

MAILED 25-2 002

Commission into Sexual Abuse
Peter O'Callaghan Q C

Owen Dixon Chambers West
Room 1815
205 William Street
Melbourne 3000

23 February 2000

Tel 9608 7979
Fax 9640 0335

PRIVATE & CONFIDENTIAL

Mr A. & Mrs C Foster

REDACTED

Oakleigh 3166

Dear Anthony and Chris

Re: Application for Compensation

First let me apologise for not dealing with this matter earlier than I have. In that context, I advise that I have received a letter from your solicitors in relation to Katie, and I have replied to that letter.

With respect to the meeting we had on 6 May 1999 I limit myself in this letter to dealing with what was raised in relation to the applications for compensation which you had lodged with the Compensation Panel. Consequent upon that I had written to you on 17 November 1998 stating inter alia,

" I must advise you that I have made no findings that either or both of you were victims of sexual abuse within the meaning of the Terms and Conditions of my appointment. The only persons who can be classified as a victims of sexual abuse are those who have been actually abused. In a limited number of instances when another person such as a parent has been so proximate in point of time and place that person has also classified as a victim.

For instance, the parent who witnessed the assault upon his or her child.

However, in yours, as in many other cases, whilst the discovery of the abuse is a traumatic and distressing occurrence, this does not make that person a victim within the meaning of the Terms and Conditions of my appointment."

At the meeting on 6 May I understood Anthony to contend that the scheme introduced by the Archdiocese was to provide compensation to victims of sexual abuse and that both of you were such victims, and that I "contrary to the wishes of the Archdiocese was taking a legalistic approach to the position and denying people such as both of you compensation.

I said that I had fully considered your position as I have many others and Anthony then referred to the Terms and Conditions of the appointment and said that no where is there a definition of a victim. And as I recall he said "I defy you to sit there and say we are not victims".

I endeavoured to explain that I had the greatest sympathy for both of you and recognise the trauma, the stress and pain suffered by virtue of what had occurred, but that did not make you compensable within the terms and conditions of my appointment. Anthony did not accept that. I told him that I would again consider the matter and report in chapter and verse my reasons. Chris said that there did not seem to be much point in doing that if my mind is ready made up, and I said I would explain the reasons for the conclusions I have reached and do that in writing. This I now do.

Entitlement to Compensation

- (i) This is governed inter alia by the Terms and Conditions of my appointment by Archbishop Pell to enquire into allegations of sexual abuse by priests, religious and lay persons within the control of the Archdiocese of Melbourne. You are familiar with the Terms and Conditions ("Terms") of my appointment. The following definitions are relevant.

"Church person" includes any priest of the Archdiocese and religious, and lay persons, working within the Archdiocese.

"Complaint" means any complaint made to the Commissioner by a person that he or she has been sexually abused by a church person or a complaint made to the Commissioner by a person who complains that some other person has been sexually abused by a church person, and any complaint of sexual abuse by a church person which is referred to the Commissioner by any other body or person.

"Complainant" means any person making a complaint of sexual abuse as aforesaid.

"Sexual abuse" includes any form of criminal sexual assault, sexual harassment, or other conduct of a sexual nature that is inconsistent with the public vows, integrity of the ministerial relationship, duties or professional responsibilities of church personnel.

(ii) **The Compensation Panel**

Entitlement is also governed by the provisions applicable to the Compensation Panel. The Compensation Panel is a panel established to provide ex gratia payments to complainants of sexual abuse who establish the factual basis of their complaint.

The Compensation Panel is described as follows:

"In October 1996 Archbishop George Pell announced a range of initiatives to respond to allegations of sexual abuse made against priests, lay persons, and religious who are or were under the control of the Archbishop of Melbourne. One of these initiatives is the formation of a Compensation Panel, which will provide recommendations, binding on the Archbishop, to make ex gratia compensation payments to victims of sexual abuse within the Archdiocese.

The Panel is intended to offer applicants a forum in which they can seek fair, just and speedy ex gratia compensation in settlement of their claims in an informal and cost effective manner.

The maximum payment that can be recommended by the Panel is \$50,000 per person. In formulating its recommendations, the Panel will rely on findings of fact made by the Archbishop's Independent Commissioner, Mr Peter O'Callaghan Q.C. The Panel will also consider medical and other information submitted to it by applicants and, in addition, it may conduct its own inquiries.

It is also further provided that the Panel will rely exclusively on the report of the Independent Commissioner as to the facts surrounding the abuse. An applicant who wishes to supplement the Commissioner's report on such facts will need to raise this with the Commissioner.

The Commissioner will make his decision on all material presented to him. Essentially it will have regard to the physical, mental and spiritual effects of the assault on the applicant."

- (iii) The above documentation makes clear, in my opinion, that the only person entitled to compensation is a person who has been the actual victim of sexual abuse. Quite apart from the construction of the documents leading to that conclusion, it was made clear at the time of their preparation that this was to be the position. Thus the scheme of compensation does not extend to persons who may be, indirectly (albeit seriously), affected by the abuse of a victim.

- (iv) The classic illustration is a parent or close relative who is affected by knowing that his or her child or close relative has been the victim of sexual abuse. It is of course unfortunately the fact that many associates of victims of sexual abuse as a consequence of the abuse suffer psychological trauma. Conversely if for instance a parent of a victim is in close proximity to a sexual assault on his or her child e.g. that parent witnesses the assault, that parent would be treated as a victim within the meaning of the Terms and Conditions of my appointment.
- (v) But neither under the Compensation Scheme (which is an ex gratia scheme, i.e. it is not necessary to establish legal liability) or indeed under the civil law of torts (ie. negligent or wrongful acts), is a person who becomes aware of a wrong done to another person (eg. the child of), some years after the event, entitled to compensation.
- (vi) I do not here engage in an exhaustive analysis of relevant legal principles. However, by analogy with the principles of the common law, the Terms do not provide that a person who is not in close proximity, either in point of time or space, can be treated as a primary victim entitled to compensation under the Compensation Scheme. (See Jaensch v. Coffey 155 CLR 549)
- (vii) In both your cases it was many years after the abuse occurred that you became aware of it. I must again record my sympathy for all the trauma and upset occasioned by this tragic discovery and the effect which it has had upon the whole of the family.

Should there be any queries arising out of the above I would be happy to discuss same.

Yours sincerely,



Peter O'Callaghan
Independent Commissioner