and its communities. Refer to chapter 7 for a discussion on minimization and concealment of the truth as being forms of denial of what is happening now and what happened in the past and being contradictory versions of the truth.[67]

60 V1-4.
61 V2-6.
62 V1-6.
63 V1-7, V2-6, V1-10, V2-7, LA-6.
64 LA-6.
65 V1-7.
66 V1-10.
67 Stephen Parmentier and Elmar Weitekamp, 'Punishing Perpetrators or Seeking Truth for Victims: Serbian Opinions on Dealing with War Crimes' (2013) 13 *International Criminal Law Review* 43, 55.

6.4 Theme two: healing of victims

As mentioned earlier in the chapter, healing for the victims is stated to be a primary aim of the Church's processes and is one of the seven underlying principles to which the Church is committed. The Church protocol explicitly articulates its responsibility to seek to bring healing to victims of abuse and recognises that a sensitive and compassionate response must be the first priority, even when the allegations are unproven.[68]

Healing was seen, along with the truth, as essential for the victims in this research. This section of the chapter will examine the impacts on the primary and secondary victims who engaged in the Melbourne Response and Towards Healing. This theme of healing was discussed by all but two of the legal advocates, who between them had represented about 1900 Catholic clergy victims of sexual assault. More than three-quarters of the primary victims who had attended the internal complaints processes addressed this issue, as did seven secondary victims, three non-legal advocates and one prosecuting solicitor. In fact, interviewees talked not only about the failure of the Melbourne Response and Towards Healing processes to provide a healing environment, but also about the further trauma they suffered as a result of engaging in these processes.

Three broad categories in relation to healing were identified from the interviewees' data. First, the general impacts on victims; second, the mental health impacts on victims;[69] and third, the sources or causes of those impacts from within the Melbourne Response and Towards Healing.

6.4.1 General impacts on victims

Twenty interviewees, from all interviewee groups, raised the issue of the general negative impacts on victims as a result of going through the Melbourne Response and Towards Healing.[70] They referred to primary and secondary victims being reabused, retraumatised and revictimised by these processes.

These interviewees also referred to the impacts of the two processes as having no semblance of healing and being 'belittling', 'humiliating', 'embarrassing', 'harmful', 'inflammatory', 'bullying', 'confusing', 'intimidating', 'incredibly painful', 'distressing', 'daunting', 'highly detrimental', 'disempowering' and 'like a nightmare'. One man felt 'stripped quite bare of my personal identity' and it was like 'standing in the middle of a road and a truck running me over'.[71] According to another male victim, his experience of the Melbourne Response caused him to relive his abuse such that he risked being 'permanently entrenched in his childhood abuse'.[72]

A female victim, who also worked as a non-legal advocate, said she would not allow herself to be put '… in the power of Church officials and letting them pontificate and condescend and determine the truth or not of a situation that you're experiencing. There was no way in the world I would put myself in that situation'.[73]

68 Australian Catholic Bishops Conference and Catholic Religious Australia, above n 1, 9.
69 The mental health impacts of child sexual abuse are well documented. There is a strong association between sexual abuse and suicidal ideation, suicide and accidental fatal drug overdoses as well as depression, anxiety disorders and post-traumatic stress. Judy Cashmore and Rita Shackel, 'The long-term effects of child sexual abuse' (2013) CFCA Paper 11, *Australian Institute of Family Studies* 1, 11.
70 V1-10, V1-7, V1-18, V1-12, V1-1, V1-24, V1-3, V1-20, V2-2, V2-7, V2-13, V2-10, V2-18, LA-2, LA-10, LA-7, LA-1, LA-8, NLA-1, NLA-2, NLA-5.
71 V1-3.
72 V1-12.
73 V1-14, NLA-3.

Whilst secondary victims spoke of the negative impacts on themselves from engaging in the Melbourne Response and Towards Healing, they referred also to the vulnerability of primary victims within these processes and their inability to protect themselves. One woman, whose son had committed suicide as a young man, would sit and cry and feel 'absolutely shattered for the day' after a meeting with the Melbourne Response personnel. She said it was '… like losing your child all over again, you're being abused again, your family is being abused … [It was as if her son] didn't matter … he's not important anymore'.[74]

Two primary victims made reference to the name of the process, 'Towards Healing'. The irony was described thus: 'Towards Healing, and yet my experience was anything but that'[75] and '… it's not towards healing, it actually takes you towards madness'.[76]

Nonetheless, one legal advocate, who at the time of interview had conducted four Towards Healing cases, pointed out that, despite reopening 'old wounds' Towards Healing can also be a positive because the victim had the opportunity:

> … to name the harm they've suffered and to describe the impact … [some victims] do get vindication [and] … an opportunity to face the perpetrator or the representative of the perpetrator [and] … they do actually feel some sense of closure on the day [settlement].[77]

6.4.2 Specific mental health impacts on victims

Seven victims and a non-legal advocate raised the specific issue of mental health problems becoming more severe as a result of engaging in the two processes.[78] This included a case of attempted suicide and several cases of suicidal tendencies and thoughts. Several victims found the responses of the Church personnel to suicidal victims were cold and heartless. One female victim who had been through the Melbourne Response and had struggled in having her complaint upheld, said:

> … if you're prepared to fight the wrongs of the process, then they will destroy you … they tried to destroy me …They destroy the mind. Once they know they've destroyed the mind, then they hit them with a sledgehammer … give them a pittance, go away, nothing … And if a victim suicides, good, we don't have to pay the compensation. They don't give a damn about the dead victim.[79]

A male victim, who said he had become suicidal as a result of the Towards Healing process, was very close to driving through his old school's front gates, smashing into the school and killing himself:

> He [the facilitator] knew that I wasn't far off killing myself [he] had no words of understanding or sympathy or empathy … to him … I was another one off the list … if I had … committed suicide back then, [xxxx] would have been the cause … [h]e was manipulating the system to have one less person to worry about because he'd be dead. Now, I see that as clear as day. That's not conspiracy theory, it's just fact. And I don't know how many other people he's done that to.[80]

74 V2-7.
75 V1-20.
76 V1-24.
77 LA-5.
78 V1-20, V1-7, V1-1, V1-15, V1-4, V1-21, V1-14, NLA-3.
79 V1-15.
80 V1-21.

One interviewee, herself a victim, reported an attempted suicide by another victim who had been part of the Towards Healing process. This interviewee said she managed to save the victim just before he was about to hang himself. She said the Towards Healing personnel, including the Church leaders, were 'aggressively unhelpful' and considered the victims as enemies who were to be beaten down, manipulated and destroyed.[81]

Another victim talked in his interview about his depression and despair as a result of going through Towards Healing. He said he felt: '… suicidal, extremely alienated, quite incapacitated … hopeless and devoid of any sense of life being good, life being joyful'.[82] He reported that he felt controlled by the personnel at Towards Healing to the point where he felt shocked, powerless, exhausted and resigned so that '… every vestige of my private self was just being torn into'.

The experience of the Church processes also challenged many victims' spiritual and religious beliefs. One female victim described it this way

> It was as if god had betrayed you. That's how you feel. And you spend the rest of your life trying to understand why … this god is no god of love, but he's a despot.[83]

6.4.3 Causes and sources of the impacts

As well as the general and specific mental health impacts on victims outlined above, 20 interviewees also volunteered information relating to the internal complaints processes themselves. Apart from the Melbourne Response and Towards Healing using time as a weapon and dragging out the processes, these interviewees also described these processes as 'corrupt', 'damaging', 'cold', 'contradictory', 'daunting', 'depersonalising', 'flawed' and 'deficient'. There were also varying levels of inconsistency and standards of competency of the personnel and processes in which the victim's ignorance was exploited.

One secondary victim, whose brother died just after completing the Melbourne Response process, said that sending her brother there was the worst thing she could ever have done for her brother.[84] A legal advocate reported that the Melbourne Response repeated 'the same arrogance and power and things that were … a major cause … of the assault in the first place'.[85]

One lawyer who had represented about 550 clergy victims and now refused to deal with Towards Healing, said it is 'a sham … [and] designed in such a way as to obfuscate and defraud the psychiatrically damaged victims'.[86] Another lawyer said the facilitations at Towards Healing were used to excuse the behaviour of the offenders, rather than providing a healing environment for the victim. That is, the Towards Healing process was being used more for the benefit of the Church and to the detriment of the victim.

Eight primary victims and three secondary victims raised specific concerns about the Melbourne Response and the roles of the Independent Commissioner, the Carelink Coordinator and the Compensation Panel as adversely affecting the primary and secondary victims.[87] These are discussed in turn.

81 V1-14.
82 V1-20.
83 V1-10.
84 V2-11.
85 LA-3.
86 LA-12.
87 V1-1, V1-10, V1-13, V1-18, V1-12, V1-15, V1-4, V1-7, V2-13, V2-2, V2-10.

INDEPENDENT COMMISSIONER

Overall, these interviewees said they felt very 'uncomfortable', 'intimidated', 'victimised', demoralised', 'daunted', 'caged-in', 'confronted', 'distressed', 'deeply disempowered' and 'frightened' by the Independent Commissioner. For many, having an experienced and elderly QC in that position meant victims were out of their comfort zone and on guard. One female victim likened her experience with the Independent Commissioner with that of her confessor when she was a child. She said: 'I felt I was a little girl again having to confess my sins to the priest. Now the priest is a QC but he wanted to know everything … [and] asked some really probing questions'.[88]

CARELINK COORDINATOR AND PSYCHIATRIST

Carelink as a whole, and the Carelink Coordinator in particular, were referred to by some of these interviewees as 'abusive', 'grueling', 'horrible', 'absolutely awful' and 'lacking in care and compassion'. Some victims said they felt 'vulnerable', 'punished' and 'like the one on trial'.

Adverse experiences with a particular psychiatrist at Carelink were reported by several interviewees because, they said, his questioning was very intense and intimate and they felt that he also represented the same male power as a victim's offender and the hierarchy. These same interviewees pointed out the conflicted position in which this psychiatrist placed himself. He also held a position with the Archdiocese of Melbourne in which he clinically assessed and provided medico-legal reports for clergy offenders, including the offender of the daughters of a secondary victim who was interviewed. The purpose of these medico-legal reports was to provide the sentencing Judge with mitigating evidence for the offender (who was subsequently convicted, but not for the offences of this woman's two daughters): 'How can that be? … I felt so betrayed. You've got no idea. I was so angry … [We were] threatened'.[89]

Another secondary victim claimed this psychiatrist was deliberately chosen by the Archbishop because he had 'a vicious attitude towards the victims' and 'blamed the victim'.[90] This interviewee said he was so distressed by his experiences with this psychiatrist that he was prescribed sleeping medication (by his GP) for the first time in his life and was advised to have nothing further to do with Carelink, the psychiatrist and the Archdiocese of Melbourne for a few months: '… I was in a hell of a state after that'.[91]

THE COMPENSATION PANEL

Many victims also identified attendance at the Compensation Panel as a very difficult experience. It was described as 'dreadful', 'traumatising', 'humiliating', 'very daunting', degrading', 'intrusive', 'terrible', 'overwhelming', 'shocking', like a 'kangaroo court' and as having compounded the already existing pain and reintroduced feelings of guilt. Victims said they felt 'interrogated', 'extremely emotional', 'like a shag on a rock' and 'dirty' (for accepting the compensation money). A number of interviewees said they had found the chairman of the Panel to be very 'overbearing', 'dominating', 'bullying' and someone who 'wanted to do all the talking'.

88 V1-10.
89 V2-10.
90 V2-2.
91 V2-2.

Some interviewees questioned the need for the Panel at the Melbourne Response in view of the fact that they had already bared their soul and been cross-examined and investigated by the Independent Commissioner. A few victims described themselves as being 'tortured' by having to again describe their abuse and go through another cross-examination with the Panel. One male victim was totally overwhelmed:

> Quite degrading. Very intrusive … It wasn't in any sense the victim impact statement … it was more like justification for compensation … That's how I felt it was … That's how it impacted on me. I had to justify why I should receive any payment from them at all.[92]

6.4.4 Discussion

The Melbourne Response and Towards Healing made a promise to strive for healing for victims. The people who went through these processes also sought healing. According to the interviewees, not only was healing not delivered, but further harm was caused.

Harmful impacts on primary and secondary victims from the Melbourne Response and Towards Healing processes were identified fairly equally by primary victims, secondary victims and legal advocates. It was the primary victims though, who discussed at length the harm caused by these processes to their mental health. The harmful impacts on primary and secondary victims stemmed equally from the Melbourne Response and Towards Healing.

That 19 interviewees discussed Towards Healing and 20 discussed the Melbourne Response reflects the high degree of concern about this issue and the extent of the harm caused. As a Catholic priest said: 'How can the organisation not recognise the gravity of this and the effect on individuals?'.[93]

Compared with the victims, the legal advocates spoke about the two processes in a more generic way and with more of a critical overview and analysis. For example, according to the legal advocates, both processes had very poor outcomes and they did not work well for victims who were reabused. Further, the objectives as outlined in the protocols were not achieved. The more individual views and experiences of the primary and secondary victims focused much more on their mental health and other impacts they experienced as a result of going through the Church processes.

Within the Melbourne Response data itself, there were many more negative experiences related to the personnel at Carelink, compared with the Independent Commissioner and the Compensation Panel. With respect to Towards Healing, apart from one particular facilitator, the interviewees referred to the process in a more generic way.

Whilst most of the legal advocates and primary victims provided information on the impacts on victims, very few of the secondary victims did so. This is not unexpected because, of the 18 primary victims associated with the secondary victims, nine had not attended either process.

Three times as many legal advocates discussed the Towards Healing process compared with the Melbourne Response. This is most likely due to the fact that six legal advocates represented the Melbourne Response victims whilst 11 represented Towards Healing victims. This includes five who represented victims through both processes.

92 V1-18.
93 P1.

6.4.5 Summary: Theme two

This section on the interviewees' lived experiences with Melbourne Response and Towards Healing processes has found that, contrary to the Church's protocols, healing was not delivered for these victims. Rather, both the primary and secondary victims at these processes experienced additional abuse and trauma.

6.5 Theme three: legalistic approaches

The third major theme to emerge from interviews about the Melbourne Response and Towards Healing processes concerns the lived experiences of interviewees of the so-called 'pastoral' or 'non-adversarial/non-legalistic' approaches of both processes.

As highlighted in the previous section of this chapter, the main stated purpose of Towards Healing, according to the process's protocol, is to assist the victim to find healing, and where possible, to experience some measure of reconciliation with the Church. Its purpose, therefore, is presented primarily as a pastoral one, which (is said to) distinguish it from a legal process.[94] The Melbourne Response characterises its process as expressly designed as an alternative to civil legal proceedings that operates in an informal non-legalistic way.[95]

However, the lived experiences of the primary and secondary victims in their dealings with the Church processes are very different. Four main areas of concern have been identified from further analysis of the interviews.

1. Compassionate responses
2. Legal representation of victims
3. Forensic investigations and examinations
4. Threats and responses to victims' needs

In describing their experiences of the pastoral approach at the Melbourne Response, interviewees also reflected on the roles of the Business Manager and Lawyer for the Archdiocese of Melbourne, the Vicar-General and the Archbishop.

The legalistic approaches at the Melbourne Response and Towards Healing were discussed by more than three-quarters of the 18 primary victims who had been through the processes and all but one of the legal advocates. These comments and views were unprompted. Four secondary victims and one non-legal advocate also contributed. In total, 31 interviewees, or nearly half of all the interviewees who contributed to this research, raised concerns about the pastoral approach at these processes and said their experiences were confrontational and adversarial.

6.5.1 Compassionate responses

The Church protocols emphasise that a compassionate response must be the first priority for both processes in all cases of abuse.[96] Just under half of the interviewees for this theme, however, expressed significant concerns about the Melbourne Response and Towards Healing being in fact highly legalistic and adversarial. They found these processes to be distrustful, defensive, condescending and highly conflicted. Several victims described feeling as though they were 'the ones on trial' or that they were the perpetrator.

94 Australian Catholic Bishops Conference and Catholic Religious Australia, above n 1, 24.
95 Catholic Archdiocese of Melbourne, above n 4.
96 Australian Catholic Bishops Conference and Catholic Religious Australia, above n 1, s.16.

One victim claimed that the Church's process was more traumatic than the original sexual abuse.

One secondary victim, whose two children had been sexually assaulted by a parish priest, referred to the whole set-up at the Melbourne Response and the Archdiocese of Melbourne as follows:

> [They were]… enemies … this ugly, behind-the-scenes existence … driving this big machine … [behind which is the]… façade of god, the façade of Christianity, of goodness, of compassion, of love. It's all just a joke! Behind, there is none of that. It's just some front to keep their business going.[97]

According to a senior lawyer with 15 years' experience, the Archbishop of Melbourne had 'outsourced his pastoral responsibility' for victims to the legal and other professionals at the Melbourne Response. Another senior lawyer observed that victims were isolated by what he saw as a self-serving, very secretive, male-dominated, hierarchical, wealthy and powerful organisation. His view was that the Melbourne Response process worked to address the political and financial needs of the Archdiocese of Melbourne, at the expense of the victims. He said:

> [They are] pretty hard men, playing a fairly hard ball … [ready to use] financial and political nous to leave the system as it is … To fight all the blows – the damage they've done.[98]

Another legal advocate found the nuns much harder to deal with in negotiations, compared with some of the male Religious Orders, and reluctant to admit any error on behalf of their order. Further, they were 'much tighter with the purse strings, much more reluctant to acknowledge the … criminality of the actions'.[99]

The legalistic approach of the Melbourne Response is also demonstrated, according to one legal advocate, by the appointment of an Independent Commissioner – an experienced, male Queen's Counsel – as the entry point for victims. He said victims felt intimidated by the legalistic language and the fact that the Independent Commissioner represented the Church hierarchy, in that he was male, held in a position of esteem and authority and 'had all the power'.[100] Two primary victims made similar observations. The legalistic approach at Towards Healing was also highlighted by one legal advocate who said that some Provincials of Religious Orders approached the process 'as if it were an academic exercise' rather than a pastoral response, and refused to meet with victims.[101]

Several legal advocates described the Christian Brothers and their legal representatives as 'insincere', 'hypocritical', 'aggressive', 'hostile' and 'sanctimonious'.[102] These legal advocates also reported they were often undermined by the Church's legal representatives. One legal advocate recounted a situation when she was asked to leave the facilitation meeting room, at which point the Christian Brothers' representative told the victim that his

97 V2-10.
98 LA-2.
99 LA-3.
100 LA-2.
101 LA-1.
102 LA-3, LA-4, LA-5.

case had multiple legal difficulties, adding: 'I'm just telling you this as a favour because your lawyer might not have told you'. This legal advocate said in her view the Christian Brothers representative had bullied the victim into trying to accept an unreasonable offer of compensation.[103]

DISCUSSION

The victims taking part in this research wanted a pastoral response from the Church authorities. They wanted the Church authority to genuinely care about what happened to them. However, the protocol's promises that victims must be listened to and that assistance be given as demanded by justice and compassion,[104] were not experienced by those interviewed. According to primary victim, secondary victim and legal advocate interviewees who had experienced one or other of the processes, the Church's responses were instead marked by a lack of pastoral or spiritual care. They were not victim-centred. Rather than embracing the victim with compassion, love and Christianity, a legalistic approach prevailed.

6.5.2 Legal representation

One of the most significant concerns raised by those who had direct experiences of the approach adopted by both of the Church's internal complaints processes was the issue of legal representation for victims. These concerns went to the failure of the Melbourne Response and Towards Healing personnel to advise victims of their right to have legal representation, especially but not only when a Church authority was legally represented and/or when a victim needed to sign a Deed of Release or other legal documents.

According to the Melbourne Response protocol, the Independent Commissioner is obliged to inform victims that they can have their legal representatives present at confidential hearings.[105] This did not always occur. One example cited by a non-legal advocate was that a victim, who participated in a confidential hearing, was not advised by the Independent Commissioner that he could, or should, have legal representation at the hearing. This meant, said the non-legal advocate, this victim was 'grilled for days' by the Independent Commissioner, without any legal representation of his own. As a consequence, the victim found the hearing 'very, very traumatic'.[106] In this same case the non-legal advocate reported that information obtained by the Independent Commissioner during these confidential hearings was later used against the victim by the offender's defence counsel at trial.[107]

Another victim described his experience of when he was told by the Independent Commissioner that a formal hearing was going to be conducted. He said: 'I wasn't told I could have a lawyer. I wasn't given any of my rights. I was told literally nothing'.[108] Despite this priest being charged by police, the Independent Commissioner still chose to hold a confidential hearing. In the end, this interviewee was so disgusted with the process that he withdrew his complaint from the Melbourne Response. His aim was to hold the offender accountable, which did not happen.

103 LA-5.
104 Australian Catholic Bishops Conference and Catholic Religious Australia, above n 1, s.19.
105 Catholic Archdiocese of Melbourne, above n 4.
106 NLA-1.
107 NLA-1.
108 V1-6.

More than half of the victims who went through the Melbourne Response said they were unrepresented and unsupported during that process. They reported that they were either not advised they could or should have representation, or that they were actively told they did not require a lawyer. A legal advocate interviewed observed that in many cases victims, already uninformed about the process, were prevented from bringing legal or even non-legal support people.[109] Victims were either told they could not bring a legal representative or other support person, or they were not advised or encouraged to do so. She said this occurred at Towards Healing and during all phases of the Melbourne Response process, from the Independent Commissioner to the Compensation Panel.

What this meant in some cases was that victims would arrive alone for a meeting at the Melbourne Response. For example, one female victim reported arriving at a meeting unaware there would be the coordinator from Carelink, the Finance Manager of the Archdiocese and a Church-appointed social worker present. This victim, a single woman in her sixties, had been part of, and contributed to, the Catholic Church for decades. She was so surprised to find herself alone with these three people, she felt overwhelmed and pressured. 'It was bloody awful' she said.[110]

Similarly, a secondary victim who attended the Compensation Panel hearing with her victim husband recalled that they were not advised to bring a lawyer or support person and found the experience very difficult. 'Very, very overwhelmed … I don't recall reading anything or being told anything of how I could prepare myself for this meeting'.[111]

Other victims related how the Chair of the Compensation Panel told them that they would not require a lawyer to read over and check the compensation offer and the Deed of Release. One of these victims described the giving of advice by the Chair thus:

> It will be very clear and in layman's terms so that you can understand it. So there will be no need for you to have a solicitor to look over it before you sign it … he kept up right to the last minute that I wouldn't need a lawyer … [h]e tried so very hard to convince me of that … he was bullying me.[112]

A legal advocate[113] observed that as many as half of the Religious Orders and Dioceses in the Towards Healing process with which he had been involved, appeared to believe the process was better controlled if the victim is not legally represented, and as a result they did not advise the victims to have their own support. Another legal advocate said Towards Healing lawyers and personnel become quite aggressive if the victim is legally represented.

> [Victims weren't] given the opportunity of obtaining legal advice [and the process is] designed so that the Church is legally represented, but the psychiatrically damaged person who was molested, isn't.[114]

A particular concern of another legal advocate was that the contact person[115] at Towards Healing did not advise victims they were free to engage their

109 LA-1.
110 V1-1.
111 V2-13.
112 V1-10.
113 LA-3.
114 LA-12.
115 'Contact persons receive complaints and shall be skilled listeners and sensitive to the needs of the victim'. Australian Catholic Bishops Conference, above n 1, 15.

own legal advocate. In her view, when a victim was unrepresented, this was often exploited by Towards Healing leaving victims uninformed, daunted and disempowered by the process: '[Having] nobody who stands with them … is one of the main deficiencies of Towards Healing … where people do have an advocate, they are treated better in Towards Healing'.[116]

Lack of legal representation has significant consequences. A legal advocate described the case of two victims who went through the Towards Healing process unrepresented, but who were ultimately represented by him outside of the process. In the first case a victim did not initially receive any financial compensation, and in the second case an unrepresented male victim received some funding for his Kung Fu classes but no financial compensation. When each of these victims engaged this lawyer, the woman received $100 000 and the man received $50 000 in compensation.[117]

This same legal advocate, though, also said that even though reabuse and retrauma can happen with some Church authorities, generally speaking the Towards Healing process:

> … can be a helpful process because it's a collaborative process rather than totally litigious, particularly where the survivor/victim has legal representation. Receiving an acknowledgement of the abuse by a representative of the Church … can be very important for the victim but must not be allowed to be used as a means of compromising the financial claim.[118]

DISCUSSION

The interviewees' experiences suggest that there is a practice at the Melbourne Response and Towards Healing of actively dissuading and hindering, either explicitly or implicitly, victims' rights and their attempts to gain legal representation. A major concern raised by interviewees in respect to legal representation at both processes involved victims not being informed they could or should have legal representation. Indeed, in some cases, victims reported that they had been positively told that they did not need legal representation, even when signing legal documents. Victims found themselves alone and unrepresented in crucial meetings with either of the Church's processes, and were confronted and bewildered by the unequal power imbalance and the superior negotiating leverage of the Church.

Primary victims focused more on their personal experiences of being unrepresented at Towards Healing especially at the facilitation meetings. This is contrary to the Towards Healing protocol, which clearly states that if the victim is not legally represented then neither should the Church authority be legally represented.[119]

Legal representation of victims, compared with the other sub themes of this section, attracted the most response from interviewees, with 22 contributing information about their experiences. Three-fifths of the 18 victim interviewees, who went through the Melbourne Response and Towards Healing processes, had not been legally represented. It is unclear whether legally unrepresented victims experienced more trauma than the represented victims. But, the unrepresented victim interviewees did contribute almost

116 LA-8.
117 LA-10.
118 LA-10.
119 Australian Catholic Bishops Conference and Catholic Religious Australia, above n 1, s.41.4.2.

twice the number of comments and views to this third theme of the chapter, compared with the represented victim interviewees, suggesting those legally unrepresented were more dissatisfied with the processes.

More than half the legal advocates interviewed raised concerns about legal representation and Towards Healing. In the view of one legal advocate with extensive experience with the Towards Healing process, around half of the Church authorities involved with Towards Healing routinely advise victims not to have their own support, whether legal or non-legal. Legal advocates also discussed the impacts on psychiatrically-harmed victims who were not legally represented – including being disempowered, uninformed, stressed and exploited – while not being provided with the same opportunity as legally-represented Church authorities to put their case. There was also the impact on the compensation quantum. One advantage of victims being legally represented was that, in some cases, compensation amounts could be significantly more than that which was offered to an unrepresented victim at Towards Healing.

6.5.3 Investigations and examinations

Interviewees' discussions about investigations at the Melbourne Response and Towards Healing raised concerns about what were seen to be overly forensic examinations as well as unnecessary and repetitive investigations. Multiple questioning and interviewing of the primary victims created an adversarial and distressing experience. These experiences undermined any fair 'hearing' or outcome.

Interviewees raised concerns that the Victorian Towards Healing assessors/investigators, who are former policemen and Catholic, conducted examinations that were overly forensic. In relation to a particular incident of sexual assault, one of these interviewees reported that he was asked by one of the Towards Healing investigators:

> … 'Did you see the penis?' [The victim said] no I don't believe I did see his penis. He said you must have seen the penis. There would be much more impact [on the claim] if you saw the penis. And I said I didn't see the penis. It was all about the penis. Please stop talking about the penis. I didn't see a penis. What am I? In a Woody Allen movie.[120]

A legal advocate also voiced her concern that victims felt that they were being tested, examined and disbelieved by two partisan investigators, as opposed to being assessed by independent assessors. An example cited by this legal advocate involved a very vulnerable client who was asked whether:

> … the rosary beads hanging off the cassock of the offender were sort of on the right side or on the left side. What kind of cross was it? I mean, we're talking about abuse from 35, 40 years ago. And we're asking questions of a person who, I would say, has a developmental delay. Very hard, really, really hard.[121]

A number of interviewees highlighted what they saw as unnecessary and repetitive questioning or examinations during the investigation process. A legal advocate believed that a high percentage of cases at Towards Healing were investigated unnecessarily.[122]

120 V1-3.
121 LA-1.
122 LA-3.

Another legal advocate claimed that the more legalistic Church authorities were routinely insisting on an investigation even when there was no significant dispute or uncertainty about the facts of the case.

