REPORT
BY
PROFESSOR PATRICK PARKINSON

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FINAL REPORT: TOWARDS HEALING REVIEW

Prof. Patrick Parkinson AM

Introduction

Towards Healing was last reviewed in 1999-2000, following three years of its operation. I conducted that review. It involved an extensive process of consultation. Since that time, various relatively minor amendments have been made to the document to address specific issues.

The National Committee for Professional Standards decided in the latter part of 2008 that it would be desirable to have a further process of consultation on Towards Healing, by inviting written comments and submissions. It invited me once again to conduct the review. Such reconsideration was timely. As a system evolves, new issues arise that have to be dealt with, misunderstandings develop that need to be corrected, and issues of poor application need to be addressed, to the extent possible. For these reasons, Towards Healing has to be a living document, and one which is responsive both to a changing environment and to the needs of those involved.

The process of consultation

This review commenced in mid-November 2008. Letters went out inviting submissions to all church organizations and all community groups and other known organizations working to support victims of abuse. In addition, I met with the Directors of Professional Standards, the National Committee, and some individuals from whom I sought advice on specific issues.

I also wrote to the Archbishop of Melbourne to invite him to discuss bringing the processes of the Archdiocese into Towards Healing. He expressed continuing satisfaction with the processes of the Archdiocese. It follows that it is still not possible for the Catholic Church in Australia to have a uniform national approach.

The review generated a very substantial response from victims, church leaders and professionals involved with the process such as lawyers and mediators. Around 70 submissions were received in total. Many of the submissions went through Towards Healing paragraph by paragraph, making detailed suggestions about amendments. This demonstrates a high level of engagement with, and interest in, the text of Towards Healing.

Many of the submissions advocated for change from a particular perspective. Some submissions, for example, were most concerned with issues of fairness for accused persons. Others submissions advocated for the needs of complainants and expressed concerns about the fact that complaints had to be assessed, and that assessors did not just accept the complainant’s account at face value.
These tensions will always exist because *Towards Healing* by its very nature, may involve an assessment of complaints that have otherwise not been investigated by the police or gone to court, and where the reputation and livelihood of the accused person is at stake. Assessments in disputed cases need to be thorough and involve careful investigation of the facts because it is not only the complainant who has an interest in the outcome. The livelihood and place within the Church of the accused person may well be in issue if there is an adverse assessment. Even if the person has long since retired, his or her reputation will be at stake.

**Dissatisfaction with the implementation of *Towards Healing***

It is important to note that this Review was of the policies and procedures for receiving, assessing and responding to complaints of abuse. It was not an audit of the manner in which the processes have been carried out, nor of the levels of satisfaction or dissatisfaction with the process.

Policy can only go so far. It is only as good as its implementation. In particular, the process of *Towards Healing* is only as good as a complainant’s personal experience of it. It is now widely recognized that people’s experience of the processes of justice is as important as the outcome. If people feel that they have been treated fairly, and listened to with respect, they are much more likely to accept the outcome even if it is adverse. Conversely, people who feel poorly treated in a process may remain dissatisfied even if they have an apparently successful outcome.

*Towards Healing*, as a document, may espouse the most admirable principles, and seek to give effect to those principles with a suitable process, but if the reality falls far short of the intent, then a lot of harm can be done. However, it is possible to learn from failures of implementation in improving policy, as long as there is a willingness amongst all leaders of the Church to adhere to the improved policies in the future, and not to continue with their own variations on it.

There were 29 submissions from complainants or their relatives, (including two who had gone through the Melbourne process). One man wrote specially to say how much he had appreciated the role *Towards Healing* had played in helping him, and praised in particular the care shown by a Director for Professional Standards.

Others relayed their disappointment with aspects of the process, or were critical of the way in which the Church dealt with their case. Some reported that they felt they were ‘interrogated’ by the assessors in a confrontational manner. Others expressed disappointment with the way in which the facilitation was handled. A particular issue for a small number of female complainants was the lack of gender balance in who was present at the facilitation. Some called for a process entirely independent of the Church. Some said they were re-abused by the process.

There have been more than 2500 cases dealt with under *Towards Healing* since 1996, not including cases dealt with under the separate procedures of the Archdiocese of Melbourne or – in the first few years - by the Jesuits. This number includes all kinds of cases, and only a proportion of them involve alleged child sexual abuse. Many
complainants alleged inappropriate care practices or physical abuse in children's homes. Others concerned sexual relationships with adults that were in breach of the pastoral responsibilities of the priest or religious. Against this background, the numbers who wrote in with complaints represented a quite small proportion of those who have been through Towards Healing over the years.

Nonetheless some of the accounts of failures in the process were disturbing. A recurring theme was about delay, with cases taking one or two years or even longer, and complainants not being given information about what was happening. There seem to be many different reasons for the delays. In some cases, difficulty contacting the complainant, or in getting responses through solicitors where they are involved, has prolonged the process. In other cases, it has been the assessment which has taken such a long time. In other cases still, the Church authority has not been diligent in moving the case forward. In some cases these factors have operated cumulatively, adding delay to delay.