Similarly, four interviewees who had direct experience of the Melbourne Response reported unnecessary questioning and interrogation of victims by Carelink personnel and members of the Compensation Panel. In all these cases, this had occurred despite the victims' claims being previously approved by the Independent Commissioner. A male victim reported being asked by the coordinator at Carelink whether the priest who raped him when he was eight years old was circumcised.[123] Another female victim, a young nun at the time of the offences, reported being interviewed intensively over three 40-minute sessions by the psychiatrist at Carelink in which the questioning was unnecessary, very intense and intimate in nature. This woman did not want to discuss the nature of those questions because they were too upsetting. She said:

> I found it pretty difficult because I hadn't spoken to anyone for 35 years about it. I had mentioned it in confessions and some bloody priest more or less implied that it was my fault. And it wasn't. You know … I didn't know what to do … I couldn't tell anyone.[124]

Concern was also expressed about the practices of the Compensation Panel and additional investigation and questioning of victims by its members. A secondary victim reported that awful things happened at the Panel where victims were asked questions about what happened to them and how they feel. She said:

> If it's been found [by the Independent Commissioner] that this has happened, why do you have to then be tortured, go through it again about how it's affected you, what was done to you, by this bunch of who knows who they are.[125]

Another secondary victim wondered why her husband had to tell the Compensation Panel about his abuse all over again.[126] Her husband, a primary victim whose claim had been approved by the Independent Commissioner, expressed anger that he was cross-examined again by the Compensation Panel.

> That really sucks … It was terrible … I had to tell my story partially again … Quite degrading. Very intrusive. It's already gone through XYZ, and why do I have to go through you as well? Why do you have to sit there in judgement of me? … I had to justify why I should receive any payment from them at all.[127]

DISCUSSION

Most interviewees contributing to this section felt that the investigations and examinations of victims and their complaints at the Melbourne Response and Towards Healing were overly forensic and unnecessary. Multiple rounds of interrogation and intimate inquiry of the sex offences were reported as being

123 V1-12.
124 V1-1.
125 V2-10.
126 V2-13.
127 V1-18.

conducted at both processes, but especially at the Melbourne Response. According to the victims, the Melbourne Response personnel made additional, intimate and mostly gratuitous inquiries of primary victims, such as asking for intimate details of the sexual offending. Unlike the primary victims and legal advocates, it was more the secondary victims who focused on the impacts of the unnecessary questioning of victims by the Compensation Panel in that they caused reabuse and retrauma for the primary victims.

The legal advocates reported that the Towards Healing investigators were overly forensic in their examinations to the degree that, according to one, not one investigation was entirely adequate. Legal advocates also claimed that Church authorities associated with Towards Healing were responsible for ordering unnecessary investigations, contrary to the Towards Healing protocol that states that investigations should only be carried out if there is a significant dispute or uncertainty about the facts.[128]

The excessive and intrusive examinations reported by interviewees raises the question whether the Melbourne Response and Towards Healing processes are applying a higher standard of proof, the criminal standard of beyond reasonable doubt. Both Church processes specify that they use the lower standard of proof, on the balance of probabilities.

6.5.4 Threats and conditions

The fourth area of concern where the legalistic approach was discussed includes bullying behaviour and threatening responses by personnel at both Church processes, particularly in relation to victims' needs. This included the geographical locations and physical environs utilised in the processes for meetings with victims.

With respect to the Melbourne Response, several interviewees reported feeling under pressure not to complain. If victims wanted to receive services from Carelink, such as funding for counselling or perhaps a retreat, they had to fully comply with all requests from Carelink and not complain or rock the boat. One legal advocate reported, for example, that a lack of compliance could mean that Carelink would 'baulk at giving you things … people were loath to say anything that might damage the opportunity'.[129]

In one case a female victim, who became pregnant to the offender, related how she had been promised unconditionally that the Church would pay for her daughter's final two years of education. This woman had paid for all of her daughter's education up to this point. At the last minute, she reported that the Archdiocese of Melbourne withdrew this promise and told her she would now have to repay the Archdiocese a sum of money. She said:

> You've promised that you'd let [my daughter] finish her education. You let me go into debt. You've stalled off and … you've got me with a gun over my head. Either I pull my daughter out of there and break her heart or I hand over [to the Archdiocese of Melbourne] every cent I've got … Shocking.[130]

In another case a mother reported that she was told that if she refused to meet with the psychiatrist at Carelink, her daughter (the victim) would no longer be entitled to any medical and counselling services. The interviewee was

128 Australian Catholic Bishops Conference and Catholic Religious Australia, above n 1, 20.
129 NLA-1.
130 V1-8.

reluctant, as this same psychiatrist had written a mitigating psychiatric report for the sentencing Judge about this woman's daughter's offender. She said:

> They changed the goal posts … I did go to see [the psychiatrist] because he said we had to … otherwise he would stop all the support they were giving [my daughter]. … [I felt] threatened. I was so angry. I never wanted to see him because of those reasons about getting [the offender] a lighter sentence.[131]

Another victim reported feeling 'blackmailed' in that he was told that if he reported his complaint to the police, he would not receive any counselling.[132]

A legal advocate observed that the Melbourne Response[133] requires victims to consent to the Carelink coordinator receiving regular reports from the victims' therapists or psychologists. This interviewee said that this caused victims to feel as though 'the Church is kind of breathing down their necks, watching and finding out their personal stuff … they're kind of being held to ransom'.[134]

Both processes include the offer for victims of a meeting with the Bishop or Provincial of the Religious Order. This is considered valuable because it provides an opportunity for the victim to tell the Church leader first hand of the sexual assaults and their impacts. One primary victim described how she was threatened that unless she accepted an offer of $15 000 (which she did not want to accept) the Archbishop of Melbourne would not meet with her.[135] A male victim said he was surprised and hurt when Towards Healing told him that if he chose to be legally represented, he would be regarded as initiating a civil adversarial process and, as such, he would not be entitled to have a pastoral meeting with the Provincial of the Church authority.[136]

More than half of the interviewees discussing this issue of threats and conditions observed that the Melbourne Response and Towards Healing both exploited the fact that there are minimal legal options (primarily due to the Ellis defence as discussed in chapter 4) for victims who want to receive compensation and/or counselling. Three legal advocates and two victims reported that both the Melbourne Response and Towards Healing routinely threaten use of the Ellis defence. As one legal advocate said: 'They are very litigious, for men of god or whoever they proclaim to be, they certainly have a lot of legal defences they like to trumpet out'.[137]

Secondary victims also expressed concern that victims are threatened that if they go to court, the Church will fight their claim strenuously (that is, with the use of the Ellis defence). This threat persists, they say, even though the majority of victims have neither the financial resources nor the emotional wherewithal to sue the Catholic Church. As a secondary victim put it: 'A victim would not stand up for themselves, very few do, they can't, they don't … The insults, the knock-backs, the attack, they will fall back'.[138]

131 V2-10.
132 V1-4.
133 Catholic Archdiocese of Melbourne, above n 4.
134 LA-1.
135 V1-1.
136 V1-20.
137 LA-5.
138 V2-10.

One legal advocate put it another way. He said that some lawyers for Church authorities portrayed their client, a Church authority, as being legally untouchable, taking the approach: 'Unless … you can find a Defendant, then we'll offer a small amount of money but we won't do any more than that'.[139] This interviewee highlighted the lack of options for victims. If victims do not accept what is offered, they have nowhere else to go, given the Ellis defence.

Finally, the physical environments and geographical locations in which victims met with the Melbourne Response personnel, especially the Compensation Panel and the Independent Commissioner, were important. The conference room used by the Compensation Panel, for example, is situated directly opposite the Archdiocese of Melbourne Cathedral and the Independent Commissioner uses his legal chambers for his meetings with victims. According to the interviewees (five primary victims and two secondary victims) these environments gave rise to feelings of intimidation. They all felt they were completely inappropriate. The formality and physical set-up of the office for the Independent Commissioner were reported by several victims as being 'intimidating', 'daunting', 'confronting', 'frightening' and 'scary'. They described the surroundings as 'really plush' and 'palatial' with marble floors and walls and a very large desk with a big microphone placed in front of the victim, who, mostly, was alone in these surroundings with the Independent Commissioner. One secondary victim said she was totally overwhelmed by the set-up: 'They all sat up one end and [my husband] and I sat up the other … It felt like the Bali courtroom … it was uncalled for … humiliating, degrading'.[140]

Some victims reported that even though there may have been only six members on the Compensation Panel, it felt as though there were many more. One secondary victim, who was supporting her husband at the hearing, said the impact of the set-up of the Panel made it feel as though 'there were 20 of them there'.[141] A primary victim said that sitting opposite, and being assessed and evaluated by a group of powerful professionals, including 'lawyers and QCs', was 'pretty daunting, really, really hard'.[142] Another female secondary victim did not allow her teenage daughter to attend the panel hearing, because she would have been there on her own with up to nine panel members. 'She would not have coped'.[143]

DISCUSSION

Where victims did not acquiesce to demands placed on them (such as meeting with the psychiatrist at Carelink), services such as counselling and compensation were withheld, and some victims were threatened that they would be withheld. This was particularly so at the Melbourne Response. Some victims were also threatened that a pastoral meeting with the Bishop or Provincial would be withheld, if they did not comply with requests from the personnel at Towards Healing.

According to the interviewees, the most common threat with both processes was the use of the Ellis defence, accompanied by warnings that the Church would fight the victim tooth and nail if civil procedures were commenced.

139 LA-4.
140 V2-13.
141 V2-13.
142 V1-18.
143 V2-10.

In this sense, victims commence these Church processes already legally disadvantaged. The formal, daunting and at times formidable settings and locations of meeting rooms accentuated this power imbalance between the victim and the personnel of the processes.

6.5.5 Summary: Theme three

Contrary to the pledged pastoral approach for victims at Towards Healing and the Melbourne Response, interviewees were confronted with a legalistic and adversarial modus operandi. Legal representation was neither recommended nor encouraged and investigations could be overly forensic and unnecessary. Finally, victims, all the while in overwhelming and daunting Church environs, could be threatened with the use of the Ellis defence and/or the withholding of counselling and other services if they did not toe the line with the Church personnel.

6.6 Theme four: Compensation, apology, counselling and decision-making

According to the Church's protocols, decisions about the provision of compensation, apologies and counselling are entirely discretionary. Multiple personnel in the discrete divisions of both processes are granted such decision-making powers.[144] Although the Towards Healing protocol provides for discretionary decision-making about counselling and other services,[145] the Melbourne Response, whose personnel exercise discretion in this area, is silent in its protocol on this issue. The provision of an apology and its content are also discretionary at both processes.[146] If apologies are given, the Archbishop of Melbourne will provide one on behalf of the Archdiocese and the Bishop or Provincial of the particular Church authority will provide one on behalf of their Diocese or Religious Order respectively. As discussed at the beginning of this chapter, the Melbourne Response appoints a compensation panel to determine compensation, whereas the Bishop or Religious Order Provincial will make such decisions in the Towards Healing process.

This fourth theme, which emerged from a thorough analysis of the interviews, addresses these issues of compensation, apologies, funding for counselling and the associated discretionary and unregulated nature of the decision-making processes adopted by the Church's processes. The unreviewable nature of such decisions is also examined.

This theme was discussed by more than half of the legal advocates,[147] who between them had represented about 1500 Catholic clergy victims of sexual assault. All but one of the primary victims[148] who had attended the internal complaints processes addressed this issue in their interviews, as did two non-legal advocates,[149] one litigation barrister[150] and five secondary victims.[151] All responses were unprompted.

The discussion of the data commences with the subject of compensation and follows with the provision of an apology, funding for counselling, and finally the decision-making processes used. A discussion of the findings follows each section.

144 Australian Catholic Bishops Conference and Catholic Religious Australia, above n 1, s41.1.1; Catholic Archdiocese of Melbourne, above n 4.
145 Australian Catholic Bishops Conference and Catholic Religious Australia, above n 1, s41.1.
146 Ibid.
147 LA-10, LA-1, LA-2, LA-12, LA-7, LA-8, LA-5.
148 V1-8, V1-7, V1-1, V1-14, V1-11, V1-4, V1-3, V1-5, V1-6, V1-10, V1-12, V1-13, V1-15, V1-18, V1-20, V1-21, V1-23, V1-24.
149 NLA-1, NLA-2.
150 LB-3.
151 V2-18, V2-6, V2-7, V2-2, V2-18.

6.6.1 Compensation

As discussed in chapter one, compensation for victims of crime reflects the principles of corrective justice, such that the offender or his employer puts right the injury or other loss caused by the sexual abuse. Corrective justice is also commonly referred to as reparation, rectification or restitution.

Compensation at Towards Healing is referred to as financial assistance or reparation and its payment to victims, as described above, is discretionary.[152] It is up to the individual Provincial of a Religious Order or Bishop of a Diocese as to whether compensation is paid or not, and if so, what that amount will be. Towards Healing claims that there is no cap on compensation amounts. There are, however, about 140 Church authorities included under the one umbrella of Towards Healing, all of whom have complete discretion in their decision-making. This means that in practice there are potentially up to 140 individual caps.

At the Melbourne Response, compensation amounts, which are binding on the Archbishop, are recommended at the discretion of the Compensation Panel and are currently capped at $75 000.[153] All financial settlements at the Melbourne Response and Towards Healing are ex gratia payments – that is, no admission of liability is made.

Interviewees described compensation amounts at both processes as paltry and grossly inadequate. The legal advocates said they struggled to get decent financial settlements for their clients and the offers were extremely low relative to the severity of the sex crimes and their life-long impacts on victims. The legal advocates also claimed that the amounts offered within the Towards Healing and Melbourne Response processes were very low compared with matters that were negotiated outside those processes.

Despite Towards Healing claiming there is no cap on compensation, one legal advocate reported that the highest offer received for her clients was about $40 000. She said: 'It's peanuts for the type of abuse'.[154] Some victims were offered amounts as low as $5000. Some were offered nothing. With regard to comparable amounts of compensation in the courts, a litigation barrister told of a case where one victim had an economic loss report of $1.75 million, but Towards Healing would only pay a maximum of about $50 000.[155] According to this barrister, two other clients of his received payouts of $1.25 million and $750 000 respectively. These payments were negotiated outside the Towards Healing process. Prior to these victims being legally represented by this barrister, they had been offered between $40 000 and $50 000 each at Towards Healing.

Other interviewees reported that outcomes were inconsistent and unaccountable and such discrepancies troubled many interviewees. They talked about how victims who had survived severe sexual assaults over some years could be awarded niggardly amounts, whilst others who went through seemingly less severe abuse on one occasion, could receive much more. Not one interviewee, victim or lawyer, believed the amounts of financial reparation offered by the Compensation Panel at the Melbourne Response were anywhere

152 Australian Catholic Bishops Conference and Catholic Religious Australia, above n 1, s41.1.1.
153 Catholic Archdiocese of Melbourne, above n 4.
154 LA-5.
155 LB-3.

near adequate. As one secondary victim said: '… as for paying any meaningful compo! Swindle your clients … Corrupt and swindling the victims'.[156] A male victim said: '… it's not compensation, it's part compensation … $30 000 was a puny amount for what it's cost me'.[157]

However, some victims who had been compensated said they still felt they had not received any justice after all. For one, the money he received felt dirty and he felt insulted and further disempowered. He put it this way:

> The cheque … looked like toilet paper to me. It just sat in my drawer for weeks and weeks … I didn't want to touch it, I didn't want to look at it. It was like, they've won, they've controlled this.[158]

A female victim, who had been sexually assaulted by a parish priest when she was a child and by another priest when she was a young nun and very sick in hospital, said the Compensation Panel had offered her $15 000. She reported that the finance manager for the Archdiocese of Melbourne took complete control of the money, which he kept aside to use for this woman's rental payments. There was no consultation about this decision, said this woman.[159] Another female victim who was also raped when she was psychiatrically very unwell in a Catholic private hospital but by a different offender, considered her offer of $15 000 insulting, especially knowing there was a cap of $50 000, at that time. She said: 'Is that all my pain and suffering is worth? Where's it gone wrong, how have they come to that? It just made you feel bad again'.[160]

The frustration and anger expressed by a secondary victim whose brother died soon after he received completely inadequate reparation from the Melbourne Response was clear when he said: 'Melbourne Response is a shut-them-up at a low cost organisation. I was bullied by the lawyer for the Archdiocese and my confidentiality was breached'.[161]

A male victim was also worried about victims who received some financial reparation, but ended up with very little of it, if anything at all, after their lawyers' fees were deducted. He said:

> … I knew of others who got … less money and 90 or 95 percent went to their own lawyers. So they basically got nothing. They got nothing. This is the whole problem. This is the Church's conditioning in the end. They make you feel lucky for what you got. But in reality, it was a sham. Absolute sham.[162]

Not only did the Church haggle over compensation amounts, its personnel could be contemptuous of the presumed financial motivation of applicants. According to some interviewees, it was assumed by some personnel at the Melbourne Response that secondary victims who lodged complaints were motivated purely by the desire for money. An example of this involved the parents of a son who had killed himself in the years following sexual assaults by a parish priest. His parents talked about their experiences when they were invited to the Melbourne Response to provide information that, they hoped,

156 V2-6.
157 V1-4.
158 V1-11.
159 V1-1.
160 V1-7.
161 V2-2.
162 V1-11.

would help lead to a prosecution of the offender. According to the mother, not only did the Melbourne Response do nothing about trying to have the accused priest extradited who had escaped overseas, they incorrectly assumed that this couple was looking for compensation. On being informed that secondary victims do not receive compensation, the mother of this victim said:

> I was insulted by that … but it wouldn't have helped with bringing [my son] back, it wouldn't have helped with watching him disintegrate, his personality disintegrate. It wasn't the aim of going there ... [I was disgusted] … and insulted … this isn't what we're here for …[163]

DISCUSSION

With respect to compensation at the Melbourne Response and Towards Healing, the legal advocates focused mainly on the dollar value of the offers. They also emphasised the difficulty they faced in obtaining acceptable offers and the extensive gulf that existed between financial settlements from within the Church processes and those negotiated outside the processes.

The primary victims' discussions, on the other hand, were more subjective and focused on the psychological impacts of the insignificant financial offers, such as not wanting to touch the 'dirty' money and feeling insulted, worthless and powerless. The Church making decisions about what offers to make to a victim was likened, for example, to a criminal deciding what his victim was worth. All groups of interviewees commented on the deficiency of compensation amounts in attempting to match the severity of the abuse and harm done to victims. The secondary victims too were more subjective in that they talked about the impacts on them of the very poor compensation offers to the primary victims.

The primary and secondary victims also talked about the impacts these deficiencies had on their psychological and mental health because they were entirely dependent on the goodwill of the particular Church authority. They felt frustrated by, and powerless within, this process.

The discussions on this crucial issue of compensation extended far beyond the dollar value of the amount paid. They also highlighted the harm caused to victims and their families by the parsimonious attitudes of many of the Church authorities who also misconstrued the reasons most victims went back to the Church in the first place: to tell the truth, receive acknowledgement and be treated with respect.

6.6.2 Apology

Most of the victims who went to the Melbourne Response and Towards Healing received an apology, an important criterion for justice. Seventeen of the 18 victims who attended these processes contributed to this section on apologies. Of the 18 primary victims who attended the two internal complaints processes, nine received an apology from the Melbourne Archdiocese and five received an apology from different Religious Orders via the Towards Healing process. Of these 14 victims, one received an apology in relation to one offender, but no apology in relation to a second offender. Three primary victims did not receive an apology at all, and for one primary victim it is unknown whether he received an apology.

163 V2-7.

Of the 14 who did receive an apology: 11 were in the form of a written letter; one was delivered by email on behalf of the Archbishop; one was delivered face-to-face in a mediation meeting; and one man received two apologies, written and verbal and at different times.

One victim was happy with his apology.[164] It was in the form of a letter and he felt it was personalised and written thoughtfully and it included an admission of the abuse and an acknowledgement of the adverse impacts on him. This man would have preferred the apology was read out to him in a meeting with the Provincial of the Order, but he said he was denied such a meeting. He had received an ineffective apology from this Religious Order some years earlier, but this victim said he 'pushed for years' to get the ultimate recognition that was contained in his final apology.

Apart from this one victim who was satisfied with his apology, all other victims were unhappy with their apologies. They were described as 'impersonal', 'insincere', 'cold', 'insensitive', 'generic', 'meaningless', 'bull shit' and 'perfunctory'.[165] Some victims said they felt further abused, angered and traumatised by these ineffective apologies.[166] One man said he found the impersonal nature of the apology very unhelpful and harmful particularly because it came from a Church that proclaims Christian values.[167] Two victims reported that they were so disgusted with the apology that, upon receiving it, they immediately ripped it up. For another victim, a 'mumbled apology' was received from the Provincial of the Religious Order during the settlement mediation at which, said this man, a person from Catholic Church Insurance was present.[168]

One victim highlighted what was not included in the apology. There were no admissions of the sexual abuse and the offender was not named. Further, she said, the words 'the wrongs and harm' were used instead of 'sexual abuse' making this woman feel as though she had just been in a 'schoolyard punch-up' and that she had 'made a mountain out of a molehill'. The apology was 'very offhanded and minimising' she said.[169]

Several victims observed that the author of the apology had no understanding of the life-long impacts of sexual assault on victims. They referred to the words 'get on with your life' that were included in their apology. They all felt that this was insulting. One man said: 'I felt shocked because I thought that meant that everyone else must be getting on with their lives, therefore, what was wrong with me that I wasn't getting on with mine?'[170] It has since become apparent that the words in one victim's apology were exactly the same as those in three apologies to victims that were tendered in evidence to the Australian Royal Commission, indicating the impersonal and pro forma nature of these apologies.[171] Further, the wording in these apologies failed to recognise or acknowledge the Catholic Church's role in the commission of these crimes. The apology stated:

164 V1-13.
165 V1-1, V1-3, V1-4, V1-7, V1-8, V1-10, V1-13, V1-15, V1-18, V1-21, V1-11, V1-20.
166 V1-7, V1-10, V1-12, V1-15, V1-21.
167 V1-18.
168 V1-24.
169 V1-10.
170 V1-21.
171 V1-11.

> On behalf of the Catholic Church and personally, I apologise to you and to those around you for the wrongs and hurt you suffered at the hands of Father Kevin O'Donnell. Whether or not you choose to accept the enclosed offer, I offer you my prayers.[172]

Archbishop Denis Hart admitted in his evidence to the Royal Commission that the letters of apology to the Melbourne Response victims were written by the Church's lawyers and the Vicar-General's office and were very, very similar, if not identical in their content.[173]

One man was critical of the impersonal, brief and second-hand apology he received from the Chancellor of the Archdiocese of Sydney on behalf of the Archbishop, George Pell. The email read, in part: 'Cardinal Pell has asked me to respond to your email on his behalf. He is presently out of Sydney. He expresses his sincere regret about your abuse by Kevin O'Donnell…'. This victim said that this apology did not progress his healing at all.[174]

One man formally requested in writing that his apology include an acknowledgement by the Religious Order of the harm done to his parents as a result of his sexual abuse, even though the parents had since deceased. This was declined, said this man, because the Provincial of the Order was at the time preoccupied with the funeral arrangements of a fellow priest.[175]

Another victim, who received a written apology and then later received a verbal apology from the representative of the Religious Order, said that he was so depressed and suicidal from going through the Towards Healing process, that he was unable to know or feel what the apology meant to him, if anything. 'It was like being punched in the face and then the abuser says sorry – how can I judge what that means to me when I am in such a state?' This male victim had never felt suicidal until he experienced the Towards Healing process.[176]

DISCUSSION

One element for an effective apology as identified in this research (see chapter 3), that it is given by a senior Church representative, was addressed by all of the apologies that were given either by an Archbishop or Provincial of the Religious Order. However, all of the apologies for the victims, except one, were ineffective when assessed against the requisite elements for an effective apology. According to the interviewees, the majority of these elements were not addressed because the apologies were not genuine. Apart from two victims, the apologies were not given face-to-face, were not a complete display of regret and neither were they personal. They did not comprehensively address the needs of the victim and, except for one, they were in the written form only rather than written and verbal. There was no acknowledgement of the crimes and the harm done. Finally, the apologies did not include the taking of responsibility by the Church authority for what happened.

172 Evidence to the Royal Commission into Institutional Response to Child Sexual Abuse, Melbourne, 26 August 2014, C4742-C4743, (Denis Hart).
173 Evidence to the Royal Commission into Institutional Response to Child Sexual Abuse, Melbourne, 26 August 2014, C4742-C4743, (Denis Hart).
174 V1-12.
175 V1-20.
176 V1-20.

6.6.3 Counselling

The Melbourne Response and Towards Healing offer funding for, or access to, counselling as part of their response to victims, although such offers are discretionary. This section relates to the provision of counselling services for the 18 primary victims interviewed in this research and who went to either the Melbourne Response or Towards Healing. Of these 18 victims who wanted counselling services at the time of interview, seven were receiving such services that were being paid for by the Church.

Five of these 18 victims said they received provision or funding for counselling that they described as either 'unlimited' and/or as 'enough'.[177] This meant that the funding was either ongoing or did not cease until the interviewee was ready for it to cease. The provision of funding for counselling was not an issue for these people.

One victim said that although she receives unlimited funding, she feels constant pressure by the Melbourne Response to stop the counselling, implying, she said, that the Melbourne Response personnel think that she, the victim, does not need any more.[178] Another victim, who receives regular funding, said she feels she wants more so she can deal more effectively with the problems related to the sexual abuse and the trauma from going through the Melbourne Response process. [179]

Four victims received limited funding for counselling whilst they were undergoing the Melbourne Response or Towards Healing process, but they said they have been refused further counselling since that process was completed.[180] One man reported that he received funding for counselling for about five years but has been refused any further counselling for the last four years.[181] Another man, who received very limited funding for a Christian counselling service in rural Victoria, said this service did not meet his needs, preferring a more secular approach to counselling.[182] Four victims have not received any funding for counselling.[183] One man said that although he was very unhappy with the process overall, the opportunity to have counselling paid for by the Church is 'a pretty good idea'.[184]

Significantly, and ironically, whether these 18 primary victims received funding for counselling or not,[185] more than three-quarters said that one of the main reasons they needed counselling, over and above the sexual abuse, was to deal with the abuse and trauma they suffered as a result of going through the Melbourne Response or Towards Healing processes.[186]

DISCUSSION

Funding from the Church for counselling has been received by some of the victims. One-third received unlimited and adequate funding but the remaining two-thirds received either no funding at all, or limited funding for a period whilst they were going through the Church processes, but none since that time. Perhaps most significantly, more than three-quarters of the

177 V1-4, V1-8, V1-11, V1-13, V1-18.
178 V1-1.
179 V1-7.
180 V1-5, V1-10, V1-15, V1-20.
181 V1-12.
182 V1-23.
183 V1-3, V1-6, V1-21, V1-24.
184 V1-3.
185 Several paid for their own counselling.
186 V1-24, V1-10, V1-4, V1-18, V1-1, V1-12, V1-21, V1-20, V1-5, V1-14, V1-23, V1-7, V1-6, V1-11.

18 primary victims who went through the Melbourne Response and Towards Healing processes, reported that one of the main reasons they needed or wanted counselling was to help cope with the trauma and abuse they suffered at these Church processes.

6.6.4 Decision-making and review

When talking about the decision-making processes involved for determining compensation amounts at the Melbourne Response and Towards Healing, a lack of transparency was of concern to 12 interviewees, including almost half of the legal advocates. According to these interviewees, there are no available guidelines, nor have any ever been provided to victims and/or their legal representatives, about how decision-makers arrive at their decisions. The other pivotal consideration related to decision-making is that there is no appeal or review process available for decisions made within both processes. The complete discretion granted to each Church authority also caused a lot of concern for the legal advocates[187] and some victims.[188] That there is no benchmark, yardstick or set of guidelines assisting these decision-makers was worrying for some legal advocates[189] as was the fact that there was no publication of reasons for decisions.[190]

All the legal advocates claimed that the Towards Healing process displayed a marked disparity in outcomes between many Church authorities, with some Bishops or Provincials being empathetic and generous whilst others paying nothing. According to one legal advocate, the outcome depends on the degree of legalism of the individual Church leader or Bishop.[191] Similarly, a primary victim observed that another victim was: '… turning up as a beggar to the all-powerful Church [and] … it all depends on which powerful figure wants to cover it up or admit the truth'.[192]

But not all experiences at Towards Healing were negative. One legal advocate reported that between two and five mediations of '20 or so' that she attended had successful outcomes. She said:

> … the victim has been moved to tears by the apology of the religious rep, and likewise the religious rep has been in tears listening to the story of the victim. And I don't think you can put a price on that. And people who have had those experiences have gone ahead in leaps and bounds and haven't needed counselling for the next five years.[193]

With respect to the Melbourne Response, there was considerable interviewee focus on the coordinator at Carelink. Many said they had no idea and were given no information about how the coordinator made decisions about who would receive services and payments for counselling. According to some,[194] paying for some services but not others resulted in inconsistency in approach, an example of which involved some victims being provided health insurance from Carelink, whilst another was refused.[195] The inconsistent and ad hoc decisions of the Carelink coordinator, according to a non-legal advocate, also

187 LA-1, LA-10, LA-12, LA-8, LA-7.
188 V1-18, V1-7.
189 LA-1, LA-10, LA-12.
190 LA-10.
191 LA-7.
192 V1-14.
193 LA-1.
194 V2-10, LA-1, V1-1.
195 V1-1.

seemed to be associated with whether or not the victim was compliant with the personnel and the process. The less compliant, the less the victim received and/or the more they were punished.

Concern was also raised by several interviewees about the decision-making processes at the Compensation Panel at the Melbourne Response. According to one victim, the Compensation Panel did not provide reasons for or publish their findings and decisions. She said it lacked transparency, causing her to feel reabused because: 'You didn't know how they were able to reach the thirty pieces of silver they were going to offer you'.[196]

Two primary victims and a secondary victim dealt with personnel from the Archdiocese of Melbourne, rather than the Melbourne Response, in relation to financial matters. They referred to the Archdiocese's Financial Manager and Lawyer utilising their broad discretion to make financial decisions affecting victims such as themselves. It was reported that they also used their discretion to break agreements. One example involved the mother of a victim who applied to the Melbourne Response for out-of-pocket expenses including the costs of caring for her psychiatrically unwell daughter over some years.[197] Her application did not include the many hundreds of hours this woman had taken off work to care for her daughter. According to this woman, the lawyer for the Archdiocese told her that those expenses would have to come out of her daughter's payout figure. Demonstrating the complete lack of understanding and compassion by the Archdiocese lawyer, the mother said:

> I stared at him. I said, you mean to tell me that … if you give [my daughter] $30 000, that you then expect me to take my $15 000 from her. And he just looked away. So you should be ashamed of yourself.[198]

A female victim, whose health was, and always will be, precarious, reported that the Finance Manager at the Archdiocese of Melbourne reversed an earlier agreement that the Archdiocese would pay her health insurance.[199] After being paid by the Archdiocese for some years, the agreement was broken, she said, and payments ceased without explanation or notice.

DISCUSSION

The decision-making processes for compensation, apologies and funding for counselling at the Melbourne Response and Towards Healing are completely discretionary and they lack transparency and guidelines. This results in inconsistent and unfair results for victims. This is worsened by the fact that there is no internal or external appeal mechanism for ex gratia compensation amounts, apologies or funding for counselling at either Church process. The only review available at Towards Healing is one of its procedures and/or the findings of the assessment.[200] For the victim though, a review is not available for the outcomes as determined under Part 41 of the protocol, that is, decisions about compensation, counselling and other services and an apology.

196 V1-7.
197 The parents of this victim also requested financial support for many other costs associated with the ill health of their daughter, all of which were denied by the Archdiocese's Lawyer.
198 V2-10.
199 V1-1.
200 Australian Catholic Bishops Conference and Catholic Religious Australia, above n 1, s44.1.

There is no review mechanism at the Melbourne Response for either the outcomes or the process used. Instead, according to their protocol, if the person making the complaint does not accept the amount of compensation offered, their only alternative is to 'feel free to use the normal court processes'.[201]

6.6.5 Summary: Theme four

Victims and their families who engage with the Melbourne Response and Towards Healing take a sizeable personal risk in opening up their hearts and telling their stories. These people attended in good faith and committed themselves to these Church processes that undertake to provide healing and to honour the truth. But the interviewee data in this research found that the paltry and insignificant compensation amounts at both Church processes made many victims feel more harmed psychologically and mentally, as did the ineffective apologies and the inadequate counselling. The unfettered discretion employed by the decision-makers in these processes resulted in unfair and inconsistent outcomes that were not reviewable.

6.7 Conclusion

This chapter has examined interviewees' experiences with the Melbourne Response and Towards Healing. The four main themes that were identified from the interviewees' lived experiences addressed the issues of the truth, healing, the pastoral process and, compensation, apologies, counselling and decision-making processes.

This chapter first examined the Melbourne Response and Towards Healing pledge that the Australian Catholic Church is committed to striving for the truth. This included the truth about individual allegations of abuse and the truth about the full extent of the problem of abuse and its causes. All groups of interviewees challenged this claim to reveal and acknowledge the truth. Using the words of the Church, concealing the truth is unjust to victims, a disservice to accused people and damaging to the whole Church community.[202]

The data clearly demonstrate that the concealment and cover-up of sex crimes by the Catholic Church is not just an historical occurrence, as argued by Cardinal George Pell in his testimony to the Victorian Parliamentary Inquiry.[203] This research reveals that such concealment of the truth continues in many cases at the Melbourne Response and Towards Healing. Not only can the truth of the clergy sex crimes not be told, the victims' truth can go unacknowledged as it is minimised, suppressed, manipulated and exploited – all forms of denial of the truth (see chapter 1).

Concealing the truth can safeguard offenders and expose more children to sexual assault. Concealing the truth traumatises and damages victims as well as being unjust. It also traumatises and damages the families and friends of the victims as well as the Catholic Church community.

With respect to the second theme, the Melbourne Response and Towards Healing expressly accept they have a responsibility to seek to bring healing to victims of clergy sexual abuse. They affirm that a sensitive and

201 Catholic Archdiocese of Melbourne, above n 4.
202 Australian Catholic Bishops Conference and Catholic Religious Australia, above n 1, s.14.
203 Evidence to the Family and Community Development Committee, Victorian Parliament, Melbourne, 27 May 2013, 13 (Cardinal George Pell).

compassionate response to the complainant must be the first priority in all cases of abuse. The protocols emphasise that victims must be listened to and assisted in a just and compassionate way.[204]

The participants in this research who experienced the Church's complaints processes reported that they have not been healed. Instead they have been harmed, and the harm for many has been grave. Their testimonies also indicate that primary and secondary victims did not experience what they were looking for in these processes, which were sensitivity, compassion and justice. Rather, they say, they were met with coldness, confrontation and abusiveness. These primary and secondary victims who went back to the Church in search of hope and healing, came away feeling traumatised, abused, depressed and angry.

Analysis of the third theme found that despite the protocol assurance of pastoral and non-legalistic practices at both processes, the reported experiences of the interviewees instead pointed to a culture of legalism that was pervasive at both the Melbourne Response and Towards Healing. Many victims described how an absence of compassion, love and Christianity meant they felt overwhelmed, intimidated and traumatised by highly legalistic and combative groups.

Analysis of the fourth theme found that the unpredictable and fluctuating ex gratia compensation amounts from the Melbourne Response and Towards Healing were inadequate and disrespectful to victims. Apologies did not address the requisite criteria of an effective apology and, thus, were also grossly inadequate. They were more harmful than healing for victims. The provision of funding for counselling for two-thirds of the victims who went through the Melbourne Response and Towards Healing was also seen as grossly inadequate. Alarmingly, the main reason that more than three-quarters of the victims who went through these processes wanted counselling, was to deal with the harm and trauma they suffered as a result of engaging in these processes.

Underpinning these unsatisfactory outcomes in relation to compensation offers and the provision of apologies and counselling were the discretionary decision-making processes employed at both Church processes. Such decisions were experienced as inconsistent, unpredictable and unreviewable. There was no transparency, no available guidelines and no benchmarks.

Such unfettered discretion granted to so many individuals in these processes was problematic because it permitted the personal biases and belief systems of each decision-maker to influence and dictate their decisions. That is, according to the interviewees, the unregulated processes combined with the discretion, power and often capriciousness of the individual decision-maker, led to inconsistent financial and other outcomes.

204 Australian Catholic Bishops Conference and Catholic Religious Australia, above n 1, ss.16-19.

The few positive experiences that were reported were mainly from the legal professionals, and a couple of victims. They were able to report that Towards Healing, in particular, provided the opportunity for some victims to talk about the harm of the sex crimes, receive acknowledgement and to face the Church representative. The other main advantage was the provision of funding for counselling.

As a pathway to justice for victims of Catholic clergy sexual abuse, the Church's two internal complaints processes, the Melbourne Response and Towards Healing, have failed. According to this research, the Church's over-arching promise to bring healing for victims has proved hollow. Instead, injurious practices have left many victims further harmed, traumatised and abused.

According to Pope Benedict XVI, the Australian Catholic Church, through its internal complaints processes, continues in the spirit of the Gospel to effectively address the issue of clergy sexual abuse so that it will 'bring about healing, reconciliation and ever greater fidelity to the moral demands of the Gospel'. The victims of such clergy sexual abuse, it seems, would disagree.

CHAPTER

7

EVALUATION OF THE PATHWAYS TO JUSTICE

7.1 Introduction

In the last three chapters, interviewees' lived experiences of the civil and criminal jurisdictions and the Melbourne Response and Towards Healing processes were examined and discussed. The purpose of this chapter is two-fold. First, there is an analysis of how well the seven criteria for justice for clergy victims and their families identified in this research[1] reflect the theories of justice as outlined in chapter 1. Second, these same criteria for justice are used to evaluate the findings from this research of victims' lived experiences of the three main pathways in trying to find justice: civil litigation; the criminal justice system; and the Church's internal complaints processes, the Melbourne Response and Towards Healing. For a summary of these findings, see Table 7.1 on page 185. These three pathways will also be discussed in light of the relevant theories for justice.

7.2 Criteria for justice

The extended analysis of what was needed for justice for primary victims that were identified by the interviewees in this research (see chapter 3) outlined seven clear criteria for justice. It is to be remembered that these criteria for justice were drawn from the proposals of all groups of interviewees, including the 12 legal advocates whose views were inevitably influenced by the experiences of the 2000-plus clergy victims they had represented.

The first criterion for justice identified by victims and other interviewees is for victims to be able tell the truth of what happened to them and have that acknowledged by the Church. Further, the Church hierarchy needs to tell the truth about its involvement in the concealment of the sex crimes and the protection of the sex offenders. The latter component of this first criterion reflects very closely the principles of transitional justice, which, as discussed in chapter 1, highlights the critical element of the recovery of the truth of serious crimes and their concealment, if victims are to find justice.[2] In addressing the need for victims to be believed and feel vindicated – that is having their truth acknowledged by the Church hierarchy – the victim-centred principles of restorative justice are also harnessed. As discussed in chapter 6, these same restorative principles are professed in the protocols of the Melbourne Response and Towards Healing.

Expanding on the theory of transitional justice and the need for 'truth recovery',[3] the international human rights principles of a victim's right to know the truth of the crimes so as to bring about accountability of the offenders and end impunity[4] are also pivotal in clergy abuse victims' journeys to justice (see chapter 1 and below). It is the combination of these first and second criteria for justice – the importance of the truth and criminal accountability of the hierarchy – which reflects these latter principles. Although the Catholic Church in Australia cannot be directly compared with military juntas and dictatorships accused of genocide and mass killings, the long-term institutional sexual abuse of children and the accompanying cover-up and protection of the sex offenders constitute serious human rights violations. The Catholic Church is a very large and wealthy institution that wields

1 The truth and its acknowledgement; accountability of the Church hierarchy; compensation; accountability of the offender; an apology; counselling and other services, and, prevention of further clergy sex crimes.

2 A McAlinden, 'An inconvenient truth: barriers to truth recovery in the aftermath of institutional child abuse in Ireland' (2013) 33 *Legal Studies* 189, 191.

3 Ibid.

4 Diane Orentlicher, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1, 61st sess, Agenda Item 17, (8 February 2005) Principle 2; T M Antkowiak, 'Truth as Right and Remedy in International Human Rights Experience' (2002) 23 *Michigan Journal of International Law* 977, 978; Paz Rojas Baeza, 'Impunity: an Impossible Reparation' (2000) 69 *Nordic Journal of International Law* 27, 28.

extraordinary personal and political power which it has used to collude with and protect abusers. Further, the long-term cover-up and protection of offenders knowingly put other children at risk of serious sex crimes. This is a crime of those guilty members of the hierarchy for which there has been no accountability. In other words, there is ongoing impunity, which of itself is causing serious harm to victims (see chapter 1).[5]

The third critical criterion for justice – adequate compensation for victims of clergy sexual abuse – mirrors the principles of corrective justice in that compensating victims for wrongs done is seen as a mechanism for 'putting right' the injury and other losses caused to the victim (see chapter 1). As highlighted by the interviewees, financial compensation is necessary to repair the harms caused by the sexual assaults and their concealment; and because most of the offenders have not paid for their crimes by way of conviction or financial reparation. Victims also have a legislative right to compensation in the criminal jurisdiction and victims of crime compensation schemes (see chapter 1).

The fourth criterion – criminal accountability of the offender – as well as criminal accountability of the hierarchy, reflect the principles of retributive justice, as discussed in chapter 1, in that it assumes that proportionate punishment is the most effective response to crime. A criminal conviction can bring about vindication for the victim and acknowledge the truth of what happened to the victim.

Victims also have needs that are additional to compensation and retribution, one of which is an effective apology, the fifth criterion for justice. This is the case for the majority of victims in this research whose offender has died and/or escaped conviction and punishment. An effective apology is essential if the principles of restorative justice are to be realised, particularly those who seek to restore victims by helping repair the harm caused by Catholic clergy sex crimes.[6]

The sixth criterion – adequate counselling – can also be seen to be required if corrective justice is to be achieved, as this would be a very important element of the pecuniary losses for victims. Counselling also reflects the restorative justice aim of healing for the victim.[7] The seventh criterion – the need for prevention of further clergy sex crimes – is reflected in several of the justice theories. One aim of transitional justice and the search for the truth is the prevention of further crimes.[8] It is also an aim of restorative justice to promote prevention by transforming the offender. This seventh criterion for justice is also an important goal of retributive justice, in that punishment, if it acts as a deterrent, may bring about prevention of further crimes.

In summary, the criteria for justice identified by the interviewees in this research parallel and embody well-recognised principles of justice, including the international human rights principles of the right to the truth for victims of crime in order to end impunity of the perpetrators. If these justice principles are to be achieved, the potential remedies of civil litigation, criminal

5 Paz Rojas Baeza, 'Impunity: An Impossible Reparation' (2000) 69 *Nordic Journal of International Law* 27, 28.
6 Daniel Van Ness, 'An Overview of Restorative Justice Around the World' (Workshop 2, Eleventh United Nations Congress on Crime Prevention and Criminal Justice, 22 April 2005) 3.
7 Ibid.
8 UN Secretary General, *The rule of law and transitional justice in conflict and post-conflict societies* (2004) UN Doc. S/2004/616, 4; A McAlinden, 'An inconvenient truth: barriers to truth recovery in the aftermath of institutional child abuse in Ireland' (2013) 33 *Legal Studies* 189, 190.

prosecutions and the Church's internal complaints processes must address the seven criteria for justice for victims. To determine if this was the case for the interviewees in this research, these three main pathways for victims are now evaluated against those seven criteria. This commences with an evaluation of civil litigation.

7.3 Civil litigation

Tort law offers several remedial options for victims of clergy sexual abuse (see chapters 1 and 4). A tortious action in trespass to the person would hold the clergy sex offender personally liable for his offences. An action in negligence could also be brought against the organisation of the Catholic Church due to a breach of its duty of care, vicarious liability of the Church for the sex crimes of its clergy or a breach of its non-delegable duty of care. All have the potential to provide clergy victims with a financial remedy. Damages in tort is aimed at restoring the victim to 'the same position as he would have been in if he had not sustained the wrong'.[9] Pecuniary losses suffered due to physical and/or psychiatric injury may result from expenses, both past and future, such as counselling and medical costs, and loss of earning capacity due to the inability to work. Non-pecuniary losses due to the injury may include pain and suffering, loss of enjoyment of life (loss of amenities) and loss of expectation of life (life expectation has been shortened).

As also discussed in chapter 1, an equitable remedy for sexual assault victims suffering a non-pecuniary loss – such as the negative impacts on his or her life due to psychiatric harm (the equivalent to pain and suffering in tort) – can be available due to a breach of fiduciary duty. Whilst not currently in Australia, such a remedy is available in, for example, Canada and New Zealand. Equitable compensation aims to compensate the plaintiff for loss caused by, for example, the breach of a fiduciary duty. Equitable compensation is comparable to common law damages.

Civil litigation most clearly addresses the aims of corrective justice. By imposing liability on the wrongdoer, corrective justice prioritises compensating victims for wrongs done including the personal injuries of victims of Catholic clergy sexual abuse (see chapter 1). Potentially, an approach based on corrective justice such as civil litigation, could address several of the criteria for justice for victims that were identified in this research and examined in chapter 3 and above. A court order that the offender and/or the Catholic Church pay the victim financial reparation through common law damages or equitable compensation could deliver an acknowledgement of the truth of the sexual abuse in a very public way, thus providing vindication for the victim. Such court judgments can also act as a public condemnation of the sex offences and the wrongdoing of the organisation involved, the Catholic Church, thus providing acknowledgment and accountability. It is also possible that such a court order include an effective apology from the offender and/or the Church's representative. The imposition of adequate compensation that reflects the degree of the harm caused to the victim, including provision for future counselling and other medical services, could also achieve some financial accountability of the Church – a very important criterion for

9 *Livingstone v Rawyards Coal Co (1880)* 5 App Cas 25, 39.

justice.[10] Procedural justice can also be achieved by civil litigation in the courts where a fair outcome will be considered just if a fair procedure is followed.[11] It is important that victims be treated with care and respect by the judge or decision-maker, whilst having their story validated (see chapter 1).[12]

In practice, though, the delivery of justice to clergy victims by way of these civil actions is highly problematic. An award of damages is unlikely because the majority of Catholic clergy offenders, who have taken the vow of poverty, are presumed to be impecunious; making the cause of action in tort, trespass to the person, futile for the victim.[13] Victims are further prevented from attaining justice in the civil courts due to the Ellis defence, which protects the Catholic Church from suit, and the unclear Australian common law position, as found in Lepore, leaving vicarious liability of the Church and a breach of its non-delegable duty of care unavailable for victims (see chapter 4). To date, no cases have been decided in Australia for the remedy of equitable compensation for non-pecuniary losses where there has been a breach of fiduciary duty. All the while, existing statutes of limitations, except for recent reforms in Victoria (see chapter 1), are preventing victims from having access to the civil courts. This means that in practice, not one of the requisite elements for justice for clergy sexual abuse victims is currently being addressed by the option of civil litigation in Australia.

7.4 Criminal prosecutions

These next two sections discuss the two components of the criminal justice pathway for victims, criminal prosecutions and the Victorian victims of the crime compensation scheme, VOCAT.

There are multiple provisions in *Victoria's Crimes Act 1958* that comprehensively address sexual offending and concealment of the sex crimes, thus potentially providing retributive justice and addressing several of the criteria for justice (see chapter 1). It can be particularly important to be able to use the criminal law to denounce crimes against children, which involve 'derogations from the fundamental human rights of immature, dependent and vulnerable persons'.[14] Criminal prosecutions and punishment could publicly acknowledge the truth that the crimes happened and their impacts on the victim – particularly if a victim impact statement is read out in the court – and provide vindication for the victim. There could be some acknowledgement by the offender if he pleads guilty to the crimes and even some compensation if the offender has assets or funds, by way of an order under s.85 of the *Sentencing Act* (Vic). Finally, further sex crimes may be prevented whilst the offender is incarcerated.

10 This would depend on whether the Catholic Church's insurance company was responsible for such payouts.
11 J Rawls, *A Theory of Justice* (1971) cited in R Bigwood, 'Conscience and the Liberal Conception of Contract: Observing Basic Distinctions Part II' (2000) *JCL* 191, 195.
12 Michael King, 'Therapeutic Jurisprudence, leadership and the role of appeal courts' (2008) 30 *Australian Bar Review* 201, 202.
13 It should be noted, however, that this broadly held view was challenged at the Victorian Parliamentary Inquiry, when it revealed that one convicted Victorian Christian Brother, Ted Dowlan, had received assistance from the Christian Brothers to protect the estate from his mother's will 'from any attack on his assets after Mrs Dowlan's death'. It was also revealed that Ted Dowlan, once 'he accepted the indult of dispensation' (dispensed from the order of the Christian Brothers) was awarded 'a quantum of separation payment [of] AUD125,000' and was also offered further assistance by way of accommodation. Evidence to the Family and Community Development Committee, Parliament of Victoria, Victoria, 3 May 2013, 24, (Brother Brandon).
14 *Ryan v The Queen (2001)* 206 CLR 267 at [118].

In assessing the criminal justice system as a pathway to justice against the seven criteria for justice that were identified by the interviewees, there has in fact been no criminal accountability of the Catholic Church hierarchy who concealed the sex crimes – a crucial criterion for justice for victims. This impunity is generating ongoing pain and trauma for victims and their families, as discussed in chapter 1.

There has been criminal accountability of the sex offender in the form of criminal prosecutions for six of the 35 victims in this research (see chapter 5). None of the primary victims interviewed had been through a criminal trial because their offenders had pleaded guilty to criminal charges relating to the sexual abuse, providing an acknowledgment by the offender of the truth of what happened.[15] The convictions also provided some public acknowledgement of the crimes, thus vindicating the victim. It is unlikely, though, that there was acknowledgement of all the crimes committed and their impacts on the victim, either by the State or the offender, because guilty pleas often involve a plea bargaining process in which the more serious charges are dropped by the prosecution in return for the offender pleading guilty and thus avoiding a trial (see chapter 5).

Prevention of further offending may have been achieved with the incarceration of the offenders in this study. All these prosecutions, however, occurred many years after the sex offending, and it is unknown whether further offending occurred between the original offending and the incarceration. It is also unknown whether there was subsequent reoffending by these offenders once they were released from prison.

At the time of interview none of the five victims whose offenders had pleaded guilty, had applied to the courts for compensation by way of section 85 of the *Sentencing Act*, under which an offender can be ordered to pay compensation to the victim (see chapter 1). This means that compensation, as a criterion for justice, has not been addressed for any of the victims in this research with respect to the criminal justice system. Reasons for this reflect the same reasons victims do not sue the clergy offender personally – the offenders are impecunious. In relation to the fifth and sixth criteria for justice, criminal convictions have not provided apologies or funding for counselling for victims.

Procedural justice by way of fair and transparent court processes and fair treatment of the victim in the criminal courts would normally be a very important consideration for complainants in criminal trials (see chapter 1). However, as highlighted above, none of the victims interviewed in this research experienced a criminal trial. Procedural justice can be measured, though, for the victims who had dealings with police officers in the criminal justice system. As found in chapter 5, about two-thirds of the victims were very happy with their experiences of the police officers. Although the police officers were not making findings of guilt or innocence, they were making other critically important decisions about whether to prosecute, for example, and they did interact at a very personal level with the victims.

15 Of the five guilty pleas, there were only four convictions. However, one of the primary victims who was not interviewed (the son of a secondary victim who was interviewed) had been through a criminal trial and his offender received a conviction.

In summary, there has been no retributive justice and none of the criteria for justice has been met for the greater majority of victims in this study. For the five victims interviewed whose offenders pleaded guilty (and the one victim not interviewed whose offender was found guilty by a jury), the degree of retributive justice they experienced depended on: whether there was a conviction (one offender who pleaded guilty did not receive a conviction); the length of the sentence; and the number of charges that were dropped as part of the plea bargaining process (see chapter 5). Procedural justice was delivered to the majority of victims in the criminal justice system, particularly since the year 2000. Finally, even though criminal charges were recently laid against the Archbishop of Adelaide, Phillip Wilson (see chapter 1), to date, there have been no convictions of the Church hierarchy for covering up the sex crimes. This leaves criminal accountability of the hierarchy, an important criterion for justice, unaddressed.

7.5 Victims of crime compensation schemes

Victims of crime compensation schemes offer distributive justice rather than corrective justice (see chapter 1). The former deals with state distribution of funds for pecuniary and non-pecuniary losses relating to the harm to victims of child sexual assault. Amounts awarded by these schemes do not compensate the victim so that they are returned to the same position they would have been in had the sexual abuse not occurred, as might occur in adjudicated outcomes. Reflecting the aim of distributive justice, VOCAT's financial assistance is a symbolic expression by the State for the community's sympathy and condolence for, and recognition of, significant adverse effects on victims of crime. Such awards of financial assistance are not intended to reflect the level of compensation to which victims of crime may be entitled at common law or otherwise.[16]

VOCAT's processes also reflect elements of restorative justice. As outlined in chapter 1, restorative justice addresses needs for victims that are additional to retribution and corrective justice compensation. This is especially important for clergy abuse victims, because they have been denied appropriate compensation and the greater majority have been denied retributive justice in relation to the sex offender. All have been denied retributive justice in relation to the hierarchy who concealed the sex crimes.

Although at the time of interview only one victim had made an application to a victims' of crime scheme, a successful application with VOCAT, for example, could normally address some of the criteria for justice. The need for counselling and other medical-type services could be addressed with VOCAT's financial assistance,[17] which can be awarded for past or future reasonable expenses in this area. Another criterion for justice – monetary compensation – could also be achieved at VOCAT, although there are limits on the amount. In addition, an award up to $20 000 can be made for lost earnings for primary or secondary victims, covering a period up to two years after the crime.[18] Relatives of victims can also receive an amount of money.[19] Overall, a primary victim can receive up to $60 000 for reasonable expenses and lost earnings plus any special financial assistance up to $10 000.

16 *Victims of Crime Assistance Act 1996* (Vic) s.1(2)(b) and (3).
17 Ibid s.1(2).
18 Ibid s.8.
19 Ibid s.13.

Victims of crime compensation schemes can provide a degree of restorative justice in that a forum is provided within which victims of crime 'can have their say' and receive some acknowledgement of their loss and suffering.[20] This element of the process would address clearly the need for victims to be able to tell the truth of what happened to them and to have that acknowledged – in this case by a legal officer of the State (a Magistrate) – thus offering vindication for the victim. In summary, VOCAT can help reflect the values of restorative justice by validating victims' experiences, restoring a sense of dignity and providing financial support to assist a victim's recovery. [21]

Whereas only one of the 35 primary victims in this research had applied for and received some justice with this particular justice model, the greater majority of victims in this research had made complaints to the Church's internal complaints processes. This could be explained by the fact that it was of the utmost importance to victims to receive some acknowledgement from the Church of the truth of what happened to them, as demonstrated by the importance of acknowledgement of the truth as a criterion for justice. Victims also wanted the Church to be accountable for the harm. In addition, because the majority of the research victims were not legally represented, they may simply not have known about VOCAT.

These schemes do not bring about any accountability of, or offer acknowledgement by, the offender or members of the Church hierarchy because the offender is not involved in these processes. It is the State that provides the funds for financial payment. Further, these schemes would not produce an apology and they have no role in the prevention of further offending of Catholic clergy.

In summary, victims of crime compensation schemes may provide victims of clergy sexual abuse with a degree of restorative and distributive justice, together with public acknowledgement of the crimes and some provision for counselling and/or other medical services.

7.6 The Melbourne Response and Towards Healing

The principles of restorative justice are explicitly central to the Church's internal complaints processes, the Melbourne Response and Towards Healing. As discussed in chapter 6, both processes claim that they seek to know the truth about the abuse and aim to bring healing to the victims, the offenders and the community. Offenders, according to the protocols, should get professional help, be held accountable, make amends and acknowledge the enduring harm they have caused victims.[22] These restorative justice aims of the Church's processes, therefore, clearly have the potential to address the varied and complex needs of the clergy victim, the Church community and the offender.

Further, the provision of an apology, a discretionary element of the processes, would normally be a very important consideration in restorative justice. The willingness and good faith of the offender, or at least his representative Bishop or Provincial, is essential if this approach to justice is to be effective.

20 Victims of Crime Assistance Tribunal, *Annual Report* (2011-2012) Victims of Crime Assistance Tribunal, 3 September 2012, 4.
21 Ibid 8.
22 Australian Catholic Bishops Conference and Catholic Religious Australia, *Towards Healing – Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church of Australia* (January 2010) 9-10.

Clergy victims who attended the Melbourne Response and Towards Healing processes wanted to be treated respectfully, to have their truth acknowledged and to experience a process that was transparent and fair. Such needs reflect the principles of procedural justice (see chapter 1), which can also apply in non-court settings, such as the Church's processes, where the decision-makers are the Bishops and Provincials of the Religious Orders.

The crucial criterion for justice for victims, the truth and its acknowledgement by the Church, parallels the fundamental principles of seeking the truth and truth recovery in transitional justice (see chapter 1). Implementing these principles could assist with not only the identification of the past wrongs within the Church – for example the concealment of the sex crimes and the protection of the offenders – but also in determining the reasons why the Church failed to learn from those wrongs.[23] The Melbourne Response and Towards Healing processes had the potential to provide a much fuller understanding of the context, causes and consequences of the crimes and their concealment, and to share these findings in good faith with victims, their families and communities, and preventing such crimes in the future.[24]

In summary, there is much potential for the Melbourne Response and Towards Healing processes to address victims' justice needs. What follows, is an evaluation of the interviewees' lived experiences of these processes against the seven criteria for justice.

TRUTH AND ITS ACKNOWLEDGEMENT

The crucial criterion for justice for clergy victims – the truth and its acknowledgement – was not achieved for most of the victims in this research who engaged in Melbourne Response and Towards Healing as a pathway to justice. Most victims were confronted with a legalistic and adversarial praxis at these processes, which did not assist with the advancement of the truth and its acknowledgement. Whilst some victims experienced acknowledgement of some of the truth of the sex crimes and their impacts from the Church authorities, most victims did not. Many were also misinformed or lied to by Church personnel about their offenders. Important information given in good faith by victims about perpetrators was not used by the Church to bring offenders to account and most victims felt silenced by the process. Many of the Church's responses, including those from the Melbourne Response and Towards Healing, equate to the different forms of denial as defined by Cohen[25] and examined in Chapter 1. Based on the interviewees' data there have been individual or personal denials by the leaders of some of the Church authorities and/or personnel within the Church's internal complaints processes. There has been literal, factual or blatant denial as many of their accounts of what happened were either minimised or downgraded or facts about the offender were either lied about or simply not told. Interpretive denial, when the facts are given a different meaning, occurred for example when the Church personnel downgraded sex offences from rape to sexual abuse. Further, the Church's denials combined with victims feeling silenced provide a powerful force in the truth being suppressed.[26]

23 McAlinden, above n 2, 191.
24 Ibid 198.
25 Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering* (Polity Press, 2001) 10-11.
26 Cheryl Lawther, 'Denial, Silence and the Politics of the Past: Unpicking the Opposition to Truth Recovery in Northern Ireland' (2013) 7 *The International Journal of Transitional Justice* 157,158.

ACCOUNTABILITY OF THE CHURCH HIERARCHY AND SEX OFFENDERS

The Melbourne Response and Towards Healing processes did not contribute to the criminal accountability of the Church hierarchy, although there may have been some financial accountability of the Church in the form of compensation (see below). Nor have these processes been responsible for any justice being delivered to victims by way of accountability of the offender – either by criminal prosecutions or laicisations. On the contrary, the Melbourne Response had not referred one matter to the police between 1996 and 2012.[27] As discussed in chapters 1 and 3, the determination of the truth is 'directly tied to accountability' in the form of prosecutions.[28] Victims and their families suffer as a result of the impunity of the Catholic hierarchy who concealed these sex crimes and the impunity of those offenders who evaded prosecutions.[29]

COMPENSATION

The discretionary ex gratia compensation at the Melbourne Response and Towards Healing was unpredictable and inadequate for victims, leaving justice, by way of compensation, elusive. The ex gratia character of these payments indicates the refusal by the Church to accept any legal liability for the harm suffered by victims. These very low compensation amounts did not match the harm suffered by the victims. Legally-unrepresented victims received less than those legally represented, as did those whose matters were negotiated inside the Church's processes, compared with those negotiated outside the processes. This has resulted in little, if any, financial accountability of Church authorities.

The provision of financial compensation at the Melbourne Response and Towards Healing could not be considered to fall within a corrective justice framework as these processes do not, and neither do they purport to, restore the victim to 'the same position as he would have been in if he had not sustained the wrong'.[30] Pecuniary losses, such as a loss of earning capacity due to the inability to work, and non-pecuniary losses, such as pain and suffering, loss of enjoyment of life and loss of expectation of life, are not used for calculating compensation payouts at the different Church authorities. This is evidenced by the compensation amounts that were paid to victims by the Church's processes. At the Melbourne Response, compensation is capped at $75 000, reflecting very closely the cap at VOCAT and other victims of crime compensation schemes. The compensation amounts at the Melbourne Response ranged from $15 000 to $50 000.[31] Although Towards Healing claims that there is no cap on financial payouts, it is argued that there are as many caps as there are Church authorities within that system (see chapter 6). The average ex gratia compensation amount for legally represented victims at Towards Healing was about $82 000, whereas for those who were unrepresented it was about $30 000.[32] There is nothing 'corrective' about these amounts.

27 Evidence to the Family and Community Development Committee, Victorian Parliament, Melbourne 19 October 2012, 2 (Deputy Commissioner G Ashton, Victoria Police).
28 Cohen, above n 25, 227.
29 Diane Orentlicher, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity,* E/CN.4/2005/102/Add.1, 61st sess, Agenda Item 17, (8 February 2005) Principle 2.
30 *Livingstone v Rawyards Coal Co (1880)* 5 App Cas 25, 39.
31 Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust* (2013) 613.
32 Ibid 619.

APOLOGY

The provision of an apology, normally a very important consideration in restorative justice, is a discretionary element at both Church processes. Apologies received by victims from the Melbourne Response and Towards Healing did not address the requisite criteria of an effective apology.[33] Most victims felt insulted by the apology they received, representing another failure by the Church to deliver justice to victims.

FUNDING FOR COUNSELLING

For the greater majority of victims, adequate counselling, as a vital element of justice for the victim, was not delivered. About a third of the victim interviewees who attended the Church's processes received unlimited and adequate funding for counselling. Two-thirds received either no funding or very limited funding. Further, more than three-quarters of the primary victims who went through the Melbourne Response and Towards Healing needed or wanted counselling to help cope with the trauma and abuse they suffered at those internal complaints processes.

A major contributor to the inconsistent, unpredictable and unfair financial outcomes, ineffective apologies and inadequate funding for counselling at the Melbourne Response and Towards Healing, is the unfettered discretion of the decision-makers. Decision-making lacks transparency in that guidelines, benchmarks and the processes and procedures used for decision-making are not made available to the victims or their legal advocates. Crucially, there is no review mechanism available in either process for decisions that impacted greatly on the lives of very vulnerable people. The victims do not feel that they were treated with care, had their full story validated or were treated politely and with respect.[34] Procedural justice was, therefore, also scant at these internal complaints processes.

PREVENTION OF FURTHER OFFENDING

Apart from the prevention of further offending that is mentioned in the Church's protocols, there was no evidence from the interviewees that the Melbourne Response and Towards Healing processes contributed to such prevention, a very important criterion for justice.

In summary, some of the criteria for justice identified in chapter 3 were partially addressed for some of the victims who engaged in these internal complaints processes of the Church. For most though, they went unaddressed. Further, the findings of the research about the Melbourne Response and Towards Healing are clearly at odds with the Church's pledge that it is committed to striving for the truth.[35] For the victims in this research, the Australian Catholic Church has displayed a lack of respect and contempt for what is a most crucial element of justice for victims – the truth and its acknowledgement. In addition, that the Church's processes cause harm to the victims, also challenges the Church's guiding principle that healing for

33 An effective apology must be unreserved and genuine; be given face-to-face or directly to the victim, as opposed to a collective apology; be a complete display of regret; be given from a senior Church representative such as the (now former) Cardinal Pell or an Archbishop, Bishop or Provincial of a Religious Order; be given by a senior representative, as above, if the offender does not apologise; be personal; comprehensively address the needs of the individual victim; include reparation or at least every possible attempt at reparation; include foundational pastoral care if the victim wants; be in the written form as well as the verbal form; include an acknowledgement of the crimes and the harm done to the victim; include the taking of responsibility by the person giving the apology for what has happened (see section 3.7).
34 King, above n 12, 202.
35 This includes the truth about individual allegations of abuse and about the full extent of the problem of abuse and its causes.

victims is a primary aim, including recognition that a sensitive and compassionate response must be the first priority. Finally, the Church's claims that it offers a non-adversarial and pastoral process contradict the research finding that these Church processes are highly legalistic and adversarial in their approach.

When asked whether he could ever receive justice, a secondary victim, whose son had committed suicide after being sexually assaulted multiple times by a diocesan priest, put it this way:

> What am I supposed to do? Hypnotise myself to believe that all's well, that they've fixed it … Can we ever get justice? No. Ridiculous … it [the Catholic Church] has been corrupt for 2,000 years. What on earth makes you think they're going to change now? … [it's a] very ugly truth … I got on with life as well as I might have. [My wife and] I stressed and fractured and split up.[36]

Table 7.1 below, provides a summary of the evaluation of the main pathways to justice for victims in this research, as assessed against the seven criteria for justice.

	Truth and its Acknowledgement	Accountability of Church and Hierarchy	Compensation	Accountability of Offender	Apology	Counselling	Prevention
Civil Litigation in the Courts	No	No	No	No	No	No	No
Criminal Prosecutions	Partial	No	S.85 Sentencing Act. If offender has assets.	Yes for 6 Victims. No for 29 Victims.	No	No	Unknown
Victims of Crime Compensation	Yes, only by the State.	No	Yes. Capped.	No	No	Yes	No
Melbourne Response and Towards Healing	Yes for some. Mostly minimised and/or concealed.	No criminal accountability. Maybe some financial accountability of the Church.	Yes. Inadequate.	No	All but one. Inadequate	Yes for one third. No for two thirds.	Unknown

Table 7.1 Evaluation of the potential pathways to justice for victims of clergy sexual abuse, as assessed against the seven criteria for justice

This section has addressed the central question of this thesis: 'Are victims of clergy sex crimes finding justice?' The seven criteria for justice identified by the interviewees in this research mirror the broad justice principles for victims of crime that were discussed in chapter 1. It is clear that when these seven criteria for justice are employed to evaluate the three main pathways to justice for clergy victims in this research, the vast majority of clergy victims are not finding justice. Indeed, victims and their families in this research suffered further abuse and harm, especially at the Church's internal complaints processes.

The final chapter concludes by highlighting the significance of this research. Areas for future research are proposed, as are reforms necessary to effectively address the criteria for justice for victims and their families.

36 V2-6. The offender fled Australia when he heard the police wanted to prosecute him. Not only did the Archdiocese of Melbourne financially support this priest for the rest of his life, he was never held accoutnable, either criminally or financially – he continued to enjoy impunity as his victims and their families suffered immeasurably.

CHAPTER

8

CONCLUSION

8.1 The research and its findings

It was the disclosure by my relative, two decades after enduring as an 11-year-old, repeated brutal sexual assaults at the hands of Christian Brothers, that precipitated this empirical research into sexual assaults and the Catholic Church. This provided the opportunity to contribute to the academic literature, which, in 2010, was still sparse.[1] The incidence of Catholic clergy sexual assault and its concealment by the Church hierarchy were not fully understood in Australia at that time, although media exposure of the problem had been gradually increasing since the early 1990s. Internationally, particularly in the Republic of Ireland, shocking details of Catholic clergy sexual and other abuse were being exposed by a series of commissions of inquiry, which commenced in 2000. In Australia, since 2012, the Victorian Parliamentary Inquiry, the NSW Special Commission of Inquiry and the national Royal Commission are also exposing the depth and breadth of sex crimes and their concealment within the Catholic Church, as well as other institutions.

What for years had been the carefully orchestrated containment of clergy sexual abuse by the Church authorities was now being undermined.

This research set out to answer the central question: 'Are victims of clergy sexual abuse in Australia finding justice?' This led to a further question: 'What does justice look like for clergy sexual abuse victims?' To address these questions, a large empirical qualitative study was designed and undertaken. A victim-centred justice perspective guided the research and its design and analysis drew on the various forms of justice: retributive, corrective, distributive, restorative, procedural and transitional, as well as the international human rights principles of a victim's right to know the truth about the crimes in order to end impunity. Seventy interviews were conducted and analysed. They represented primary victims and their family members, legal professionals and other victim advocates, all of whom had experience of Catholic clergy sexual abuse.

In addressing what justice looked like for victims, seven distinct and fundamental criteria for justice, in the form of a justice model, were identified from the data. For victims to have a voice and be vindicated, healed and empowered, they need to tell their story, their truth, and have that acknowledged, especially by the Catholic Church. They also need the Church to tell the truth about what happened when the sex crimes were covered up and offenders were protected. Equally, criminal accountability of the members of the hierarchy who covered up the sex crimes is central for victims. To address their pecuniary and non-pecuniary losses due to the impacts of the sex crimes – such as pain and suffering, and lack of education and employment opportunities – victims need adequate compensation. Counselling, also a pecuniary loss, is essential for as long as the victim requires it. Finally, criminal accountability of the offender, an effective apology and prevention of further clergy sex crimes are also essential.

1 Daly has very recently published a most interesting and comprehensive study on the social problem of the institutional abuse of children (including Catholic clergy abuse), which also focuses on the societal response of inquiries that have investigated institutional abuse in Australia and Canada. See: K Daly, *Redressing Institutional Abuse of Children* (Palgrave, 2104); K Daly, 'Conceptualising Responses to Institutional Abuse' (2014) 26 *Current Issues in Criminal Justice* 5. See also, J Death, *"They did not believe me": Adult survivors' perspectives of child sexual abuse by personnel in Christian Institutions'* (2103) Crime Justice and Research Centre Brisbane, Australia <http://eprints.qut.edu.au/59565/>.

As discussed in detail above, the civil litigation option for victims has not delivered justice due to the legal defences that are vigorously utilised by the Church and the constraints of the case law with respect to liability of the Catholic Church. Some justice by way of retribution from criminal convictions was available, but only for a very small number of the victims. For those victims who engaged in the highly-legalistic Melbourne Response and Towards Healing processes, not only did the greater majority receive no justice, they suffered additional abuse and harm. There has been no accountability of the Church hierarchy in these processes where so much of the truth was minimised and concealed.

8.2 The research and the Australian inquiries

This research will contribute to the growing body of academic research in this area and assist investigative bodies such as the Royal Commission and other future inquiries, domestically and internationally. It will also inform the courts and parliaments to better understand what victims and their families need for justice. Finally, and most importantly, this research gives voice to the experiences and needs of victims and their families, who for far too long have been silenced. As indicated in chapter 1, it is also hoped that this research will in some small way honour those clergy sexual abuse victims who died, including by suicide, before they were able to find justice.

This study was conducted in parallel with the Victorian Parliamentary Inquiry, which reported in November 2013, and the national Royal Commission, which does not conclude its investigations until the end of 2017. Although many of the issues examined in this research have also been traversed in these two inquiries, the in-depth analysis of the empirical data undertaken in this project has produced unique findings and theoretical outcomes. This study has also had a single focus on Catholic clergy sexual abuse, whereas the remits for the two inquiries were much broader and included, between them, all religious and other non-government and government organisations that deal with children. The overarching aim of this research – to determine whether victims of clergy sexual assault were finding justice – employed a theoretically informed and rigorous academic examination of the lived experiences of the victims and their families of the three main pathways to justice. This study offers, therefore, a more in-depth analysis, particularly of the Melbourne Response and Towards Healing processes, and has been able to highlight not only the additional harm caused to victims and their families by these processes and the ongoing impunity of the hierarchy, but what victims of Catholic clergy abuse specifically need for justice. This is in contrast to the aims of the Victorian Parliamentary Inquiry and the Royal Commission, which are fundamentally investigative bodies. They inquired into the ways in which religious and other organisations have handled allegations of child sexual abuse. Further, the victim-centred justice perspective that underpinned this research, ultimately informed the framework, or justice model, that was used to evaluate the three main pathways to justice.

8.3 Significance and implications of findings

This research makes a number of important contributions. First, it finds that the available pathways to justice have not addressed the needs of victims and their families. Second, the findings deliver a compelling message from victims and their families about the institutional accountability of the Church. Third, it provides the potential to extend McAlinden's use of the theoretical framework of transitional justice and 'truth recovery'[2] by including the international human rights principles of a victim's right to know the truth of the crimes to bring about an end to the harm caused by the impunity of the wrongdoers. Fourth, the extensive analysis of the criteria for justice as identified by the interviewees in chapter 3 demonstrate, inter alia, that truth and its acknowledgement and accountability of the hierarchy in particular, are of profound importance to victims and their families. Fifth, the findings of this research demonstrate that the Church's internal complaints processes have caused a new round of abuse and trauma to many victims and their families. Finally, it challenges the public claims by the Catholic Church that the aims of its complaints processes are restorative and retributive in nature. These outcomes are now considered in turn.

First, the in-depth and comprehensive analysis of the lived experiences of clergy sexual abuse victims and their families revealed the difficulties they experienced in their journeys in trying to find justice. The data relating to the Catholic Church's internal complaints processes, in particular, call attention to the distressing encounters most victim interviewees and their families have endured with the Church authorities. Victims' ongoing frustration with the severe limitations of the civil jurisdiction emphasises the incapacity of our current legal system to provide victims with access to the courts and corrective justice. There were also significant difficulties for the victims in this research achieving retributive justice in the criminal courts.

Second, a significant finding of this research is the compelling message victims and their families deliver about the institutional accountability of the Catholic Church. If there is to be justice, the Catholic Church must act in good faith to ensure criminal accountability of the hierarchy of the Church who concealed the clergy sex crimes and protected the offenders. The Church must display honesty and integrity and tell the truth about the decades of cover-up of clergy sexual abuse. Until victims and their families know that truth, there can be no accountability. As discussed in chapter 1, there has been no such accountability in terms of convictions for concealing such crimes in Australia.[3] This effectively means that members of the Catholic Church who have concealed clergy sex crimes continue to benefit from impunity, which causes compounding trauma to victims and their families.[4] This pain and suffering is additional to that of the original sex crimes.

Third, this complete lack of criminal accountability of the Catholic hierarchy is indicative of its de jure impunity, discussed in chapter 1 at section 1.5.7. One important implication of the findings of this research, therefore, is the potential for expanding McAlinden's use of transitional justice as a theoretical framework, to assist with the understanding of the ongoing harm from impunity to clergy victims and their families in Australia and elsewhere.

2 A McAlinden, 'An inconvenient truth: barriers to truth recovery in the aftermath of institutional child abuse in Ireland' (2013) 33 *Legal Studies* 189.
3 See section 1.3 in chapter 1 for an account of the recent charge of concealing a serious crime of Archbishop Wilson of Adelaide.
4 Paz Rojas Baeza, 'Impunity: an Impossible Reparation' (2000) 69 *Nordic Journal of International Law* 27, 28.

This could be achieved by drawing on the international human rights principles of a victim's right to know the truth of the sex crimes to bring about an end to the injurious impacts on victims caused by the impunity of the hierarchy who concealed those crimes. Major findings of this research mirror these principles. If victims are to find justice, they need to know and tell the truth about the sex crimes, and have that acknowledged. Equally important is clearly putting an end to the deleterious impacts of impunity of the hierarchy by making them criminally accountable.

Fourth, as highlighted in the last chapter, the extensive analysis of the criteria for justice as identified by the interviewees in chapter 3 found that truth and accountability of the hierarchy as being very significant. This clearly demonstrates the degree of hurt and anger caused to victims and their families by, first, the misfeasance of the hierarchy of the Catholic Church in its mishandling of the clergy sex crimes, and, second, the mistreatment of victims at the Melbourne Response and Towards Healing. For many, this maltreatment and betrayal by the hierarchy is worse than the original sexual abuse.

Fifth, although the Victorian Parliamentary Inquiry similarly concludes that there was ongoing dissatisfaction of victims and their families with the internal complaints processes,[5] the findings of this research go much further and show how the Church's processes caused a new round of abuse and harm to almost all of the primary and secondary victim interviewees in this research who attended the Melbourne Response and Towards Healing.

Finally, a further significance of the findings of this research, as outlined in chapter 6, is the challenge to the public claims made by the Catholic Church that its complaints processes, the Melbourne Response and Towards Healing, are restorative and retributive in nature. The protocols claim that the Church is committed to the truth, to the needs of victims, to making sex offenders accountable and promoting reconciliation between the Church and the victims and their families. These aims of the Church reflect those of 'truth commissions', as discussed in chapter 1. The Church is thus claiming what are internationally-recognised elements of restorative and retributive justice whilst failing to provide restoration of the rule of law, putting an end to impunity, and enabling some justice for victims and their families.[6]

8.4 Requisite reform

During the early work on this research, it was anticipated that a major recommendation would be the establishment of a State-led independent inquiry into sexual assault and the Catholic Church. In fact, two years later the Victorian Parliamentary Inquiry was established which soon was followed by the national Royal Commission (see chapter 1). As discussed in chapter 7 above, a number of the issues examined in this thesis traverse those investigated by these two inquiries. As a result, many of the anticipated recommendations of this research are being addressed by these inquiries, especially those relating to ensuring victims have equal access to the civil courts and the establishment of redress schemes.

5 Family and Community Development Committee, Parliament of Victoria, *'Betrayal of Trust'* (2013) 399.
6 P Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (Routledge, 2001) 24.

Therefore, proposals for future reform in this thesis focus on evaluating existing recommendations from these inquiries to assess whether they are addressing the criteria for justice for clergy victims and their families. This will include proposals to ensure federal and state governments fulfill their obligations in implementing such recommendations.

CIVIL REFORMS

The Victorian Parliamentary Inquiry made several recommendations to address the legal barriers for victims wanting to pursue claims in the courts and the existing limitations in the criminal law in Victoria. First, amendments to the *Limitation of Actions Act 1958* (Vic) to exclude criminal child abuse from the operation of the limitations period under that Act, recognise and make allowance for what is an inherent element of child sexual abuse – a lengthy delay in disclosing or reporting the abuse.[7] This change was implemented by the Limitation of Actions Amendment (Child Abuse) Bill 2015, which was introduced into the Victorian Parliament in February 2015.

In addressing the legal obstacles for victims as a result of the Ellis defence, the Victorian Inquiry recommended that non-government organisations such as the Catholic Church, (where government funds them or provides them with tax exemptions and/or other entitlements) be incorporated and adequately insured such that victims are provided with a legal entity to sue for damages.[8] Finally, the Victorian Inquiry recommended that the Catholic Church be made directly liable[9] for harm suffered by children sexually abused in their care given that the perpetrator has relied on the reputation and community's trust in the organisation to offend against the child'.[10] It was, therefore, recommended that the *Wrongs Act 1958* (Vic) be amended to ensure the Church is held accountable and has a legal duty to take reasonable care to prevent criminal child abuse.[11]

If these recommendations are adopted and implemented, the main civil legal limitations identified here for victims of clergy sexual abuse would be addressed. There would be a legal entity that could be sued, thus eliminating the effects of the Ellis defence, and victims would have the option of suing the Catholic Church either directly or indirectly for the sex offences of the Church's priests and religious brothers.

These recommendations are sound and address several of the criteria for justice identified in this research, as discussed above. They are, however, prospective: they will only apply if and when the laws are enacted and only for future victims. It is essential that, if the Catholic Church becomes an incorporated body with adequate insurance, retrospectivity apply to address the justice needs for the possibly thousands of existing Catholic clergy sexual abuse victims in Victoria. Otherwise, the only victims who will be able to sue the new legal entity for the Church will be those who were sexually abused after the date of incorporation. Existing victims will continue to be barred

7 Family and Community Development Committee, above n 5, 543.
8 Ibid 536.
9 In that the Catholic Church has a non-delegable duty of care – see section 4.2.2 of chapter 4 above.
10 Family and Community Development Committee, above n 5, xIv.
11 Ibid 552. No further guidelines were offered by the Victorian Inquiry report other than such legislative amendments should ensure that victims can sue the Church.

from using the civil courts in their quest for justice, and the Catholic Church will be able to continue to evade its financial and moral accountability to this very large group of people in the community.

An alternative reform of the Ellis defence hurdle would be the amendment of the statutory property trusts that attach to the Dioceses and Religious Orders of the Catholic Church. For example, the assets and property belonging to the Archdiocese of Sydney are placed in a trust that cannot be sued by victims of clergy sexual abuse, because, as successfully argued by the Catholic Church, the trustees were never responsible for the behaviour of the offending priests.[12] In May 2014, David Shoebridge, a Greens MLA in NSW, introduced a bill to the NSW Parliament of which the short title is the Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2014. The object of this bill is to amend the *Roman Catholic Church Trust Property Act 1936* such that a clergy sexual abuse victim can sue the Church's property trust, thus overturning the Ellis defence. The long title of the bill succinctly describes its intentions and functions:[13]

> An Act to amend the *Roman Catholic Church Trust Property Act 1936* to provide for the ability of victims of sexual abuse where the abuser is found to be a member of the Catholic clergy and or another official and or officer in the Church to satisfy judgments awarded against such abusers as a judgment debt payable from the assets of the Trust and for other related purposes.

The bill also addresses the problem of retrospectivity. All existing victims, at the time the bill is enacted, would be able to pursue a civil cause of action. Legislative amendments, similar to this bill, are recommended here for all Church property trust Acts in Australia.

CRIMINAL REFORMS

The Victorian Parliamentary Inquiry also made a number of recommendations to address the existing limitations in the criminal law in Victoria. These included law reform to enable convictions for members of the Catholic hierarchy who concealed the sex crimes. Section 326 of the *Crimes Act 1958* (Vic) currently provides that a person who conceals a crime cannot be found guilty unless a 'benefit' is received for concealing that crime (see chapter 1). The Victorian Parliamentary Inquiry recommended the removal of the element of 'benefit' from the provision to 'ensure that a person who fails to report a serious indictable offence involving the abuse of a child will be guilty of an offence'.[14] To capture the conduct of senior clergy wittingly moving offending priests from parish to parish, without warning the new parishioners about the risk involved, a further recommendation was made by the Victorian Inquiry for an offence of 'child endangerment'. This would impose criminal responsibility on those who act 'understanding that their action may pose a substantial and unjustifiable risk of harm to children, but who disregarded

12 *Trustees of the Roman Catholic Church v Ellis and Another* (2007) 63 ACSR 346; [2007] NSWCA 117.
13 Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2014, Explanatory Note. The Private Members bill lapsed on prorogation on 8th September 2014, before it was passed. This means it may be proceeded with in a later session of the NSW Parliament. 'Prorogation' is the time between legislative sessions.
<http://www.parliament.nsw.gov.au/prod/la/precdent.nsf/0/2B9D83E6F9D7D838CA2572A0002468E7>.
14 Family and Community Development Committee, above n 5, 502.

that risk and acted accordingly'.[15] This would be an important recognition of the justice criteria of accountability of the hierarchy and the prevention of further clergy sex crimes. A child endangerment offence, as proposed by the Victorian Inquiry, would not, however, be operational until the date it is enacted, and would be prospective in nature. Once again, the many thousands of existing clergy sexual abuse victims will not be able to make use of these new provisions as they cannot be applied retrospectively. Between 1981 (when the common law charge of misprision of felony was abolished in Victoria – see chapter 1) and the planned introduction of an amended section 326 of the *Crimes Act 1958* (Vic) as above, a period of more than 30 years will have elapsed. This means that in Victoria, in practice, members of the hierarchy suspected of concealing clergy sex crimes during this period cannot be convicted unless it can be proved beyond reasonable doubt that they received some benefit or reward for covering up the crime. This element of 'benefit' is more suited to other criminal activities where some gain or reward would be received, such as thefts, robberies and drug crimes, but should not be relevant to the concealment of institutional sex crimes.

The Inquiry also recommended amending the *Victims of Crime Assistance Act 1996* (Vic) to specify that no time limits apply to applications for assistance by victims of criminal child abuse in organisational settings.[16]

FINANCIAL COMPENSATION

The need for the truth and accountability of the hierarchy are not the only pressing needs of victims and their families. Adequate financial compensation for pecuniary and non-pecuniary losses (as prescribed by the principles of corrective justice) should be non-negotiable. Any reform must, therefore, adequately address the financial burdens victims and their families are enduring. About 70 percent of the primary victims who were interviewed were unemployed at the time of the interview. Many of these people had earlier been employed, but as a result of mental health problems associated with the sexual abuse, they were unable to continue with their work. Consequently, the financial burdens placed on victims and their families are immense. Victims often forego counselling due to its prohibitive costs, thus relinquishing a vital lifeline.

The Royal Commission is currently considering submissions on this crucial element of justice – compensation by way of a redress scheme – and will make recommendations in mid-2015. The Royal Commission continues to liaise with the various stakeholders about the complexities of compensation for damages and statutory redress schemes. Both of these options need to be available so that victims are provided with an authentic choice. But any statutory scheme should address adequately victims' pecuniary and non-pecuniary losses and must be fully funded by the Catholic Church. This means that the underlying principles and aims of any such redress scheme should go beyond distributive justice to reflect the principles of private law and corrective justice. The principles of corrective justice focus on compensating victims for wrongs done. That is, the wrongdoer must put right the injury or other loss caused to the victim. Rectifying such injustices is achieved

15 Ibid. It recommended the introduction of such an offence in organisations so that the offence 'covers relevant wanton or reckless behaviour in situations: when a person in authority is aware of and consciously disregards a substantial and unjustifiable risk that their acts or omissions placed a child in a situation that might endanger the child's life, health, welfare, morals or emotional wellbeing'.
16 Ibid 557.

by imposing liability on the wrongdoer such that there is full restoration for the victims and their families to reflect the positions they would have been in if the sexual abuse had not happened.

In considering any future agreement between the Catholic Church and the Federal Government in relation to a redress scheme, caution is urged. In the Republic of Ireland, where a statutory redress scheme was established in 2002, it is estimated that the Catholic Church (comprising 18 Religious Orders), which originally agreed to share equally with the State the costs of the redress scheme, have paid only about 10 percent of the costs of the scheme, leaving the remainder of the burden with the Irish taxpayer.[17] Any future negotiations in Australia involving the Church and a redress scheme, therefore, must guard against such unacceptable outcomes by the State ensuring, and insisting upon, more robust and enforceable contractual terms.

The Royal Commission's current consultation paper on redress schemes emphasises its legitimate concerns about affordability of any future redress scheme, arguing that if it is unaffordable, it will not be effective.[18] The Royal Commission is inquiring into all government and non-government organisations, not just the Catholic Church, making its task particularly onerous. Some schools or institutions no longer exist, leaving direct redress for their victims highly unlikely. Other institutions do not have assets or funds and are genuinely impoverished. The Catholic Church fits neither of these categories. As such, the issue of affordability with the Catholic cases should be assessed primarily according to the costs, both pecuniary and non-pecuniary, to the victims and their families, and not the financial costs to the Church. Not doing so would pose a far greater risk in terms of further suicides and premature deaths and economic costs to the community. The affordability argument must go both ways: we cannot afford not to compensate victims and their families adequately and fairly.

Affordability for the Church is an issue that has recently been highlighted in the USA, which heralds further caution for Australia. The Archbishop of Milwaukee transferred $60 million into a cemetery trust fund for the care of graves, of which he was the sole trustee. The Archdiocese then declared bankruptcy, leaving victims of clergy sexual assault without the means to compensation. The Seventh Circuit Court of Appeals however, in overruling an earlier decision, ordered that the $60 million be transferred back into the Archdiocese.[19]

OBLIGATIONS OF GOVERNMENT

It is crucial that the Federal Government, in addition to having established the Royal Commission, commit to implementing its recommendations, especially those that may address potential prosecutions, and thus accountability, of the Catholic Church hierarchy.[20] The Australian Government, as a

17 M Enright, 'Abuse Redress, Property and the Catholic Church in Ireland' (2013) 14 *Culture and Religion* <http://humanrights.ie/law-culture-and-religion/abuse-redress-property-and-the-catholic-Church-in-ireland/>.
18 Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Redress and Civil Litigation*, (January 2015) 50.
19 *Doe v. Archdiocese of Milwaukee*, No. 12-3689 (7th Cir. 2014).
20 The Royal Commission does not have prosecutorial powers, but it does liaise with all state and territory Offices of Public Prosecutions.

signatory to the United Nations *Convention on the Rights of the Child*, has an obligation to '… take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse…'. [21] International law also sets standards that involve taking 'effective measures … to combat impunity' [22] and a general obligation to combat impunity by, inter alia, 'ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished'. [23] These international human rights principles (which normally apply to gross human rights violations) are not being directly applied to the institutional child sexual abuse by the Catholic Church, as discussed in chapter 1. These principles are, however, being employed here by analogy to both provide a context for, and promote a very important discussion about, the ongoing injustices for clergy victims and their families in Australia.

Given the obligations of our Federal Government, there exists an unequivocal onus for it to prioritise what are major criteria for justice for clergy victims and their families, the right to the truth of the crimes and criminal accountability of the hierarchy for concealing those crimes and protecting the offenders. The Federal Government must also promote and facilitate the central justice needs of financial compensation and redress.

The Royal Commission's consultation paper on redress schemes concluded that the most effective and fair approach would be delivered by a scheme that, although run by the Federal Government would, on the whole, be paid for by the institutions where the crimes occurred. The Royal Commission also proposed that the Federal Government be a funder of last resort for those victims whose institution either does not exist anymore or is genuinely impoverished. The Government did not agree with the need for a national redress scheme because it would be too time-consuming, too complex and too costly. [24] This rebuff of the Royal Commission's proposal to co-ordinate such a redress scheme is accompanied by the message that victims should return to the institution where the abuse occurred to ask for compensation. As this research has found, this would mean that victims of clergy abuse would need to attend the Melbourne Response and Towards Healing processes, placing them at risk of additional abuse and of receiving inadequate compensation.

Recommendations are worthless unless and until they are implemented. The genuine resolve of State and Federal Governments to bring about legal reform is the final element, and the *sine qua non* for justice, in what has been decades of suffering, anguish and battling for victims and their families.

21 *Convention on the Rights of the Child*, opened for signature 20 November 1989, UNTS 1577, art 39 (entered into force 2 September 1990) <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.
22 Diane Orentlicher, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1, 61st sess, Agenda Item 17, (8 February 2005) Preamble.
23 Ibid, Principle 1.
24 Commonwealth Government, *Consultation Paper: Redress and civil litigation – Commonwealth Submission* 19 March 2015 <http://www.childabuseroyalcommission.gov.au/getattachment/2efe0fa6-ae6b-4cd3-bc37-a856dc485cc5/Australian-Government>.

8.5 Need for further research

The findings of this research point to the need for further research in three very important areas. First, the impacts of clergy sex crimes on families and loved ones, and how they might find justice. Second, the impacts of the suicide and premature deaths of clergy sexual abuse victims on families and loved ones and what they need for justice. Third, an extension of the theoretical framework of transitional justice, adopted by McAlinden, to include the right to the truth to end the harmful impacts of impunity, as discussed above.

First, the impacts of clergy sex crimes on families and loved ones, and how they might find justice, is deserving of a study in its own right. This research provided data from some secondary victims about their experiences of going through the Melbourne Response and Towards Healing and what they wanted for justice, but these data were limited because the central research question focused on the needs of primary victims. Secondary victims' experiences in this research offered valuable insights and identified many of the same significant needs as primary victims. The impacts of clergy sex crimes on this group of people, however, necessitate research that is specifically designed to tackle the multiple injustices they also face. Such a study for secondary victims of clergy sexual abuse would be able to assess, through a Catholic lens, the multi generational impacts of these crimes on families,[25] including the impacts on the practice of their Catholic faith and their avenues for justice.

Second, further research should be conducted into the impacts of the suicide and premature deaths of clergy sexual abuse victims on families and loved ones. Such impacts will be felt for generations.[26] More than half of the secondary victims who were interviewed for this research had a family member who had either committed suicide or died prematurely due to excessive use of drugs and/or alcohol (see appendix 13). One interviewee in this research said that she knew of at least eight suicides in the parish of Gardenvale, and another interviewee reported at least five in the parish of Oakleigh. These numbers are to be added to the very high number of known suicides of victims – more than 45 in the Ballarat region – of notorious offenders such as Ridsdale, Best, Ryan and Dowlan.[27] These preliminary figures relate to only three of the 219 parishes and 327 Catholic schools in the Melbourne Archdiocese alone.[28] As well as the impacts on the individual members of the family, including children, it is critical that this group of people be able to tell of the experiences they encountered with the Catholic Church, if any, both before and after the death of their loved one. To help understand the harmful consequences for families and to bring about justice, it is essential to examine the degree to which the misfeasance of the Church hierarchy may have contributed to the suicides and deaths of the clergy victims, including those who went through the Church's internal processes.

25 T Evans-Campbell, 'Historical Trauma in American Indian/Native Alaska Communities: A Multilevel Framework for Exploring Impacts on Individuals, Families, and Communities' (2008) 23 *Journal of Interpersonal Violence* 316, 328-329.
26 M Seguin, A Lesage and M Kiely, 'History of Early Loss Among a Group of Suicide Survivors' (1995) 16/3 *Crisis* 123; M Seguin, A Lesage, & M Kiely, 'Parental bereavement after suicide and accident: A comparative study' (1995) 25 *Suicide and Life-Threatening Behavior*, 489-492.
27 N McKenzie, R Baker and J Lee, 'Church's suicide victims', *The Age* (online), 13 April 2013 <http://www.theage.com.au/victoria/Churchs-suicide-victims-20120412-1wwox.html>.
28 <http://www.cam.org.au/Church-in-Melbourne/Facts.aspx>. There are three more dioceses in Victoria, apart from the Archdiocese of Melbourne.

Such proposed empirical work would also identify the needs of these families, which, if they reflect those of the participants in this research, will include the pressing need to know the full truth of the sexual abuse of their loved one and the full truth of the hierarchy's involvement in any cover-up of the crimes and protection of the victim's offender. The families of clergy sexual abuse victims who have committed suicide or died prematurely, not only want to know the truth, they also want an end to the impunity of those responsible for the sex crimes and/or the concealment of those crimes, as discussed in chapter 1.

Third, as discussed above, a major implication of the findings of this research is the potential for further research which could examine an extension of the theoretical framework of transitional justice, adopted by McAlinden (see chapter 1), to include the international human rights principles of a victim's right to know the truth about the crimes to bring about an end to the impunity of the wrongdoers. Such potential research could draw on a major finding of this research – that justice requires, inter alia, the truth and accountability of the hierarchy.

In conclusion, if families and loved ones of Catholic clergy sexual abuse victims are to receive justice, their needs must be more fully identified. In-depth empirical research unique to these groups of people will help identify the needs, legal hurdles and challenges to existing pathways to justice. Further, providing an extended theoretical framework to capture the harm suffered by clergy abuse victims and their families due to the impunity of the hierarchy, would provide a context within which such grave injustices are better understood and, therefore, better confronted and managed.

8.6 Concluding thoughts

Victims of Catholic clergy sexual abuse and their families have been looking for justice for decades while the Catholic Church has been unrelenting in its resistance. Victims have not only suffered serious harm from the sex crimes themselves, this battle with the Church has been the source of additional abuse and trauma for the victims and their families. Abuse and trauma are also a reality for the vast majority of the people in this research who went looking for justice at the Melbourne Response and Towards Healing processes. The Church's repeated use of legal defences that blocked justice for victims also causes harm. Further, the impunity enjoyed by both the perpetrators of the sexual abuse and the members of the hierarchy who protected them, continue to distress victims and their families.

There has been much progress over the last three and a half years with the establishment of the State-led inquiries in Australia, especially the Royal Commission, which still has over two years to run. It is now up to State and Federal Governments to commit to a full range of recommendations that will address effectively the justice needs of victims and their families as identified in this research.

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Zoll, Rachel, 'Homosexuality, celibacy didn't cause clergy sexual abuse, Catholic study shows', *The Times-Picayune*, (New Orleans), 18 May 2011

Zwartz, Barney, 'Church removes guilty priests', *The Age* (Melbourne, Australia), 6 April 2011

Zwartz, Barney, 'Salesian report to sex probe queried', *The Age* (Melbourne, Australia), 16 October 2012

APPENDICES

Appendix 1 The Author's Advocacy

Nine opinion pieces by the author were published in Fairfax newspapers between 14 October 2011 and 30 August 2015. Nine pieces were published in the Conversation, an independent source of news and views, sourced from the academic and research community. The aim of these pieces was to highlight the injustices for Catholic clergy victims of sex crimes and to push for legal reform. These written pieces were often accompanied by radio and television interviews.

Fairfax Media

http://www.smh.com.au/federal-politics/editorial/child-abuse-and-the-Church-no-more-excuses-20111013-1lmzo.html

http://www.smh.com.au/it-pro/clergy-victims-need-justice-now-20111013-1lmzy

http://www.smh.com.au/federal-politics/political-opinion/the-truth-deserves-a-commission-20120413-1wz1s.html

http://www.canberratimes.com.au/federal-politics/pell-should-face-up-and-fess-up-20120923-26esa.html

http://www.smh.com.au/federal-politics/political-opinion/the-unholiest-of-pr-spin-20120926-26li3.html

http://www.canberratimes.com.au/comment/atonement-not-in-catholic-Churchs-best-interests-20130225-2f27u.html

http://www.theage.com.au/comment/the-catholic-Church-still-seems-more-concerned-for-its-reputation-than-for-its-victims-20140824-107rnj.html

http://www.smh.com.au/comment/governments-response-further-abuses-childsex-victims-20150329-1ma65v.html

http://www.theage.com.au/comment/misuse-of-flawed-operation-plangere-report-cheats-victims-of-ballarat-clergy-sex-20150808-giujol.htm

The Conversation and other

http://theconversation.com/profiles/judy-courtin-8743/articles

http://www.smh.com.au/national/hell-on-earth-20120624-20wa8.html

http://www.abc.net.au/news/2015-05-25/courtin-royal-commission-ballarat-victims-still-lack-justice/6495346

The author has also conducted, and continues to do so, many radio and television interviews from 2011, advocating for justice for victims and law reform in this area of Catholic clergy sexual abuse.

Appendix 2 Victims of Crime Assistance Tribunal, Victoria

Introduction

The Victims of Crime Assistance Tribunal, VOCAT, is an administrative tribunal that operates within the criminal justice system and Magistrates also sit as tribunal members for VOCAT.[1] This crossover between the criminal and administrative processes potentially provides Magistrates with a deeper insight into the impacts of crime on the victims, who, for the most part, are marginalised in the criminal justice system (apart from Victim Impact Statements). Also, VOCAT gives Magistrates a much better understanding of how victims of crime feel, thus assisting Magistrates with their role in the criminal court.[2]

In recognising that recovery for victims of crime can take time, the VOCAT process enables a single application to take up to six years, during which there can be several interim and variation applications. This also ensures victims receive the financial assistance they need to assist with recovery.[3] The tribunal must act with as much expedition as the requirements of the Act and a proper determination of the matter permit,[4] because unwarranted delays can be discouraging and harmful.[5] VOCAT gives victims 'their day in court', thus making them integral to the criminal justice system. Giving the victim an opportunity to be heard can be therapeutic for the victim.[6] VOCAT is not required to conduct itself in a formal manner[7] thus providing victims with a less threatening environment.[8]

Support Services

VOCAT has links with a broad network of victim support services, such as the Victims Support Agency (VSA) and Victims Helpline. Victims can be supported through the VOCAT application for financial assistance process by these services.[9]

Eligibility

VOCAT can determine who is eligible to receive financial assistance and can make awards to cover the reasonable costs of counselling, medical and safety-related expenses, loss of, or damage to, clothing worn at the time of the crime, loss of earnings, and, other expenses that will assist a victim (in exceptional circumstances).[10] Those who can apply to VOCAT include the primary victim of a violent crime;[11] a secondary victim[12] who is a person who is injured because he or she is a parent of the primary victim child or a person who was present at and witnessed the crime, and a related victim,[13] who is a close family member, a dependent of the victim or a person in an intimate personal relationship with the victim. An injury can be physical or psychological including an exacerbation of a pre-existing psychological illness/disorder or pregnancy, but does not include injury arising from loss of or damage to property.[14]

1 Victims of Crime Assistance Tribunal, *Annual Report* (2011-2012) Victims of Crime Assistance Tribunal, 3 September 2012, 6.
2 Ibid 7.
3 Ibid 4.
4 *Victims of Crime Assistance Act 1996* (Vic) s.32(1)(c).
5 Victims of Crime Assistance Tribunal, above n 1, 5.
6 Ibid 7.
7 *Victims of Crime Assistance Act 1996* (Vic) s.38(1)(a).
8 Victims of Crime Assistance Tribunal, above n 1, 7.
9 Ibid 8.
10 *Victims of Crime Assistance Act 1996* (Vic) s.8.
11 Ibid s.7.
12 Ibid s.9.
13 Ibid s.11.
14 Ibid s.3(1).

Application

Applications for Assistance at VOCAT are free of charge and must generally be lodged within two years of the crime.[15] An extension of time may be granted in circumstances where VOCAT will consider the applicant's age at the time of the crime, their mental health and whether the offender was in a position of power, influence or trust in relation to the applicant.[16]

Legal Representation

Because access to justice for victims of crime is of paramount importance, VOCAT usually covers the reasonable cost of a lawyer's fees to assist the applications.[17] In 2011, the amount paid by VOCAT to legal practitioners increased, reflecting the hope that high quality legal services be available for victims of crime.[18] A lawyer cannot bill a client for a VOCAT application without VOCAT's approval.[19] If a contested hearing is required, VOCAT will also generally meet the costs of legal representation for the alleged offender.[20]

Powers of VOCAT

VOCAT has investigative powers to assist in the decision-making process for the tribunal member.[21] The tribunal liaises with Victoria Police in relation to the crime and any criminal history of both the offender and the victim. VOCAT can also request any medical or psychological reports and any other documents the applicant will rely upon for their case. The tribunal can also request further medical or psychological reports.[22] The tribunal may also issue a warrant to arrest against a witness who has been served with a summons to attend, but failed to attend.[23]

Interim Awards

If urgent assistance is required, such as funeral expenses or counseling, an interim award of financial assistance can be sought. If granted, such an interim award can be paid to the victim before the final decision by VOCAT.[24]

Hearings

A straightforward application may not require a hearing at VOCAT.[25] Such a determination 'on the papers' avoids the potential stress and trauma of a hearing, and addresses timeliness with the process.[26] If a hearing is necessary, it usually takes place within six weeks of a VOCAT member deciding to conduct a hearing, or, if the applicant requests a hearing, within 6 to 10 weeks of the applicant filing all the supporting material.[27]

To assist in restoring a victim's sense of dignity, a sympathetic and compassionate forum for applicants is considered necessary by VOCAT. Tribunal members also conduct hearings in a demonstrably victim-centred way, such as the member sitting with the victim whilst encouraging the victim to talk about the impacts of the crime. Victims can also request a private hearing and may have support people to accompany them at the hearings.[28] Because

15 Ibid s.29(1).
16 Ibid s.29(3)
17 Ibid s.46.
18 Victims of Crime Assistance Tribunal, above n 1, 21.
19 *Victims of Crime Assistance Act 1996* (Vic) s.48(4).
20 Victims of Crime Assistance Tribunal, above n 1, 10.
21 *Victims of Crime Assistance Act 1996* (Vic) s.39(1)(a). The tribunal has the power to authorise a person to make an inquiry or carry out an investigation.
22 *Victims of Crime Assistance Act 1996* (Vic) s.39(1)(b).
23 Ibid s.37(1A).
24 Ibid s.56.
25 Ibid s.33(1)(b).
26 Victims of Crime Assistance Tribunal, above n 1, 9.
27 Ibid.
28 Ibid 10.

VOCAT is not a court, hearings are less formal and members are not bound by the rules of evidence, rather, they may inform themselves in any manner they think fit.[29] Unlike a court, the member can investigate, inquire and gather any further information required to make a decision.[30]

Related victim hearings, which usually occur some time after the primary victim's death, can offer families the opportunity to discuss the impact of the death and the criminal justice process has had on them.[31] If VOCAT is requested to determine whether a crime has been committed (for example, there has been no conviction in the courts), this may involve the alleged offender attending a hearing. If this is the case, alternative arrangements can be made to ensure the victim and the alleged offender do not come into contact such as one party giving evidenced by video link.[32]

Burden of Proof

The burden of proof for VOCAT is the civil standard, on the balance of probabilities.[33] This means that if the criminal courts have not convicted an alleged offender, VOCAT can still find that a crime occurred, albeit on a standard of proof lesser than the criminal standard, beyond reasonable doubt.[34] This means that VOCAT can award financial assistance to a victim of crime, even though the alleged offender has not been charged or found guilty of or convicted of an offence arising from the act of violence.[35]

Awards

The elements of which the tribunal must be satisfied (on the balance of probabilities) before a financial assistance award is made are that: A violent crime has occurred; the applicant is a primary, secondary or related victim of that crime, or a person who has incurred funeral expenses, and, the applicant is eligible to receive the assistance.[36] If a successful applicant later receives damages, VOCAT may require an applicant to refund all or part of the amount awarded by VOCAT.[37]

Types of Assistance

A victim of crime can be awarded financial assistance for past or future reasonable expenses associated with counseling, medical treatment and safety measures such as security systems, and, funerals. In addition to these expenses, an award up to $20 000 can be made for lost earnings for primary or secondary victims, covering a period up to two years after the crime.[38] Related victims can also receive an amount of money.[39]

Amounts of Financial Assistance

A 'special financial assistance' lump sum payment, up to $10 000, can be awarded to a primary victim.[40] The amounts of financial assistance from VOCAT are not intended to compensate victims for their loss, rather, they are intended to provide a level of targeted assistance for victims' recovery, and an expression of the community's sympathy for, and recognition of, victims' suffering.[41] A primary victim can receive up to $60 000 for reasonable expenses and lost earnings plus any special financial assistance up

29 *Victims of Crime Assistance Act 1996* (Vic) s.38(1)(b).
30 Ibid.
31 Victims of Crime Assistance Tribunal, above n 1, 10.
32 *Victims of Crime Assistance Act 1996* (Vic) s.37(2) & (3).
33 Ibid s.31.
34 Victims of Crime Assistance Tribunal, above n 1, 10.
35 *Victims of Crime Assistance Act 1996* (Vic) s.50(4).
36 Ibid s.50(1).
37 Ibid s.50(3).
38 Ibid s.8.
40 Ibid s.8A.
41 Victims of Crime Assistance Tribunal, above n 1, 11.

to $10 000. A secondary victim can receive up to $50 000 for reasonable expenses, and, in exceptional circumstances, lost earnings suffered as a direct result of the crime.[42] A single related victim can receive financial assistance up to $50 000 for reasonable expenses, with a maximum of $100 000 for more than one related victim, such as the children of a deceased primary victim of crime.[43]

Appeals

An applicant who is not satisfied with a VOCAT decision can apply to the Victorian Civil and Administrative Tribunal (VCAT) for a review of the decision. VCAT can conduct a new hearing, including considering any new evidence, and, can confirm or vary the original order; make a new order, or return the matter to VOCAT to be reconsidered.[44]

42 *Victims of Crime Assistance Act 1996* (Vic) s.10.
43 Ibid s.13.
44 Ibid s.59.

Appendix 3 Towards Healing and the Melbourne Response

1 Towards Healing

Towards Healing was set up by the National Committee for Professional Standards that was established by the Catholic Bishops and leaders of Religious Institutes. Its function is to oversee the development of policy, principles and procedures of a 'compassionate and just system for dealing with complaints of sexual abuse' by catholic clergy.[1]

> The main purpose of Towards Healing is to assist the complainant to find healing, and where possible, to experience some measure of reconciliation with the Church. Its purpose therefore is primarily a pastoral one.

This emphasis on a 'pastoral' process distinguishes it from a legal process.[2] Towards Healing is a national protocol receiving complaints from all over Australia, other than complaints emanating from the Melbourne Archdiocese. The Catholic Bishops and leaders of religious organisations in Australia, acknowledge:

> …with deep sadness and regret that a number of clergy and religious and other Church personnel have abused children, adolescents and adults who have been in their pastoral care.[3]

The Towards Healing protocol has undergone revisions since it was first published in 1996. These were led by Professor Patrick Parkinson from the Faculty of Law at Sydney University. Consideration of the requirements of Canon Law were part of these revisions so that 'decisions made through Towards Healing could be securely implemented'.[4] It is not clear what this means and there is no explanation as to which Canon Law provisions are involved and what weight they may carry in any Towards Healing determinations.

1.1 Principles for dealing with complaints of abuse

The response of the Church is underpinned by seven principles, to which the Church makes a firm commitment to strive for in its handling of complaints. These seven principles are: The truth; humility; healing for victims; assistance to other persons affected; a response to those accused; a response to those guilty of abuse, and, prevention.

TRUTH The Church is committed to seeking to know and understand the full extent of the problem of abuse and its causes, especially abuse that is committed in a community that professes the values of Jesus Christ. It is also committed to seeking to know the truth, so far as possible, about individual allegations of abuse. Such commitments are made because to conceal the truth is unjust to victims, a disservice to accused people and damaging to the whole Church community.[5]

1 Australian Catholic Bishops Conference and Catholic Religious Australia, *Towards Healing – Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church of Australia* (January 2010).
2 Ibid.
3 Ibid 1.
4 Ibid.
5 Ibid 9.

HUMILITY The Church recognises that humility is essential if victims are to be cared for and abuse if prevented in the future. It is very humbling for a Christian Church to have to acknowledge that some of its clergy, religious and other Church personnel have committed abuse.[6]

HEALING FOR THE VICTIMS The Church authorities accept they have a responsibility to seek to bring healing to victims of abuse and that a sensitive and compassionate response must be the first priority, even when the alleg-ations are unproven.[7] At the first interview, and assuming the truth is being told, the complainant should be assured that the abuse should be named for what it is and that it is the offender who is to blame, and not the victim.[8] Victims should be asked what their needs are to ensure they feel safe from further abuse and should be offered appropriate assistance, as this is the Christian thing to do when the person present is very possibly a victim of abuse.[9] If the abuse did happen, the Church Authorities must listen to victims concerning their needs and ensure they are given such assistance as demanded by justice and compassion.[10]

ASSISTANCE TO OTHER PERSONS AFFECTED The Church must also strive to assist in the psychological and spiritual healing of others who have been 'seriously affected' by the abuse such as family members, the parish, school or other community in which the abuse occurred, the family and close friends of the offender and other clergy and religious.[11]

A RESPONSE TO THOSE ACCUSED If the accused, who must be presumed innocent until proved otherwise, steps aside from their position while the matter is pending, 'it is to be clearly understood that they are on leave and that no admissions of guilt are implied by this fact' and they are not to be referred to as offenders or in any way treated as offenders.[12]

A RESPONSE TO THOSE GUILTY OF ABUSE When guilt is admitted or proved, the response must be appropriate to the gravity of the abuse and consistent with the appropriate civil law or Canon Law. Depending on the seriousness of the abuse, certain offenders will not be given back the power they have abused and cannot return to ministry. That is, where the offender has abused children or vulnerable adults *and* such abuse of the vulnerable adult may well happen again.[13] There is acceptance that the Church and the community expect a serious and ongoing role by the Church authorities in seeking to ensure that offenders are held accountable; that there is a true appreciation of the enduring harm caused by the offenders; that offenders seek professional help and do whatever is in their power to make amends. This means that the Church authorities have contact with the offender and some form of influence over their conduct.

PREVENTION There is commitment to make every effort to reduce the risk of abuse by Church personnel and this is to be achieved by education and the implementation of appropriate codes of conduct.[14] The processes for

6 Ibid.
7 Ibid.
8 Ibid.
9 Ibid.
10 Ibid.
11 Ibid 9-10.
12 Ibid 10.
13 Ibid 10-11.
14 Ibid 11.

selection and training for clerical and religious life continue to be reviewed and the procedures for those in ministry include police checks, verified references from previous employers and induction processes.[15] There is also commitment to the education of Church personnel on the seriousness of abuse and its adverse effects and to a program of community education and awareness in the recognition and response to abuse.[16]

1.2 Personnel and procedures for dealing with complaints of abuse

The Towards Healing procedures are underpinned by the above principles for dealing with complaints of abuse and apply to all complaints by Church personnel with pastoral relationships. That is, clerics, religious personnel, lay employees or volunteers. First, the personnel involved in the Towards Healing process will be outlined, followed by the procedures. The personnel consist of the National Committee for Professional Standards; the Director of Professional Standards; resource groups; assessors; facilitators; contact persons; consultative panel and review panel.

NATIONAL COMMITTEE The National Committee for Professional Standards, which was established by the Australian Catholic Bishops Conference and Catholic Religious Australia, oversees the development of the policy, principles and procedures in relation to complaints of abuse against Church personnel.[17]

THE DIRECTOR OF PROFESSIONAL STANDARDS The Bishops and leaders of religious organisations are also responsible for appointing a Director, and maybe a Deputy Director, of Professional Standards for each State and Territory. The Director must manage the entire complaints process and is responsible for appointing assessors; convening and chairing meetings with the Resource Groups; liaising with the National Committee, the Resource Groups and the Church bodies; the safe-keeping of documentation and keeping the complainant and the accused informed of the process.[18] If there are delays in the process, the Director must ensure that the complainant and the accused are kept informed of the progress of the investigation and the reasons for any delay.[19] The Director of Professional Standards shall not deal with complaints that are brought against a Bishop or leader of a Religious Order. Instead, these allegations are managed by the co-chair-persons of the National Committee all acting together. Canon Law is drawn upon to determine which members of the hierarchy are to be involved with possible complaints against a Bishop or Archbishop.[20]

RESOURCE GROUPS The Catholic Bishops and leaders of religious organisations also establish and maintain Professional Standards Resource Groups that advise all Catholic Church bodies in matters relating to professional standards.[21] As well as the Resource Groups offering advice when requested,

15 Ibid.
16 Ibid.
17 Ibid 13.
18 Ibid 14-15.
19 Ibid 15.
20 For example, if a complaint were made against a Bishop, his Archbishop (also called a Metropolitan) would be the Church authority to manage the complaint. If the Archbishop of Sydney is the subject of a complaint, the Church Authorities responsible for dealing with the complaint, would be the Archbishop of Canberra and Goulbourn, the Maronite Bishop, the Melkite Eparch (Bishop of the Melkite Greek Catholic Church), the Ukrainian Eparch (Bishop) and the Military Ordinary (Bishop). Australian Catholic Bishops Conference and Catholic Religious Australia, *Towards Healing – Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church of Australia* (January 2010) 14.
21 Australian Catholic Bishops Conference and Catholic Religious Australia, above n 1, 14.

they are also proactively give advice to any Church body in the States and Territory, as long as it falls within the groups' mandate.[22]

ASSESSORS The Resource Group must also keep a list of suitable people, not from its own members, to be Assessors. Assessors are responsible for investigating complaints and examining areas of dispute. They must advise the Director of any findings.[23]

FACILITATORS The Resource Group must also keep a list of suitable people, not from its own members, to be Facilitators. Facilitators, appointed by the Director, facilitate meetings and mediate agreements between the Church and the complainant.[24]

CONTACT PERSONS Contact persons, appointed by the Resource Group from among its own members or others, receive complaints and may act as a support person for the complainant in communications between the complainant, the Church authority and the assessor. The contact person shall also be available for the complainant through the entire process, although he or she is not the complainant's therapist or counsellor.[25]

CONSULTATIVE PANEL This panel consists of at least five members with the requisite experience, expertise and impartiality to advise and assist Bishops and Religious Order leaders about matters in this area. This Panel must be consulted if a priest or religious is criminally charged or is an unacceptable risk to children, young people or vulnerable adults.[26]

NATIONAL REVIEW PANEL The National Committee for Professional Standards is charged with appointing this National Review Panel that is comprised of up to nine members from the wider Australian community. This Panel may decide on requests for areview of the process or the findings of the Towards Healing process.[27] The Towards Healing process consists of receiving complaints, selecting an appropriate process, assessment of the complaint and outcomes for both the complainant and the accused.

RECEIVING A COMPLAINT The Towards Healing process commences when the Church authority or the Director of Professional Standards (the Director) receives a signed written complaint from the complainant. A verbal complaint may also be received if it is followed up by a contact person. The contact person follows up the complaint and explains the procedures to the complainant who consents to the proceedings.[28]

Every effort should be made to minimise the number of times a complainant must tell his or her story to the personnel at Towards Healing.[29] If a complainant is represented by a lawyer and seeks compensation and is not wanting pastoral support or other engagement with the Church, then the matter will proceed outside of Towards Healing process on the proviso that the Church endeavours to concern for the wellbeing of the complainant

22 Ibid. The Resource Group consists of at least one priest or religious and a suitable number of men and women (not more than ten) of diverse backgrounds and faith traditions who are skilled in child protection, the social sciences, the civil and Canon Law and industrial relations.
23 Australian Catholic Bishops Conference and Catholic Religious Australia, above n 1, 15.
24 Ibid.
25 Ibid.
26 Ibid 15-16.
27 Ibid 16.
28 Ibid 16-17.
29 Ibid 17.

in seeking to resolve the civil claim and the Director must take steps to investigate any risk to children, young people or vulnerable adults, if the accused is in active ministry.[30] To help determine whether an accused should remain in ministry, the Director should seek assistance from the complainant.[31]

With allegations of criminal matters, the Director must inform the complainant that the Church has a strong preference that the allegation be reported to the police. If the complainant does report to the police, and whilst Towards Healing may still make recommendations for funding of counselling for the complainant, Towards Healing will not become involved with the matters until the criminal justice process has been concluded.[32] Apart from matters that are captured by Mandatory Reporting legislation, if a complainant decides not to report to the police[33] or other civil authority, or if a civil authority decides not to take further action under the criminal law or child protection legislation, the Church authority must act on the complaint.[34] Also, in cases of alleged criminal offences where the complainant does not want to take the matter to the police, Church personnel should nonetheless provide details of the complaint to the Director, who in turn, should provide this information to the police. Such information to the police should not include any details that could potentially lead to the identification of the complainant.[35]

RESPONSE TO COMPLAINTS The Towards Healing procedures in relation to a response to a complaint only apply if the following three scenarios exist: The complaint does not involve a criminal offence; the complainant has chosen not to report the matter to police or other civil authority and chooses to proceed under the Towards Healing protocol, and, third, the civil authorities have decided not to take further action under the criminal law or child protection legislation.[36] Assuming complaints fall within the definition of 'abuse' within the Towards Healing document,[37] they are forwarded by the Director to the appropriate Church authority. The Director may make a recommendation if there needs to be immediate action taken to protect children, young people or vulnerable adults or in relation to the provision of funding for counseling, pending the outcome of the process.[38]

The accused is then informed of the complaint, by the Church authority, of his or her rights and the process for dealing with the complaint. There is provision for independent legal representation for the accused, who shall also be offered a support person, who should not be the accused's therapist.[39] If there is a significant dispute or uncertainty about the facts, the matter is sent for investigation by the Director. Depending on the severity of the matter,

30 Ibid.
31 Ibid.
32 Ibid.
33 This decision by the complainant not to report to the police must be recorded and confirmed by signature by the complainant before a Towards Healing process can proceed.
34 Australian Catholic Bishops Conference and Catholic Religious Australia, above n 1, 18.
35 Ibid.
36 Ibid.
37 'Abuse' has two meanings within the context of the Towards Healing protocols. First, 'abuse' means sexual assault, sexual harassment or any other conduct of a sexual nature that is inconsistent with the integrity of the relationship between Church personnel and those who are in their pastoral care. The second definition of 'abuse' is intentional acts by a person with responsibility for a child or young person causing significant physical injury, or other behaviour, 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.
38 Australian Catholic Bishops Conference and Catholic Religious Australia, above n 1, 19.
39 Ibid 20.

the Director may recommend to the Church authority that the accused be asked to stand aside from his or her position, pending investigation. This being the case, it is to be clearly understood that the accused is on leave and no admissions of any kind are implied by this fact. This means the accused continues to receive remuneration and other entitlements pending the outcome of the matter whilst not engaging in any public ministry.[40]

ASSESSMENT There will be one or two assessors, both appointed by the Director. The assessors must be, and be seen to be, independent of the Church authority, the complainant and the accused.[41] They investigate the complaint by separately interviewing the complainant, who must be invited by Towards Healing to have a support person with them,[42] and the accused, who must be invited to have either a support person or a legal adviser present during the interview.[43] They may interview other people to aid their investigation. The accused's version of events must, at some stage, be put to the complainant.[44] An assessment will not go ahead if a victim is not available or unwilling to be interviewed by the assessors.[45] A finding about the truth of the complaint is made on the balance of probabilities. A written report with findings and reasons must be provided to the Church authority and the Director.

In relation to interviewing children and young people, only Towards Healing personnel who are 'professionally recognised as skilled practitioners in interviewing children' must be chosen. Only 'appropriately qualified and experienced' people must conduct interviews with people who have an intellectual or psychiatric disability.[46] The Director has the discretion to cease a case if the complainant is not co-operating with the assessment process. If an accused does not cooperate, the matter will go ahead anyway.[47]

The Church authority shall discuss the findings and recommendations with the Director as soon as possible and if the complaint is sustained, the Church authority must seek the advice of the Consultative Panel and may seek advice from the Director of the Professional Standards who will seek to ensure that assessments are completed as quickly as possible and as transparent as possible. It is the Director's responsibility to ensure that this principle of timeliness is adhered to.[48] All documents and records associated with the assessment and records of interview are subject to confidentiality and the Director must keep a confidential record of all findings and documents that are relevant to the suitability of the accused for future ministry.[49]

1.3 Outcomes relating to the victim

If a Church authority is satisfied of the truth of the complaint (whether by admission, a finding of a court, a penal process under Canon Law or the Towards Healing process) the victim's needs must be responded to as demanded by justice and compassion. Although it is discretionary whether Towards Healing responses include an apology on behalf of the Church, the provision of counseling services or the payment of counselling costs.[50]

40 Ibid.
41 Ibid 21.
42 Ibid 22.
43 Ibid 23.
44 Ibid 22.
45 Ibid.
46 Ibid 24.
47 Ibid 22-23.
48 Ibid 24.
49 Ibid.
50 Ibid.

It is also discretionary as to whether financial assistance or reparation is paid to victims of a criminal or civil wrong, even though the Church is not legally liable.[51] A Bishop or religious leader must seek the advice of the Consultative Panel in determining how to respond to the complainant, as well as an expert opinion from a suitably qualified professional to assess the impacts on the victim.[52]

FACILITATION Facilitators arrange and moderate communication between the Church authority and the victim and also provide the means of addressing the needs of the victim and where an apology may be given to the victim. Mediations address any unresolved issues.[53] The victim and the Church authority (or its delegate) may be legally represented (by an 'adviser') at these meetings. If the victim is not legally represented, then neither shall the Church authority. The victim must choose between a lawyer and a support person.[54]

It is the responsibility of the facilitator to 'seek to know the ongoing needs of the victim and the response of the Church authority to those needs'. The facilitator must also seek to know the support needs of the victim's family and of 'the community in whose midst the abuse occurred if the abuse is publicly known'.[55] If there is disagreement in relation to the monetary reparation, these must be dealt with by negotiation and separate to the process of the facilitation.[56]

DEED OF RELEASE If a victim has independent legal advice or has indicated in writing that he or she has declined legal advice, the victim is required to sign a Deed of Release.[57] As a condition of an agreement with the Church authority, complainants are not required to give an undertaking of confidentiality in relation to the circumstances that led them to make a complaint.[58]

1.4 Outcomes relating to the accused

A Bishop or religious leader must seek the advice of the Consultative Panel in determining the outcomes for the accused. If a police investigation, a civil process or a Church procedure makes it clear that the accused is innocent, the Church authority will take whatever steps are necessary to restore the good reputation of the accused. This is done in consultation with the accused.[59] If the accused admits abuse or it is found by Towards Healing that there are concerns about the accused's suitability to be in a position of pastoral care, the Church authority, in consultation with the Director and the Consultative Panel, must consider what action needs to be taken in relation to the future ministry of the accused. Factors to be considered are the degree of risk of further abuse and the seriousness of the violation of the integrity of the pastoral relationship.

Where the accused has pleaded guilty or been found guilty, any decisions by the Church authority will be made according to the provisions of Canon Law, if the accused is to be released from ministry. The Church authority must be guided by the seriousness of the offence and by the principle

51 Ibid.
52 Ibid 24-25.
53 Ibid 25.
54 Ibid.
55 Ibid.
56 Ibid.
57 Ibid 26.
58 Ibid.
59 Ibid.

that no-one shall be permitted to exercise a public ministry if doing so presents an unacceptable risk of abuse to children and young people.[60] The Church authority must, as far as it is within its power to do so, require the offender to address the issue of reparation to the victim and to the Church community.[61]

1.5 Outcomes relating to other affected people and communities

For those families and faith communities affected by findings of abuse, or wrongful accusations of abuse, it is discretionary for the Church authority to consider how to assist these affected people, such as counseling or other pastoral support.[62]

1.6 Review of process and findings

A review of the process and findings excludes a review of the outcomes for the victim or the accused. A review consists of an independent evaluation of the grounds for review and whether there has been adherence to the principles underpinning the Towards Healing process.[63] A review of the Towards Healing process, and/or the findings of the assessment, is available to the complainant, the accused (only if he or she cooperated with the assessment process) and the Church authority. Reasons for the review should be in writing and sent to the Director, who passes this on to the Chairperson of the National Review Panel.[64]

THE REVIEW PROCESS The reviewer, in determining his or her own procedures for the review, may question the complainant, the accused or any other person in connection with the case; have access to all relevant documentation, and, must complete the review within three months, unless the National Review Panel provides an extension of time.[65]

OUTCOMES OF THE REVIEW A written report with recommendations must be given to the Chairperson of the National Review Panel, who, in consultation with the reviewer and another panel member, will consider the reviewer's report and possibly make recommendations to the Church authority, which can substitute the assessor's findings. This may involve a further assessment being undertaken.[66]

1.7 Concluding statements

Sexual abuse by Church personnel has done great harm to the individuals and the whole Church. The opportunity to create a better Church is possible on the condition that the response given by the leaders and all the members of the Church is humble, honest and thoroughly Christian.[67]

60 Ibid 27.
61 Ibid.
62 Ibid.
63 Ibid.
64 Ibid 28.
65 Ibid.
66 Ibid.
67 Ibid 30.

2 The Melbourne Archdiocese Response

In 1996, George Pell, in announcing several initiatives by the Archdiocese of Melbourne, said:

> Sexual abuse of minors and adults has emerged as one of the most horrific issues in recent memory. It is an evil that has permeated all levels of society, including our ranks. It is all the more serious when it involves priests and others who have betrayed the trust placed in them by virtue of the privileged position they occupy in society. Regrettably, the Catholic Church has taken a long time to come to grips successfully with the issue … I wish to address the issue in a professional, caring and appropriate manner.[68]

Archbishop Pell, as he was then, apologised sincerely and unreservedly to all the victims and also to the people of the Melbourne Archdiocese 'for this betrayal of trust'. He also used the words of Catholic Bishops of Australia in a pastoral letter in early 1996 to outline the main goals of the Archdiocese's complaints process:

> 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 victims, assistance to other persons affected, an adequate response to those accused and to offenders, and prevention of any such offences in the future.[69]

These major goals are the same as the seven underlying principles of the Towards Healing process as discussed above.

2.1 The structure and process of the Melbourne Response

The structure and process of the Melbourne Response will now be discussed. There are four areas or divisions of the Melbourne Response: Complaints and Investigations, Carelink, Pastoral Parish Response and the Compensation Panel.

COMPLAINTS AND INVESTIGATIONS Complaints and Investigations[70] is run by Independent Commissioners, Peter O'Callaghan QC and Mr Jeffrey Gleeson SC, who enquire into allegations of sexual abuse by priests, lay people and religious who are, or were, under the auspices of the Catholic Archbishop of Melbourne.[71] Although Jeffrey Gleeson SC was appointed by the Archbishop of Melbourne, Denis Hart, on 1 August 2012, he has acted as Counsel Assisting Mr O'Callaghan QC Since 1997. From time to time, the Archbishop of Melbourne has appointed ad hoc Independent Commissioners to investigate complaints. These have included Mr Paul Guest QC, Mr Paul Lacava QC, Mr James Elliott SC.[72] The office of the Independent Commissioner is the entry point for those wanting to make a complaint about allegations of sexual abuse. It is also the entry point for those enquiring about pastoral support and/or compensation.

The Independent Commissioner[73] meets with complainants who are invited to tell their story or their personal recollections of abuse, before an investigation is conducted.[74] The Independent Commissioner makes an appraisal

68 Pell, George, *Sexual Abuse* The Melbourne Archdiocese Response Brochure (1996) 2.
69 Ibid.
70 Catholic Archdiocese of Melbourne, *Sexual and Other Abuse. The Melbourne Response* Catholic Archdiocese of Melbourne <http://www.cam.org.au/Portals/0/Documents/Melbourne-Response-2012-brochure.pdf>.
71 Ibid.
72 Archdiocese of Melbourne, Submission to Community and Family Development Committee, *Victorian Parliamentary Inquiry into Handling of Child Abuse by Religious and Other Organisations*, 21 September 2012, 55.
73 When discussing the Independent Commissioner in a generic capacity, it will apply to both Mr O'Callaghan QC and Mr Jeffrey Gleeson SC. In relation to excerpts from interviewees, when Mr O'Callagahn QC is named, that comment will reflect only Mr O'Callaghan QC.
74 Catholic Archdiocese of Melbourne, above n 70.

of all the circumstances of the situation and 'helps victims to explain and address their very personal issues'[75] and helps them deal with that 'in a compassionate and understanding way'.[76] In relation to the privacy of the victim, from the initial contact with the Independent Commissioner, the Melbourne Response 'respects the individual's privacy'.[77] Once the Independent Commissioner completes his investigations, a determination is made which is based on the evidence. When the Independent Commissioner is satisfied that the abuse occurred, he notifies the Archbishop about the offender and refers the victim to Carelink.[78] Victims can be referred at any stage of the Melbourne Response process to Carelink for the 'provision of free counselling and psychological support' and if a complaint is established, the Independent Commissioner will refer the complainant to the Compensation Panel.[79]

CARELINK Carelink[80] co-ordinates the provision of counseling and other professional support to clients and is co-ordinated by consulting psychologist, Mrs Susan Sharkey.

PARISH PASTORAL RESPONSE The *Parish Pastoral Response*[81] was included in the Melbourne Response process as a targeted and professional support for parish communities and parish priests especially at times of crisis 'following the disclosure, or imminent disclosure, of misconduct by clergy or Church personnel'. The Archdiocese acknowledges that parishioners hearing information about a previous or current priest would need support so as 'to understand and work through sensitive issues of breach of trust, disbelief, anger and fear'.[82] Before September 2012, the contact person and co-ordinator for the Parish Pastoral response was Maria Kirkwood.[83] Since then, Vicky Russell has been the co-ordinator.

THE COMPENSATION PANEL The Compensation Panel,[84] also operating independently from the Archdiocese, has four members comprising a psychiatrist, a solicitor, a community representative and the Chair, David Curtain QC. It has the discretion to grant ex gratia[85] compensation for clergy victims, up to a maximum of $75 000. According to the Melbourne Archdiocese, the Panel provides an alternative to civil litigation and operates in an 'informal way and, by design, is not legalistic but provides a forum for the settlement of claims'.[86]

75 Archdiocese of Melbourne, above n 72, 55.
76 Catholic Archdiocese of Melbourne. above n 70.
77 Archdiocese of Melbourne, above n 72, 55.
78 Catholic Archdiocese of Melbourne, above n 70.
79 Ibid.
80 Ibid.
81 Archdiocese of Melbourne, above n 72, 60.
82 Ibid. The type of support for parishes has included: Providing advice about the support available to victims; meeting with parish priests and parish leadership teams to explain processes and protocols of the Archdiocese when abuse occurs; assisting priests to prepare announcements and answer questions, prepare homilies as part of and following public disclosures of abuse; meeting individual and small groups of parishioners to provide pastoral support and answer questions about processes and protocols; providing information about child protection protocols and processes; providing pastoral support to principals and school staffs; providing advice to school principals on dealing with the outcomes of disclosures relating to priests in their community; making referrals, as required, to the Independent Commissioner and Carelink; attending in parishes over successive weekends to provide ongoing support to the priest and community as required; meeting with parents, siblings, friends or associates of victims, on request, and, providing referrals to spiritual directors when requested.
83 Catholic Archdiocese of Melbourne, Sexual and Other Abuse. *The Melbourne Response* Catholic Archdiocese of Melbourne (undated) 4.
84 Catholic Archdiocese of Melbourne, above n 70.
85 A payment made by way of a settlement of a claim without admission of liability (*Edwards v Skyways Ltd* [1964] 1 All ER at 500).
86 Catholic Archdiocese of Melbourne, above n 70.

Appendix 4 Letters to legal and non-legal advocates

L1 Letter to legal advocates for primary victim clients

MONASH University

My PhD Research into Child Sexual Abuse by the Catholic Clergy – Primary Victims

I enclose a copy of a letter that can be given to your clients (primary victims) to see if they would like to participate in my research, by way of an interview.

I have urged the potential victim participants not to feel obliged in any way to participate in my research. Whatever their decision, they should not feel compelled to let you know of their participation or not – unless they prefer to do so. Also, if they decide to participate and then change their mind *at any stage*, they are absolutely entitled to do so. Such a decision would be respected and thoroughly supported. Once again, they do not need to let you know about this, unless they choose to do so. I will not, at any stage, be talking with you about their participation or whether or not they decide to withdraw from the project.

The aim of the research

The reporting rate to police of child sexual assaults is, typically, very low. Conviction rates are extremely low and appeal rates are very high. The Catholic Church has no legal entity that can be sued in Australia for the crime of historical sexual assault. This means there exist multiple legal problems for victims of Catholic clergy child sexual assault, who desire a sense of justice.

Data on the numbers of victims of Catholic clergy sexual assault, compared with other offenders, are unavailable in Australia. Recently, there has been a worldwide increase in the number of people reporting, or disclosing, a history of sexual assault at the hands of the Catholic clergy. Despite this influx of cases reported in the media, there is limited research in this area in Australia.

In Australia, there are potentially three main options available for victims. The criminal trial, litigation and the protocols set up by the Catholic Church - Towards Healing (a National process) and the Melbourne Response (Melbourne Archdiocese).

Some groups have raised concerns about the processes with both Towards Healing and the Melbourne Response in terms of transparency, accountability and independence, and when they require victims not to pursue civil action.

My research aims to provide some data that may assist with recommendations to improve the availability of real options for victims of sexual assault at the hands of the Catholic clergy.

The aim of the proposed research is to examine whether or not justice is being delivered to victims of Catholic clergy sexual assault, in Australia. In identifying the available avenues and processes being utilised by these victims, the research will seek to map and analyse the effectiveness of such processes.

The following issues will be addressed:

- What processes are the victims using to seek justice?

- What is the effectiveness of these processes? That is, are the outcomes just from the standpoint of the victim?

- Do victims feel 'heard' by the authority figures (mediator, judge, Church authorities) and do they feel they are being treated with respect and dignity?
- What avenues are victims pursuing in civil litigation?
- I hope later to make comparisons between the Australian regimes and what is happening in Ireland and Canada.

Interviews

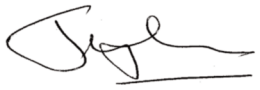
In order to answer some of the above questions, and to assist with recommendations to improve the availability of real options for victims of sexual assault, I would like to interview victims. Ordinarily, the interviews would last about an hour.

Anonymity for the victims will be assured. There would also be some non-identifying demographic data obtained such as the victim's age, age at time of abuse, gender, postcode and occupation.

I have attached a copy of the letter to be given to your clients (primary victims), which also contains information about my research, the interviews, the questions and my contact details.

I thank you very much for your interest and co-operation.

Yours sincerely,



Judith Courtin

L2 Letter to legal advocates for secondary victim clients

MONASH University

My PhD Research into Child Sexual Abuse by the Catholic Clergy – Secondary Victims

I enclose a copy of a letter that can be given to your secondary victim clients to see if they would like to participate in my research, by way of an interview.

I have urged the potential secondary victim participants not to feel obliged in any way to participate in my research. Whatever their decision, they should not feel compelled to let you know of their participation or not – unless they prefer to do so. Also, if they decide to participate and then change their mind at any stage, they are absolutely entitled to do so. Such a decision would be respected and thoroughly supported. Once again, they do not need to let you know about this, unless they choose to do so. I will not, at any stage, be talking with you about their participation or whether or not they decide to withdraw from the project.

The aim of the research

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Some groups have raised concerns about the processes with both Towards Healing and the Melbourne Response in terms of transparency, accountability and independence and when they require victims not to pursue civil action

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The aim of the proposed research is to examine whether or not justice is being delivered to victims of Catholic clergy sexual assault, in Australia. In identifying the available avenues and processes being utilised by these victims, the research will seek to map and analyse the effectiveness of such processes.

The following issues will be addressed:

- The secondary victim's own views on the processes that victims are using to using seek justice.
- What is the effectiveness of these processes? That is, does the secondary victim think that the outcomes are just?
- Does the secondary victim think that they, and the primary victims, feel 'heard' by the authority figures (mediator, judge, Church authorities) and do they feel they are being treated with respect and dignity?
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Interviews

In order to answer some of the above questions, and to assist with recommendations to improve the availability of real options for victims of child sexual assault, I would like to interview secondary victims.

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I have attached a copy of the letter to be given to your clients, which also contains information about my research, the interviews, the questions and my contact details.

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MONASH University



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Interviews

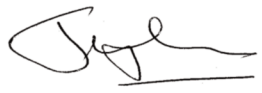
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Anonymity for the victims will be assured. There would also be some non-identifying demographic data obtained such as the victim's age, age at time of abuse, gender, postcode and occupation.

I have attached a copy of the letter to be given to your clients, which also contains information about my research, the interviews, the questions and my contact details.

I thank you very much for your interest and co-operation.

Yours sincerely,



Judith Courtin

MONASH University

My PhD Research into Child Sexual Abuse by the Catholic Clergy – Secondary Victims

I enclose a copy of a letter that can be given to your secondary victim clients to see if they would like to participate in my research, by way of an interview.

I have urged the potential secondary victim participants not to feel obliged in any way to participate in my research. Whatever their decision, they should not feel compelled to let you know of their participation or not – unless they prefer to do so. Also, if they decide to participate and then change their mind at any stage, they are absolutely entitled to do so. Such a decision would be respected and thoroughly supported. Once again, they do not need to let you know about this, unless they choose to do so. I will not, at any stage, be talking with you about their participation or whether or not they decide to withdraw from the project.

The aim of the research

The reporting rate to police of child sexual assaults is, typically, very low. Conviction rates are extremely low and appeal rates are very high. The Catholic Church has no legal entity that can be sued in Australia for the crime of child sexual assault. This means there exist multiple legal problems for victims of Catholic clergy child sexual assault, who desire a sense of justice.

Data on the numbers of victims of Catholic clergy child sexual assault, compared with other offenders, are unavailable in Australia. Recently, there has been a worldwide increase in the number of people reporting, or disclosing, a history of sexual assault at the hands of the Catholic clergy. Despite this influx of cases reported in the media, there is limited research into this area in Australia.

In Australia, there are potentially three main options available for victims. The criminal trial, litigation and the protocols set up by the Catholic Church - Towards Healing (a National process) and the Melbourne Response (Melbourne Archdiocese).

Some groups have raised concerns about the processes with both Towards Healing and the Melbourne Response in terms of transparency, accountability and independence and when they require victims not to pursue civil action

My research in this area aims to provide some data that may assist with recommendations to improve the availability of real options for victims of child sexual assault at the hands of the Catholic clergy.

The aim of the proposed research is to examine whether or not justice is being delivered to victims of Catholic clergy child sexual assault, in Australia. In identifying the available avenues and processes being utilised by these victims, the research will seek to map and analyse the effectiveness of such processes.

The following issues will be addressed:

- The secondary victim's own views on the processes that victims are using to using seek justice.
- What is the effectiveness of these processes? That is, does the secondary victim think that the outcomes are just?
- Does the secondary victim think that they, and the primary victims, feel 'heard' by the authority figures (mediator, judge, Church authorities) and do they feel they are being treated with respect and dignity?
- What avenues are victims pursuing in civil litigation?
- I hope later to make comparisons between the Australian regimes and what is happening in Ireland and Canada.

Interviews

In order to answer some of the above questions, and to assist with recommendations to improve the availability of real options for victims of child sexual assault, I would like to interview secondary victims.

Ordinarily, the interviews would last about an hour. Anonymity for the secondary victims will be assured. There would also be some non-identifying demographic data obtained such as the secondary victim's age, gender, postcode and occupation.

I have attached a copy of the letter to be given to your clients, which also contains information about my research, the interviews, the questions and my contact details.

I thank you very much for your interest and co-operation.

Yours sincerely,



Judith Courtin

Appendix 5 Interview locations

Interviewees	Home	Monash	Legal Office	Workplace	Telephone	Other	TOTAL
Primary and Secondary Victims	23	5	5	3	4	1	**41**
Legal Professionals	–	–	–	19	4	–	**23**
Non-legal Advocates	–	–	1	2	2	–	**5**
Catholic Priest	–	–	–	1	–	–	**1**
Total Interviewees							**70**

Appendix 6 Interviewee codes

Code	Interviewee Group
CCJ-1 – CCJ-4	County Court Judges
LA-1 – LA-12	Legal Advocates
LB-2 – LB-3 *	Litigation Barristers
LP-1 – LP-3	Prosecution Solicitors
NLA-1 – NLA-5	Non-legal Advocates
P-1	Catholic Priest
PB-1 – PB-2	Prosecution Barristers
V1-1 – V1-24 **	Primary Victims
V2-1 – V2-19 ***	Secondary Victims

* LB-1 withdrew after interview
** V1-9 withdrew before interview
*** V2-3 withdrew before interview

Appendix 7 Letters to primary and secondary victims via advocates

L5 Letter for primary victims via legal and non-legal advocates

MONASH University

My PhD Research into Sexual Abuse by the Catholic Clergy – Victims/Survivors

I would like to introduce myself. I am a mature-age student doing my PhD in Law at Monash University. I am doing research in the area of sexual assault and the Catholic Church. The main reason I am doing this research is that there is very little research done in this area in Australia. Also, I am very interested to find out whether victims of Catholic clergy abuse are receiving justice here in Australia. If justice is not being delivered, what is it that victims feel would need to be done, in order to feel as though they have received justice.

In order to find this out, I want to interview victims, such as yourself, secondary victims as well as other people involved in this area – for example, lawyers, judges and advocates for victims or people that work for organisations that are set up to support victims.

The aim of the research

The reporting rate to police of child sexual assaults is, typically, very low. Conviction rates are extremely low and appeal rates are very high. The Catholic Church has no legal entity that can be sued in Australia for the crime of historical sexual assault. This means there exist multiple legal problems for victims of Catholic clergy sexual assault, who desire a sense of justice.

Data on the numbers of victims of Catholic clergy sexual assault, compared with other offenders, are unavailable in Australia. Recently, there has been a worldwide increase in the number of people reporting, or disclosing, a history of sexual assault at the hands of the Catholic clergy. Despite this influx of cases reported in the media, there is limited research into this area in Australia.

In Australia, there are potentially three main options available for victims. The criminal trial, litigation and the protocols set up by the Catholic Church - Towards Healing (a National process) and the Melbourne Response (Melbourne Archdiocese).

Some groups have raised concerns about the processes with both Towards Healing and the Melbourne Response in terms of transparency, accountability and independence, and when they require victims not to pursue civil action.

My research aims to provide some data that may assist with recommendations to improve the availability of real options for victims of sexual assault at the hands of the Catholic clergy.

The aim of the proposed research is to examine whether or not justice is being delivered to victims of Catholic clergy sexual assault, in Australia. In identifying the available avenues and processes being utilised by these victims, the research will seek to map and analyse the effectiveness of such processes.

The following issues will be addressed:

- What processes are the victims using to seek justice?
- What is the effectiveness of these processes? That is, are the outcomes just from the standpoint of the victim?
- Do victims feel 'heard' by the authority figures (mediator, judge, Church authorities) and do they feel they are being treated with respect and dignity?
- What avenues are victims pursuing in civil litigation?
- I hope later to make comparisons between the Australian regimes and what is happening in Ireland and Canada.

Interviews

In order to answer some of the above questions, and to assist with recommendations to improve the availability of real options for victims of clergy sexual assault, I would like to conduct interviews.

Ordinarily, the interviews would last about an hour. This may vary from person to person. The types of questions I will be asking in the interview would include:

- How old were you when the abuse took place?
- Have you been to the police about your abuse?
    - What did the process involve?
    - What was the outcome? Or, where are you in this process?
    - How did/do you feel about this process?
    - Did you feel understood in this process?
    - Did you feel respected in this process?
    - Did you feel your dignity was maintained in this process?
    - How did/does it affect you?
- Have you been to a solicitor about your abuse?
    - The same questions as above will be asked in relation to the legal system
- Have you been to court in relation to your abuse?
    - The same questions as above will be asked in relation to the court system
- Have you been to the Catholic Church (CC) about your abuse?
    - The same questions as above will be asked in relation to the Catholic Church
    - Who did you contact at the CC? Towards Healing/Melbourne Response?
    - The same questions as above will be asked in relation to the Melbourne Response and Towards Healing
- Have you been to the Victims of Crime Assistance Tribunal (VOCAT):
    - The same questions as above will be asked in relation to VOCAT.
    - What would you need/do you need to feel as though you have attained justice?

If you would like to participate in my research, and be interviewed, you will be anonymous. I will not be using your name or any identifying information about you. As well as the above types of questions, I would also ask some general information such as your age now, your age at time of abuse and your gender, postcode and occupation.

The interviews would be held at a place and time that are convenient for you. I would hope to record the interview. The recorded interview would be kept in my office in a locked filing cabinet and no-one else, other than my supervisor, Dr Bronwyn Naylor, at Monash University, would have access to these files.

Your decision about participating in the research

Even though [legal advocate] has passed on this information to you to see if you would like to participate in my research, I urge you not to feel obliged in any way to participate. Whatever your decision, you do not need to let [legal advocate] know – unless you prefer to do so. Also, if you do decide to participate and then change your mind at any stage, you are absolutely entitled to do so. Such a decision would be respected and thoroughly supported. Once again, you do not need to let [legal advocate] know about this, unless you choose to do so. I will not, at any stage, be talking with [legal advocate] about your participation or whether or not you decide to withdraw from the project.

If you would like to participate, or you have any questions or queries about my research and what it would mean for me to interview you, please do not hesitate to contact me. My contact details are:

Email: jecou1@student.monash.edu

Mobile: 0418 329 049

Address: PO Box 36, Brunswick East, 3056

Yours sincerely,



Judith Courtin

L6 Letter for secondary victims via legal and non-legal advocates

MONASH University



My PhD Research into Sexual Abuse by the Catholic Clergy – Secondary Victims

I would like to introduce myself. I am a mature-age student doing my PhD in Law at Monash University. I am doing research in the area of sexual assault and the Catholic Church. The main reason I am doing this research is that there is very little research done in this area in Australia. Also, I am very interested to find out whether victims of Catholic clergy abuse are receiving justice here in Australia. If justice is not being delivered, what is it that victims feel would need to be done, in order to feel as though they have received justice.

In order to find this out, I want to interview victims, secondary victims, such as yourself, as well as other people involved in this area – for example, lawyers, judges and advocates for victims or people that work for organisations that are set up to support victims.

The aim of the research

The reporting rate to police of child sexual assaults is, typically, very low. Conviction rates are extremely low and appeal rates are very high. The Catholic Church has no legal entity that can be sued in Australia for the crime of historical child sexual assault. This means there exist multiple legal problems for victims of Catholic clergy sexual assault, who desire a sense of justice.

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The following issues will be addressed:

- The secondary victim's own views on the processes that victims are using to using seek justice.
- What is the effectiveness of these processes? That is, does the secondary victim think that the outcomes are just?
- Does the secondary victim think that they, and the primary victims, feel 'heard' by the authority figures (mediator, judge, Church authorities) and do they feel they are being treated with respect and dignity?
- What avenues are victims pursuing in civil litigation?

I hope later to make comparisons between the Australian regimes and what is happening in Ireland and Canada.

Interviews

In order to answer some of the above questions, and to assist with recommendations to improve the availability of real options for victims of clergy sexual assault, I would like to conduct interviews. Ordinarily, the interviews would last about an hour. This may vary from person to person. If you choose to take part in my research, I will not be asking for any private or identifying information about the primary victim, as they will not have consented to this. The types of questions I will be asking in the interview would include:

- In what sense are you a secondary victim? That is, what is your relationship to the primary victim?
- If the primary victim has been to the police about their sexual abuse:
  - Did you support the victim during this process?
  - What did this process involve?
  - What was the outcome?
  - How has this process affected you?
  - What do you think of the process?
  - In your view, was the victim respected in this process?
- If the primary victim has been to a solicitor about the sexual abuse:
  - The same questions as above will be asked in relation to the legal system
- If the primary victim been to court in relation to the sexual abuse:
  - The same questions as above will be asked in relation to the court system
- If you or the primary victim has been to either Towards Healing or the Melbourne Response:
  - The same questions as above will be asked in relation to the Catholic Church
- If you, or the primary victim, been to the Victims of Crime Assistance Tribunal (VOCAT):
  - The same questions as above will be asked in relation to VOCAT.
- In your view, what do you need to attain a sense of justice.
- What do you think primary victims of clergy sexual assault need to feel as though they have attained justice?

If you would like to participate in my research, and be interviewed, you will be anonymous. I will not be using your name or any identifying information about you. As well as the above types of questions, I would also ask some general information such as your age now, your age at time the primary victim was abused, your postcode and occupation. The interviews would be held at a place and time that are convenient for you. I would hope to record the interview, but if you were not happy with this, I would take notes. The recorded interview, or written responses, would be kept in my office in a locked filing cabinet and no-one else, other than my supervisor, Dr Bronwyn Naylor, at Monash University, would have access to these files.

Your decision about participating in the research

Even though [legal advocate] has passed on this information to you to see if you would like to participate in my research, I urge you not to feel obliged in any way to participate. Whatever your decision, you do not need to let [legal advocate] know – unless you prefer to do so. Also, if you do decide to participate and then change your mind at any stage, you are absolutely entitled to do so. Such a decision would be respected and thoroughly supported. Once again, you do not need to let [legal advocate] know about this, unless you choose to do so. I will not, at any stage, be talking with [legal advocate] about your participation or whether or not you decide to withdraw from the project. If you would like to participate, or you have any questions or queries about my research and what it would mean for me to interview you, please do not hesitate to contact me. My contact details are:

Email: jecou1@student.monash.edu
Mobile: 0418 329 049
Address: PO Box 36, Brunswick East, 3056

Yours sincerely,



Judith Courtin

Appendix 8 Letters to victims who contacted researcher directly

L7 Letter to primary victims who contacted researcher directly

MONASH University

My PhD Research into Child Sexual Abuse by the Catholic Clergy – Primary Victims/Survivors

Thank you for contacting me about being interviewed for my research. I would like to confirm that I am doing research in the area of sexual assault and the Catholic Church. The main reason I am doing this research is that there is very little research done in this area in Australia. Also, I am very interested to find out whether victims of Catholic clergy abuse are receiving justice here in Australia. If justice is not being delivered, what is it that victims feel would need to be done, in order to feel as though they have received justice.

In order to find this out, I want to interview victims, such as yourself, as well as other people involved in this area – for example, secondary victims, lawyers, judges, police informants and advocates for victims or people that work for organisations that are set up to support victims.

The aim of the research

The reporting rate to police of child sexual assaults is, typically, very low. Conviction rates are extremely low and appeal rates are very high. The Catholic Church has no legal entity that can be sued in Australia for the crime of child sexual assault. This means there exist multiple legal problems for victims of Catholic clergy child sexual assault, who desire a sense of justice.

Data on the numbers of victims of Catholic clergy sexual assault, compared with other offenders, are unavailable in Australia. Recently, there has been a worldwide increase in the number of people reporting, or disclosing, a history of sexual assault at the hands of the Catholic clergy. Despite this influx of cases reported in the media, there is limited research into this area in Australia.

In Australia, there are potentially three main options available for victims. The criminal trial, litigation and the protocols set up by the Catholic Church - Towards Healing (a National process) and the Melbourne Response (Melbourne Archdiocese).

Some groups have raised concerns about the processes with both Towards Healing and the Melbourne Response in terms of transparency, accountability and independence, and when they require victims not to pursue civil action.

My research aims to provide some data that may assist with recommendations to improve the availability of real options for victims of sexual assault at the hands of the Catholic clergy.

The aim of the proposed research is to examine whether or not justice is being delivered to victims of Catholic clergy sexual assault, in Australia. In identifying the available avenues and processes being utilised by these victims, the research will seek to map and analyse the effectiveness of such processes.

The following issues will be addressed:

- What processes are the victims using to seek justice?
- What is the effectiveness of these processes? That is, are the outcomes just from the standpoint of the victim?
- Do victims feel 'heard' by the authority figures (mediator, judge, Church authorities) and do they feel they are being treated with respect and dignity?
- What avenues are victims pursuing in civil litigation?
- I hope later to make comparisons between the Australian regimes and what is happening in Ireland and Canada.

Interviews

In order to answer some of the above questions, and to assist with recommendations to improve the availability of real options for victims of child sexual assault, I would like to conduct interviews. Ordinarily, the interviews would last about an hour. This may vary from person to person. The types of questions I will be asking in the interview would include:

- How old were you when the abuse took place?
- Have you been to the police about your abuse?
    - What did the process involve?
    - What was the outcome? Or, where are you in this process?
    - How did/do you feel about this process?
    - Did you feel understood in this process?
    - Did you fee respected in this process?
    - Did you feel your dignity was maintained in this process?
    - How did/does it affect you?
- Have you been to a solicitor about your abuse?
    - The same questions as above will be asked in relation to the legal system
- Have you been to court in relation to your abuse?
    - The same questions as above will be asked in relation to the court system
- Have you been to the Catholic Church (CC) about your abuse?
    - The same questions as above will be asked in relation to the Catholic Church
- Who did you contact at the CC? Towards Healing/Melbourne Response?
    - The same questions as above will be asked in relation to the Melbourne Response and Towards Healing
- What would you need/do you need to feel as though you have attained justice?

If you would like to participate in my research, and be interviewed, you will be anonymous. I will not be using your name or any identifying information about you. As well as the above types of questions, I would also ask some general information such as your age now, your age at time of abuse and your gender, postcode and occupation.

The interviews would be held at a place and time that are convenient for you. I would hope to record the interview. The recorded interview would be kept in my office in a locked filing cabinet and no-one else, other than my supervisor, Dr Bronwyn Naylor, at Monash University, would have access to these files.

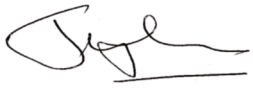
Your decision about participating in the research

Even though you contacted me directly about possibly participating in my research, I urge you not to feel obliged in any way to participate. If you do decide to participate and then change your mind at any stage, you are absolutely entitled to do so. Such a decision would be respected and thoroughly supported.

If you would like to participate, or you have any questions or queries about my research and what it would mean for me to interview you, please do not hesitate to contact me. My contact details are:

Email: jecou1@student.monash.edu
Mobile: 0418 329 049
Address: PO Box 36, Brunswick East, 3056

Yours sincerely,



Judith Courtin

L8 Letter to secondary victims who contacted researcher directly

MONASH University

My PhD Research into Child Sexual Abuse by the Catholic Clergy – Secondary Victims

Thank you for contacting me about being interviewed for my research. I would like to confirm that I am doing research in the area of sexual assault and the Catholic Church. The main reason I am doing this work is that there is very little research done in this area in Australia. Also, I am very interested to find out whether victims of Catholic clergy abuse are receiving justice here in Australia. If justice is not being delivered, what is it that victims feel would need to be done, in order to feel as though they have received justice.

In order to find this out, I want to interview victims, secondary victims, such as yourself, as well as other people involved in this area – for example, lawyers, judges, police informants and advocates for victims or people that work for organisations that are set up to support victims.

The aim of the research

The reporting rate to police of child sexual assaults is, typically, very low. Conviction rates are extremely low and appeal rates are very high. The Catholic Church has no legal entity that can be sued in Australia for the crime of child sexual assault. This means there exist multiple legal problems for victims of Catholic clergy child sexual assault, who desire a sense of justice.

Data on the numbers of victims of Catholic clergy sexual assault, compared with other offenders, are unavailable in Australia. Recently, there has been a worldwide increase in the number of people reporting, or disclosing, a history of sexual assault at the hands of the Catholic clergy. Despite this influx of cases reported in the media, there is limited research into this area in Australia.

In Australia, there are potentially three main options available for victims. The criminal trial, litigation and the protocols set up by the Catholic Church - Towards Healing (a National process) and the Melbourne Response (Melbourne Archdiocese).

Some groups have raised concerns about the processes with both Towards Healing and the Melbourne Response in terms of transparency, accountability and independence and when they require victims not to pursue civil action

My research in this area aims to provide some data that may assist with recommendations to improve the availability of real options for victims of child sexual assault at the hands of the Catholic clergy. The aim of the proposed research is to examine whether or not justice is being delivered to victims of Catholic clergy child sexual assault, in Australia. In identifying the available avenues and processes being utilised by these victims, the research will seek to map and analyse the effectiveness of such processes.

The following issues will be addressed:

- The secondary victim's own views on the processes that victims are using to using seek justice.
- What is the effectiveness of these processes? That is, does the secondary victim think that the outcomes are just?
- Does the secondary victim think that they, and the primary victims, feel 'heard' by the authority figures (mediator, judge, Church authorities) and do they feel they are being treated with respect and dignity?
- What avenues are victims pursuing in civil litigation?
- I hope later to make comparisons between the Australian regimes and what is happening in Ireland and Canada.

Interviews

In order to answer some of the above questions, and to assist with recommendations to improve the availability of real options for victims of child sexual assault, I would like to conduct interviews.

Ordinarily, the interviews would last about an hour. This may vary from person to person. If you choose to take part in my research, I will not be asking for any private or identifying information about the primary victim, as they will not have consented to this. The types of questions I will be asking in the interview would include:

- In what sense are you a secondary victim? That is, what is your relationship to the primary victim?
- If the primary victim has been to the police about their sexual abuse:
    - Did you support the victim during this process?
    - What did this process involve?
    - What was the outcome?
    - How has this process affected you?
    - What do you think of the process?
    - In your view, was the victim respected in this process?
- If the primary victim has been to a solicitor about the sexual abuse:
    - The same questions as above will be asked in relation to the legal system
- If the primary victim been to court in relation to the sexual abuse:
    - The same questions as above will be asked in relation to the court system
- If you or the primary victim has been to either Towards Healing or the Melbourne Response:
    - The same questions as above will be asked in relation to the Catholic Church
- If you, or the primary victim, been to the Victims of Crime Assistance Tribunal (VOCAT):
    - The same questions as above will be asked in relation to VOCAT.
- In your view, what do you need to attain a sense of justice.
- What do you think primary victims of clergy sexual assault need to feel as though they have attained justice?

If you would like to participate in my research, and be interviewed, you will be anonymous. I will not be using your name or any identifying information about you. As well as the above types of questions, I would also ask some general information such as your age now, your age at time of abuse and your gender, postcode and occupation. The interviews would be held at a place and time that are convenient for you. I would hope to record the interview, but if you were not happy with this, I would take notes. The recorded interview, or written responses, would be kept in my office in a locked filing cabinet and no-one else, other than my supervisor, Dr Bronwyn Naylor, at Monash University, would have access to these files.

Your decision about participating in the research

Even though you contacted me directly about possibly participating in my research, I urge you not to feel obliged in any way to participate. If you do decide to participate and then change your mind at any stage, you are absolutely entitled to do so. Such a decision would be respected and thoroughly supported.

If you would like to participate, or you have any questions or queries about my research and what it would mean for me to interview you, please do not hesitate to contact me. My contact details are:

Email: jecou1@student.monash.edu
Mobile: 0418 329 049
Address: PO Box 36, Brunswick East, 3056

Yours sincerely,



Judith Courtin

Appendix 9 Letters to legal professionals and non-legal advocates

L9 Letter to litigation solicitors and barristers

MONASH University

My PhD Research into Child Sexual Abuse by the Catholic Clergy – Legal Advocate

Following on from our discussion the other day, I would like to outline the rationale and aims of my research and introduce some of the likely questions that will be asked at interview.

As well as possibly interviewing yourself, I also intend to interview victims, non-legal advocates, Catholic clergy, individuals who work for the Catholic Church processes, police informants, prosecutors and judges.

Rationale

The reporting rate to police of child sexual assault is about 10 percent. Conviction rates are extremely low and appeal rates are very high. Also, there are many difficulties for victims of child sexual assault, at the hands of the catholic clergy, to sue in the civil courts. This means there exist multiple legal impediments for these victims to seek justice.

Data on the numbers of victims of sexual assault perpetrated by members of the Catholic clergy, compared with other victims, are unavailable in Australia. Recently, there has been a worldwide increase in the number of people reporting, or disclosing, a history of sexual assault at the hands of the Catholic Clergy. Despite this influx of cases reported in the media, there exists a paucity of research into this area in Australia.

To seek justice in Australia, there are potentially three main options available for victims. The criminal trial, litigation and/or the protocols set up by the Catholic Church - Towards Healing (a National process) and the Melbourne Response (Melbourne Archdiocese). Both of these processes may provide counselling services and compensation to the victim.

Research in this area has the potential to provide definitive data that may assist with recommendations to improve the availability of real options for victims of child sexual assault at the hands of the Catholic clergy.

Aim

The aim of the proposed research is to examine whether or not justice is being delivered to victims who were sexually assaulted by members of the Catholic Church in Australia. This research will then be compared with outcomes in Ireland and Canada. In identifying the available avenues and processes being utilised by these victims, the research will seek to determine the effectiveness of such processes.

Examples of some of the issues I will be looking at include:

- What processes are victims using to seek justice
- The effectiveness of these processes
- Whether the outcomes are 'just' from the standpoint of the victim
- Whether the victims feel 'heard' by the authority figures (mediator, judge, Church authorities) and do they feel they are being treated with respect and dignity
- What avenues are victims pursuing in civil litigation

Interviews

In order to address some of the above issues, and to assist with recommendations to improve the availability of real options for victims of child sexual assault, I will be conducting interviews.

Ordinarily, an interview would last about an hour. The types of questions to be used in the interview would include:

- How long have you been working as a litigator in cases where your client has been a victim of sexual abuse at the hands of the Catholic clergy?
- How many, approximately, of these types of cases have you conducted?
- What percentage, approximately:
    - Get to court
        - Succeed
        - Don't succeed
    - Settle out of court
    - Don't settle out of court
- In your view, does the litigation process help in bringing justice to the victim?
    - If so, in what way?
    - If not, why not?
- In your view, how does the litigation process affect the victim?
- In your view, is the litigation process one that is worth going through for the victim?
- Apart from the litigation process, in your view, what do victims need in order to achieve a sense of justice?
- In your view, how would describe the experiences for the victim/your client in going through the Melbourne Response or the Towards Healing process (if applicable)
- As an advocate, how would you describe your experiences in dealing with:
    - The Catholic Church and its Orders
    - The Melbourne Response
    - Towards Healing
- And how would you compare these dealings with other religious organisations or government institutions in relation to sexual abuse matters?
- What are your views of the use of Restorative Justice processes, whether in isolation or as an amalgam with the court process, in the area of Catholic clergy child sexual assault?
- What are your views about the use of a specialist court for these types of offences?

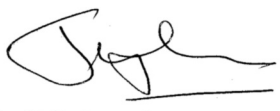
If you would like to participate in my research, and be interviewed, you will be anonymous. I will not be using your name or any identifying information about you.

The interviews would be held at a place and time that are convenient for you. I would hope to record the interview, but if you were not happy with this, I would take notes. The recorded interview, or written responses, will be kept in my office in a locked filing cabinet and no-one else, other than my supervisor at Monash University, would have access to these files.

I do invite you to participate in this very important research. Also, I would be most appreciative if you could send a copy of this letter to any other lawyers you know and who work in this area and who may wish to participate in my research by way of an interview. If you would like to participate, or you have any questions or queries about my research and what it would mean for me to interview you, please do not hesitate to contact me. My contact details are:

Email: jecou1@student.monash.edu
Mobile: 0418 329 049
Address: PO Box 36, Brunswick East, 3056

Yours sincerely,



Judith Courtin

MONASH University

My PhD Research into Child Sexual Abuse by the Catholic Clergy

Thank you very much for your time the other day. Following on from our conversation, I would like to outline the rationale and aims of my research and introduce some of the likely questions that will be asked at interview.

As well as possibly interviewing yourself, I also intend to interview victims, legal advocates, non-legal advocates, Catholic clergy, individuals who work for the Catholic Church processes, police informants and judges.

The aim/purpose of the research

The reporting rate to police of child sexual assault is, typically, very low. Conviction rates are extremely low and appeal rates are very high. The Catholic Church has no legal entity that can be sued in Australia for the crime of child sexual assault. This means there exist multiple legal problems for victims of Catholic clergy child sexual assault, who desire a sense of justice.

Data on the numbers of victims of Catholic clergy child sexual assault, compared with other offenders, are unavailable in Australia. Recently, there has been a worldwide increase in the number of people reporting, or disclosing, a history of sexual assault at the hands of the Catholic clergy. Despite this influx of cases reported in the media, there exists a paucity of research into this area in Australia.

In Australia, there are potentially three main options available for victims. The criminal trial, litigation and the protocols set up by the Catholic Church - Towards Healing (a National process) and the Melbourne Response (Melbourne Archdiocese). The processes, run by the Catholic Church, may provide the provision of counselling services and, if compensation is granted, the victim must agreenot to pursue civil action.

Research in this area aims to provide some data that may assist with recommendations to improve the availability of real options for victims of child sexual assault at the hands of the Catholic clergy.

The aim of the proposed research is to examine whether or not justice is being delivered to victims of Catholic clergy child sexual assault, in Australia. In identifying the available avenues and processes being utilised by these victims, the research will seek to map and analyse the effectiveness of such processes.

The following issues will be addressed:

- What processes are the victims using to seek justice?
- What is the effectiveness of these processes? That is, are the outcomes just from the standpoint of the victim?
- Do victims feel 'heard' by the authority figures (mediator, judge, Church authorities) and do they feel they are being treated with respect and dignity?
- What avenues are victims pursuing in civil litigation?
- My research here in Australia will be compared with what is happening in Ireland and Canada.

Interviews

In order to address some of the above issues, and to assist with recommendations to improve the availability of real options for victims of child sexual assault, I will be conducting interviews. Ordinarily, an interview would last about an hour. The types of questions to be used in the interview would include:

- How long have you been working as a Prosecutor in trials where the complainant has been a victim of child sexual abuse at the hands of the Catholic clergy?
- How many, approximately, of these types of trials have you conducted/participated in?
- In your view, do criminal trials, resulting in a conviction, bring justice to the victim?
    - If so, in what way?
    - If not, why not?
- In your view, how does the criminal trial process affect the complainant, whether resulting in a conviction or not?
- In your view, is the criminal trial process one that is worth going through for the complainant?
- Apart form the criminal trial process, in your view, what do victims need in order to achieve a sense of justice?
- What are your views of the use of Restorative Justice processes, whether in isolation or as an amalgam with the court process, in the area of Catholic clergy child sexual assault?
- What are your views about the use of a specialist court for these types of offences?

If you would like to participate in my research, and be interviewed, you will be anonymous. I will not be using your name or any identifying information about you.

The interviews would be held at a place and time that are convenient for you. I would hope to record the interview, but if you were not happy with this, I would take notes. The recorded interview, or written responses, will be kept in my office in a locked filing cabinet and no-one else, other than my supervisor at Monash University, would have access to these files.

I do invite you to participate in this very important research.

If you would like to participate, or you have any questions or queries about my research and what it would mean for me to interview you, please do not hesitate to contact me. Also, I would be most appreciative if you could send a copy of this letter to any other lawyers you know and who work in this area and who may wish to participate in my research by way of an interview.

My contact details are:

Email: jecou1@student.monash.edu
Mobile: 0418 329 049
Address: PO Box 36, Brunswick East, 3056

Yours sincerely,



Judith Courtin

MONASH University

My PhD Research into Child Sexual Abuse by the Catholic Clergy

Following on from our conversation the today, I would like to outline the rationale and aims of my research and introduce some of the likely questions that will be asked at interview.

I also intend to interview victims, legal advocates, non-legal advocates (such as yourself), catholic clergy, police informants, prosecutors, judges and personnel form Towards Healing and the Melbourne Response.

Rationale

The reporting rate to police of child sexual assault is about 10%. Conviction rates are extremely low and appeal rates are very high. Also, there are many difficulties for victims of child sexual assault, at the hands of the catholic clergy, to sue in the civil courts. This means there exist multiple legal impediments for these victims to seek justice.

Data on the numbers of victims of child sexual assault perpetrated by members of the Catholic clergy, compared with other victims, are unavailable in Australia. Recently, there has been a worldwide increase in the number of people reporting, or disclosing, a history of sexual assault at the hands of the Catholic Clergy. Despite this influx of cases reported in the media, there exists a paucity of research into this area in Australia.

To seek justice in Australia, there are potentially three main options available for victims. The criminal trial, litigation and/or the protocols set up by the Catholic Church - Towards Healing (a National process) and the Melbourne Response (Melbourne Archdiocese). Both of these processes may provide counselling services and compensation to the victim.

Research in this area has the potential to provide definitive data that may assist with recommendations to improve the availability of real options for victims of child sexual assault at the hands of the Catholic clergy.

Aim

The aim of the proposed research is to examine whether or not justice is being delivered to victims who were sexually assaulted, as children, by members of the Catholic Church in Australia. This research will then be compared with outcomes in Ireland and Canada. In identifying the available avenues and processes being utilised by these victims, the research will seek to determine the effectiveness of such processes.

Examples of some of the issues I will be looking at include:

- What processes are victims using to seek justice
- The effectiveness of these processes
- Whether the outcomes are 'just' from the standpoint of the victim
- Whether the victims feel 'heard' by the authority figures (mediator, judge, Church authorities) and do they feel they are being treated with respect and dignity
- What avenues are victims pursuing in civil litigation

Interviews

In order to address some of the above issues, and to assist with recommendations to improve the availability of real options for victims of child sexual assault, I would like to conduct interviews.

Ordinarily, an interview would last about an hour. The types of questions to be used in the interview would include:

- How long have you been working as an advocate for victims of child sexual abuse at the hands of the Catholic clergy?
- What services do you offer?
- What geographical area do you cover?
- What percentage, approximately, of your clients have:
    - Reported to the police
    - Been through the criminal trial process
    - Litigated
    - Been through the Melbourne Response process
    - Been through the Towards Healing process
    - Other?
- In your view, have your clients received justice through these processes
    - If so, in what way
    - If not, why not
- In your view, what do victims need in order to achieve a sense of justice?
- As an advocate, how would you describe your experiences in dealing with:
    - The Police
    - The Lawyers
    - The Catholic Church
    - The Melbourne Response
    - Towards Healing
- How would you compare your dealings with the Catholic Church with government and other religious organisations? (If applicable)
- What are your views of the use of Restorative Justice processes, whether in isolation or as an amalgam with the court process, in the area of Catholic clergy child sexual assault?
- What are your views about the use of a specialist court for these types of offences?

If you would like to participate in my research, and be interviewed, you will be anonymous. I will not be using your name or any identifying information about you.

The interviews would be held at a place and time that are convenient for you. I would hope to record the interview, but if you were not happy with this, I would take notes. The recorded interview, or written responses, will be kept in my office in a locked filing cabinet and no-one else, other than my supervisor at Monash University, would have access to these files. I do invite you to participate in this very important research.

If you would like to participate, or you have any questions or queries about my research and what it would mean for me to interview you, please do not hesitate to contact me. Also, I would be most appreciative if you could send a copy of this letter to any other advocates you know and who work in this area and who may wish to participate in my research by way of an interview.

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Mobile 0418 329 049
Address: PO Box 36, Brunswick East, 3056

Yours sincerely,



Judith Courtin

MONASH University

My PhD Research into Child Sexual Abuse by the Catholic Clergy

I would like to outline the aims of my research and introduce some of the likely questions that will be asked at interview.

As well as hopefully interviewing yourself, I also plan to interview victims, legal advocates, non-legal advocates, prosecutors, individuals who work for the Melbourne Response and Towards Healing and judges. If you know of any other clergy whom you think would be interested in participating in my research, I would be grateful if you could pass on a copy of this letter.

The aim of the research

The reporting rate to police of child sexual assaults is, typically, very low. Conviction rates are extremely low and appeal rates are very high. The Catholic Church has no legal entity that can be sued in Australia for the crime of child sexual assault. This means there exist multiple legal problems for victims of Catholic clergy child sexual assault, who desire a sense of justice.

Data on the numbers of victims of Catholic clergy child sexual assault, compared with other offenders, are unavailable in Australia. Recently, there has been a worldwide increase in the number of people reporting, or disclosing, a history of sexual assault at the hands of the Catholic clergy. Despite this influx of cases reported in the media, there is limited research into this area in Australia.

In Australia, there are potentially three main options available for victims. The criminal trial, litigation and the protocols set up by the Catholic Church - Towards Healing (a National process) and the Melbourne Response (Melbourne Archdiocese).

Some groups have raised concerns about the processes with both Towards Healing and the Melbourne Response in terms of transparency, accountability and independence and when they require victims not to pursue civil action.

My research in this area aims to provide some data that may assist with recommendations to improve the availability of real options for victims of child sexual assault at the hands of the Catholic clergy.

The aim of the proposed research is to examine whether or not justice is being delivered to victims of Catholic clergy child sexual assault, in Australia. In identifying the available avenues and processes being utilised by these victims, the research will seek to map and analyse the effectiveness of such processes.

The following issues will be addressed:

- The secondary victim's own views on the processes that victims are using to using seek justice.
- What is the effectiveness of these processes? That is, does the secondary victim think that the outcomes are just?
- Does the secondary victim think that they, and the primary victims, feel 'heard' by the authority figures (mediator, judge, Church authorities) and do they feel they are being treated with respect and dignity?
- What avenues are victims pursuing in civil litigation?
- I hope later to make comparisons between the Australian regimes and what is happening in Ireland and Canada.

Interviews

In order to address some of the above issues, and to assist with recommendations to improve the availability of real options for victims of child sexual assault, I will be conducting interviews.

Ordinarily, an interview would last about an hour. The types of questions to be used in the interview would include:

- How long have you been a Catholic Priest/Christian Brother?
- Can I ask you why you volunteered to partake in this research?
- What are your views about sexual assault and the Catholic Church?
- In your view, what do you think a victim of clergy child abuse might require in order to feel as though they have received justice?
- Are these needs being met?
- Are you familiar with the MR/TH processes?
- In your view, what is good or positive about these processes?
- In your view, what is negative or not good about these processes?
- In your view, do you think there is anything else the Catholic Church might offer to address the needs of victims, especially to assist them feel as though they have received justice?
- What are you views on the use of the criminal trial as a means for the victim seeking justice?
- What are your views on litigation as a means for the victim to seek justice?
- What are your views of the use of Restorative Justice processes in the area of Catholic clergy child sexual assault?

If you would like to participate in my research, and be interviewed, you will be anonymous. I will not be using your name or any identifying information.

The interviews would be held at a place and time that are convenient for you. I would hope to record the interview. The recorded interview will be kept in my office in a locked filing cabinet and no-one else, other than my supervisor at Monash University, would have access to these files.

I do invite you to participate in this very important research. If you have any further questions or queries about my research or the interviews, please do not hesitate to contact me. Me contact details are:

Email: jecou1@student.monash.edu
Mobile: 0418 329 049
Address: PO Box 36, Brunswick East, 3056

Yours sincerely,



Judith Courtin

MONASH University

My PhD Research into Child Sexual Abuse by the Catholic Clergy

Thank you very much for your time the other day. Following on from our conversation, I would like to outline the rationale and aims of my research and introduce some of the likely questions that will be asked at interview.

As well as possibly interviewing yourself, I also intend to interview victims, legal and non-legal advocates, Catholic clergy, individuals who work for the Catholic Church processes, police informants and prosecutors.

Rationale

The reporting rate to police of child sexual assault is about 10%. Conviction rates are extremely low and appeal rates are very high. Also, there are many difficulties for victims of child sexual assault, at the hands of the catholic clergy, to sue in the civil courts. This means there exist multiple legal impediments for these victims to seek justice.

Data on the numbers of victims of child sexual assault perpetrated by members of the Catholic clergy, compared with other victims, are unavailable in Australia. Recently, there has been a worldwide increase in the number of people reporting, or disclosing, a history of sexual assault at the hands of the Catholic Clergy. Despite this influx of cases reported in the media, there exists a paucity of research into this area in Australia.

To seek justice in Australia, there are potentially three main options available for victims. The criminal trial, litigation and/or the protocols set up by the Catholic Church - Towards Healing (a National process) and the Melbourne Response (Melbourne Archdiocese). Both of these processes may provide counselling services and compensation to the victim.

Research in this area has the potential to provide definitive data that may assist with recommendations to improve the availability of real options for victims of child sexual assault at the hands of the Catholic clergy.

Aim

The aim of the proposed research is to examine whether or not justice is being delivered to victims who were sexually assaulted, as children, by members of the Catholic Church in Australia. This research will then be compared with outcomes in Ireland and Canada. In identifying the available avenues and processes being utilised by these victims, the research will seek to determine the effectiveness of such processes.

Examples of some of the issues I will be looking at include:

- What processes are victims using to seek justice
- The effectiveness of these processes
- Whether the outcomes are 'just' from the standpoint of the victim
- Whether the victims feel 'heard' by the authority figures (mediator, judge, Church authorities) and do they feel they are being treated with respect and dignity – that is, has there been 'procedural justice'?
- What avenues are victims pursuing in civil litigation

Interviews

In order to answer some of the above questions, and to assist with recommendations to improve the availability of real options for victims of child sexual assault, I would like to conduct interviews.

Ordinarily, the interview would last about an hour. The types of questions to be used in the interview would include:

- How long have you been a County Court Judge?
- What preceded your judicial career?
- How many trials involving Catholic clergy child sexual abuse, approximately, have you conducted?
- Does the trial involving Catholic clergy child sexual abuse differ in any way from non-Catholic clergy child sexual assault trials?
- In your view, does the successful criminal trial process bring justice to the victim?
- In your view, how does the criminal trial process affect the victim?
- Would you recommend the criminal trial process to a member of your family as an avenue for seeking justice in the area of clergy child sexual abuse?
- In your view, and your experience, what do you think is required for a victim to receive justice?
- What are your views of the use of Restorative Justice processes, whether in isolation or as an amalgam with the court process, in the area of Catholic clergy child sexual abuse?
- What are your views about the use of a specialist court for these types of offences?

If you would like to participate in my research, and be interviewed, you will be anonymous. I will not be using your name or any identifying information about you. The interviews would be held at a place and time that are convenient for you.

I would hope to record the interview, but if you were not happy with this, I would take notes. The recorded interview, or written responses, will be kept in my office in a locked filing cabinet and no-one else, other than my supervisor at Monash University, would have access to these files.

If you would like to participate, or you have any questions or queries about my research and what it would mean for me to interview you, please do not hesitate to contact me. Also, I would be most appreciative if you could send a copy of this letter to any other judges you know and who work in this area and who may wish to participate in my research by way of an interview.

My contact details are:

Email: jecou1@student.monash.edu
Mobile: 0418 329 049
Address: PO Box 36, Brunswick East, 3056

Yours sincerely,



Judith Courtin

Appendix 10 Explanatory statement

Explanatory Statement – Judith Edwina COURTIN

MONASH University

Title: "Sexual Assault in the Catholic Church: Are Victims Finding Justice?"

Secondary Victims

This information sheet is for you to keep.

Student Research Project

My name is Judith Edwina Courtin and I am conducting a research project with Dr Bronwyn Naylor, a senior lecturer in the Department of Law towards a PhD at Monash University. This means that I will be writing a thesis which is the equivalent of a 300-page book. I may also publish academic and other articles based on this research.

I have chosen to interview secondary victims of Catholic Clergy[1] sexual abuse to assist with the some important and central questions of my research, which are:

1. To determine what a victim requires in order to feel as though justice has been delivered, and
2. Whether or not justice is being delivered via one, or more, of the processes currently available to victims – that is:
    a. The criminal trial process
    b. Litigation and
    c. The Catholic Church processes, Towards Healing and the Melbourne Response.

The aim/purpose of the research

The reporting rate to police of child sexual assaults is, typically, very low. Conviction rates are extremely low and appeal rates are very high. The Catholic Church has no legal entity that can be sued in Australia for the crime of child sexual assault. This means there exist multiple legal problems for victims of Catholic clergy child sexual assault, who desire a sense of justice.

Data on the numbers of victims of Catholic clergy sexual assault, compared with other offenders, are unavailable in Australia. Recently, there has been a worldwide increase in the number of people reporting, or disclosing, a history of sexual assault at the hands of the Catholic clergy. Despite this influx of cases reported in the media, there exists a paucity of research into this area in Australia.

In Australia, there are potentially three main options available for victims. The criminal trial, litigation and the protocols set up by the Catholic Church - Towards Healing (a National process) and the Melbourne Response (Melbourne Archdiocese).

1 Catholic Clergy includes priests, brothers, monks and nuns.

The processes, run by the Catholic Church, may provide the provision of counselling services and, if compensation is granted, the victim must agree not to pursue civil action. There are several concerns about the processes with both Towards Healing and the Melbourne Response in terms of transparency, accountability and independence.

Research in this area aims to provide some data that may assist with recommendations to improve the availability of real options for victims of child sexual assault at the hands of the Catholic clergy.

The aim of the proposed research is to examine whether or not justice is being delivered to victims of Catholic clergy sexual assault, in Australia. In identifying the available avenues and processes being utilised by these victims, the research will seek to map and analyse the effectiveness of such processes.

The following issues will be addressed:

- What processes are the victims using to seek justice?
- What is the effectiveness of these processes? That is, are the outcomes just from the standpoint of the victim?
- Do victims feel 'heard' by the authority figures (mediator, judge, Church authorities) and do they feel they are being treated with respect and dignity?
- What avenues are victims pursuing in civil litigation?
- My research here in Australia will be compared with what is happening in Ireland and Canada.

Possible benefits

This study aims to come up with recommendations for legislative reform and recommendations for improvements in the services available to victims in the future.

What does the research involve?

The research involves interviews with victims, secondary victims and other stakeholders in the area of Catholic clergy sexual abuse. The interviews will be asking you about your perceptions or ideas of the processes you have been, or are going, through, and the experiences you have been through whilst supporting the primary victim. The perceptions and observations of people with experience of the Catholic system will be extremely valuable in better informing my analysis and recommendations of my research.

How much time will the research take?

The interviews should take up to an hour.

Inconvenience/discomfort

Discussing your experiences as a secondary victim may be distressing for you. We can suspend or terminate the interview at any point if you wish. I will encourage you to talk to a support person if at any point you find the interview distressing, or if you feel distressed after talking with me.

Payment

There will be no payment offered for these interviews. If travel is involved, reimbursement for reasonable travel expenses will be provided.

Can I withdraw from the research?

Being in this study is voluntary and you are under no obligation to consent to participation. However, if you do consent to participate, you may only withdraw prior to approving the interview transcript.

Confidentiality

I will not be using your name or any identifying information about you in this research.

Storage of data

Storage of the data collected will adhere to the University regulations and kept on University premises or in my home office in a locked cupboard/filing cabinet for 5 years. A report of the study may be submitted for publication, but individual participants will not be identifiable in such a report.

Results

If you would like to be informed of the aggregate research finding, please contact me, Judy Courtin on 0418 329 049 or by email at jecou1@student.monash.edu.

If you would like to contact the researchers about any aspect of this study, please contact the Chief Investigator: Dr Bronwyn NAYLOR bronwyn.naylor@law.monash.edu.au 9905 3319 Or contact the student researcher: Judith Courtin jecou1@student.monash.edu Mobile: 0418 329 049 Fax: 03 9388 0430	If you have a complaint concerning the manner in which this research project number CF10/3009 - 2010001658 is being conducted, please contact: Executive Officer, Monash University Human Research Ethics Committee (MUHREC) Building 3e Room 111 Research Office Monash University VIC 3800 Tel: +61 3 9905 2052 Fax: +61 3 9905 3831 Email: muhrec@monash.au

Thank you.



Judith Courtin

Appendix 11 Consent form

MONASH University

Title: "Sexual Assault in the Catholic Church: Are Victims finding Justice?"

NOTE: This consent form will remain with the Monash University researcher for their records.

I agree to take part in the Monash University research project specified above. I have had the project explained to me, and I have read the Explanatory Statement, which I keep for my records. I understand that agreeing to take part means that:

I agree to be interviewed by the researcher	☐ Yes	☐ No
I agree to allow the interview to be audio-taped and/or video-taped	☐ Yes	☐ No
I agree to make myself available for a further interview if required	☐ Yes	☐ No

and

I understand that my participation is voluntary and I am under no obligation to consent to participation. However, if I do consent to participate, I may only withdraw prior to approving the interview transcript. Otherwise I can withdraw at any stage of the project without being penalised or disadvantaged in any way.

and

I understand that any data that the researcher extracts from the interview for use in reports or published findings will not, under any circumstances, contain names or identifying characteristics.

and

I understand that I will be given a transcript of data concerning me for my approval before it is included in the write up of the research.

and

I understand that data from the interview/transcript will be kept in a secure storage and accessible to the research team. I also understand that the data will be destroyed after a 5-year period unless I consent to it being used in future research.

Participant's name:

Signature:

Date:

Appendix 12 Primary victim data

PRIMARY VICTIM							OFFENDER					
Code	Age of Abuse	Year(s) of Offences	MR TH	Legal Rep.	Work-ing at Inter-view	Victims of Crime Comp. Scheme	Alive or Dead	Fled	Con-victed	Jailed	Laicised	Offender School or Parish
V1-1a	9	1948	No	–	No	No	Dead	No	No	No	No	Diocesan Parish Priest, Country Victoria
V1-1b	28	1967	MR	No	No	No	Alive	No	No	No	Yes Voluntary	Chaplain, Metropolitan Melbourne, Victoria
V1-2	12	1975	No	–	Yes	No	Alive	No	No	No	N/A	Brother, Metropolitan Melbourne, Victoria
V1-3	14-17	1983-86	TH	Yes	Yes	No	Alive	Yes Bali	No	No	No	Novice Priest, Metropolitan Melbourne, Victoria
V1-4	11	1966	MR	No	Yes	No	Dead	Yes UK	No	No	No	Diocesan Parish Priest, Gardenvale, Victoria
V1-5	13	1970	TH	Yes	Yes	No	Alive	No	No	No	No	Parish Priest, Tasmania
V1-6	12	1986	MR	Yes	No	No	Alive	No	No	No	No	Diocesan Parish Priest, Metropolitan Melbourne, Victoria
V1-7	33	1978	MR	No	No	No	Alive	No	No	No	No	Chaplain, Metropolitan Melbourne, Victoria
V1-8	32	1978	MR	No	No	No	Alive	Yes Qld	No	No	No	Diocesan Parish Priest, Metropolitan Melbourne, Victoria
V1-9 *												
V1-10	10	1953	MR	No	No	No	Dead	No	No	No	No	Parish Priest, Metropolitan Melbourne, Victoria
V1-11	11-16	1971-76	MR	Yes	No	No	Dead	No	Yes	Yes	No	Diocesan Parish Priest, Country Victoria
V1-12	8	1963	MR	No	No	No	Dead	No	No	No	No	Diocesan Parish Priest, Metropolitan Melbourne, Victoria
V1-13	11	1971	MR/TH	No	No	No	Dead	No	No	No	No	Jesuit Priest, Metropolitan Melbourne, Victoria
V1-14	12-18	1976-80	No	–	No	No	Alive	No	No	No	N/A	Passionist Brother, NSW
V1-15	45	2002	MR	No	No	No	Alive	No	No	No	Yes Voluntary	Diocesan Priest, Metropolitan Melbourne, Victoria
V1-16a	13	1985	No	–	No	Yes NSW	Alive	No	Yes	Yes	N/A	Catholic Lay Teacher, Country NSW
V1-16b	13	1985	No	–	No	No	Alive	No	No	No	No	Priest, Country NSW
V1-17	11	1962	No	–	Yes	No	Dead	No	No	No	No	Diocesan Priest, Metropolitan Melbourne, Victoria
V1-18	11-18	1965-72	MR	No	No	No	Dead	No	**	**	No	Diocesan Priest, Altona, Victoria
V1-19	8	Approx. 1969	TH	No	No	No	Not known	Not known	No	No	N/A	Christian Brother, Metropolitan Sydney, NSW
V1-20	11-12	1966-67	TH	Yes	No	No	Alive	No	No	No	N/A	Catholic Lay Teacher, Metropolitan Melbourne, Victoria
V1-21	11	1974	TH	No	No	No	Alive	No	No	No	N/A	Christian Brother, Country Victoria
V1-22	14	1980	No	–	Yes	No	Alive	No	Yes	Yes	N/A	Brother, Country Victoria
V1-23	12-13	1966-67	TH	No	No	No	Dead	Yes Somao	No	No	No	Salesian Priest, Country Victoria
V1-24	11-12	1972	TH	Yes	Yes	No	Alive	No	Yes	Yes	N/A	Marist Brother, Country Victoria

* Primary Victim withdrew from research.
** Pleaded guilty. No conviction recorded. Good behaviour bond.

Appendix 13 Secondary victim data

SECONDARY VICTIM		PRIMARY VICTIM				OFFENDER				
Code	Relationship to Primary Victim	Alive or dead. Gender.	Psychiatric Health	Drug and/ or Alcohol Problems	Age of Offence. Year(s) of Offences.	Alive or Dead	Fled	Con-victed. Jailed.	Laicised	Offender School or Parish
V2-1	Mother	Alive Male	Psychiatric problems	Drugs	Early teens 1970s	Alive	No	No No	No	Diocesan Parish Priest, Metropolitan Melbourne, Victoria
V2-2	Brother	Died at 56 Male	Psychiatric problems	Alcohol	Teens 1960s	Dead	No	No No	No	Priest, Metropolitan Melbourne, Victoria
V2-3 *										
V2-4	Father	Alive Male	OK	–	10-14 1990-94	Alive	No	Yes Yes	No	Diocesan Parish Priest, Metropolitan Melbourne, Victoria
V2-5	Partner	Alive Male	Depression	–	14-17 1983-86	Alive	Yes Bali	No No	No	Priest, Metropolitan Melbourne, Victoria
V2-6	Father	Suicided at 22. Male	Psychiatric problems	Drugs Alcohol	13-14 1983-84	Dead	Yes UK	No No	No	Diocesan Parish Priest, Gardenvale, Victoria
V2-7	Mother	Suicided at 22. Male	Psychiatric problems	Drugs Alcohol	13-14 1983-84	Dead	Yes UK	No No	No	Diocesan Parish Priest, Gardenvale, Victoria
V2-8	Mother	Suicided at 32. Female	Psychiatric problems	Alcohol	15-16 1977-78	Alive	Yes Perth	No No	No	Diocesan Parish Priest, Metropolitan Melbourne, Victoria
V2-9	Wife	Alive Male	Depression	–	11-16 1971-76	Dead	No	Yes Yes	No	Diocesan Parish Priest, Oakleigh, Victoria
V2-10a	Mother	Suicided at 26. Female	Psychiatric problems	Drugs	5-7 Late 1980s	Dead	No	No No	No	Diocesan Parish Priest, Oakleigh, Victoria
V2-10b	Mother	Alive Female	Acquired brain injury	Alcohol	5-7 Late 1980s	Dead	No	No No	No	Diocesan Parish Priest, Oakleigh, Victoria
V2-11	Sister	Died at 56 Male	Psychiatric problems	Alochol	Teens 1960s	Dead	No	No No	No	Priest, Metropolitan Melbourne, Victoria
V2-12a	Mother	Alive Male	Psychiatric problems	–	13 1985	Alive	No	Yes Yes	N/A	Catholic Lay Teacher, Country NSW
V2-12b	Mother	Alive Male	Psychiatric problems	–	13 1985	Alive	No	No No	No	Priest, Country NSW
V2-13	Wife	Alive Male	Depression	–	11-18 1965-72	Dead	No	** **	No	Diocesan Priest, Altona, Victoria
V2-14	Sister	Suicided at 32. Male	Psychiatric problems	Drugs Alcohol	10 1985	Alive	No	No No	N/A	Catholic Lay Teacher, Metropolitan Melbourne, Victoria
V2-15	Sister	Suicided at 32. Male	Psychiatric problems	Drugs Alcohol	10 1985	Alive	No	No No	N/A	Catholic Lay Teacher, Metropolitan Melbourne, Victoria
V2-16	Mother	Suicided at 29. Male	Psychiatric problems	Drugs Alcohol	15 1990	Alive	No	No No	No	Diocesan Parish Priest, Country Victoria
V2-17	Daughter	Alive Male	Depression	–	12-13 1966-67	Dead	Yes Samoa	No No	No	Salesian Priest, Country Victoria
V2-18	Wife	Alive Male	Depression	–	12-13 1966-67	Dead	Yes Samoa	No No	No	Salesian Priest, Country Victoria
V2-19	Mother	Died at 50 Male	Depression	Drugs Alcohol	12 1960s	Dead	Yes UK	No No	No	Diocesan Parish Priest, Metropolitan Melbourne, Victoria

* Secondary Victim withdrew from research.
** Pleaded guilty. No conviction recorded. Good behaviour bond.

Appendix 14 Primary victims associated with secondary victim interviewees

Secondary Victims	Primary Victims
V2-1	1
V2-2 and V2-11	1
V2-4	1
V2-5	1 *
V2-6 and V2-7	1
V2-8	1
V2-9	1 *
V2-10	2
V2-12	1 *
V2-13	1 *
V2-14 and V2-15	1
V2-16	1
V2-17 and V2-18	1 *
V2-19	1
Total Number of Secondary Victims: 18	**Total Number of Primary Victims: 15**

* Primary Victim was interviewed as one of the 23 Primary Victims