It is important that the Church should have information about satisfaction and dissatisfaction with the process, which is more than anecdotal. For this reason I recommend as follows:

**Recommendation 1.**

The Church should follow up all complainants who have gone through Towards Healing with an 'exit survey' three months after final resolution of the matter has been reached. The exit survey should seek information on:

- How long the process took from first complaint to final resolution
- How satisfied the complainant was in the way the case was handled by:
  - The Director of Professional Standards
  - The assessors (if an assessment was required)
  - Any psychologist, psychiatrist or other health professional appointed to conduct an assessment of the impact of the abuse about which complaint was made
  - The Church authority
  - The facilitator
  - The National Review Panel, if there was a review of process and findings.

There should be a similar survey for accused persons who have cooperated with the process, three months after the conclusion of the process for the complainant.

The reason for waiting three months before contacting the complainant again is to allow for some perspective on the whole process and to see how the resolution achieved at the facilitation, if there was one, has impacted upon the complainant's wellbeing. It will be important to tell the complainant that this letter will be coming at the time of resolution and to encourage them to respond. Honesty might best be achieved if the
responses were posted in a Reply Paid envelope to the National Office. The accused should be surveyed at the same time to get his or her reactions to the process with the benefit of a similar period of perspective, and after the Church authority has had an opportunity to address the issues in relation to the accused in response to the findings of the assessment.

**Issues that have arisen in the submissions and consultations**

There are a number of key issues that have arisen over the years in discussions about *Towards Healing*, and indeed in media commentary about it. These continue to be reflected in the submissions and consultations for this review. Before addressing my specific recommendations for change, it is appropriate to address these ‘big picture’ issues so that the reasons for the proposed changes, and the reasons why other proposed changes have not been accepted, will be more clearly seen.

1. *Should all matters be dealt with by the police?*

There are perennial calls for all cases to be dealt with by referral to the police rather than by the investigatory processes established under *Towards Healing*. The concern is expressed that by commissioning assessments and deciding on the future of accused people, the Church is ‘judging its own’. This is nonetheless, a misunderstanding of the purpose of *Towards Healing*. The Church, in *Towards Healing*, has always emphasized that complainants who allege criminal offences should go to the police. It urges them to do so, and offers assistance for them to do so. The criminal justice system offers an entirely independent process for investigating complaints that involve alleged criminal offences.

Wherever possible, matters should be investigated by the police where they involve alleged criminal offences. However, the reality is that many complainants will not go to the police, or complaints will not be resolved by a police investigation, for three reasons.

- Many complaints do not involve criminal offences. Some concern the standard of care in children’s homes. Others involve apparently consensual sexual relations between adults where the abuse lies in the exploitation of the pastoral relationship (in particular the spiritual authority of the priest) in procuring that consent.
- Some complainants may be fearful of having to give evidence in a criminal trial and to be cross-examined at length on all the details of the complaint. The practical operation of the criminal justice system has long deterred rape victims and victims of child sexual assault from coming forward.
- The longer the delay between incident and complaint (and for victims of child sexual abuse in particular, that delay may be many years) the harder it is to prove a case in the criminal courts beyond reasonable doubt. There are also limitations on what evidence the courts deem to be admissible.

Even if the matter is investigated by the police, that doesn’t resolve all the issues from the Church’s point of view. The fact that the police do not consider that there is enough evidence to press charges, or the case is dropped by the Director of Public Prosecutions because there is insufficient likelihood of conviction, does not necessarily mean that
there are no concerns to be addressed. The criminal standard of proof - beyond reasonable doubt - is a very high standard of proof. There are good reasons for this. The law has long held that it is better for nine guilty people to go free than for one innocent person to be convicted. On the other hand, when it comes to questions of who should be allowed to engage in work that gives them unsupervised access to children, the community quite rightly demands its own high standards. This is expressed in Towards Healing as the standard that no-one should be allowed to work with children if there is an unacceptable risk of abuse.

Those who consider that the Church should only rely on police investigations - so that if the case does not end up in a criminal conviction, no action at all should be taken in relation to the employment status of someone working with children - are arguing that the Church should place a very low priority on children's safety. Far from usurping the role of the police, Towards Healing is part of the Church's response to the need to give a very high priority indeed to the protection of children and vulnerable adults.

A further reason why Towards Healing needs to exist is that a police investigation is only concerned with whether the accused person should be punished in the criminal courts. It does not help the complainant. Towards Healing was designed first and foremost as a pastoral response to the needs of victims of abuse, many of whom have suffered very serious long-term consequences. The Church took the view that whether or not it had any legal obligation, it should do something to address those needs. The fact that the case has gone through the criminal justice system does not mean that no further response is required from the Church. There is still at least a moral obligation to respond to the needs of the victim.

For these reasons, many cases in which criminal conduct is alleged will need to be investigated under Towards Healing. The Church considers it has a responsibility towards complainants to do so and if an accused person represents a risk to children or vulnerable adults, it has a duty to investigate the matter even if the complainant does not report the matter to the police.

2. The Church's cooperation with criminal justice investigations

The introduction to the second edition of Towards Healing contained this statement:

"Like the earlier document, this document establishes public criteria according to which the community may judge the resolve of Church leaders to address issues of abuse within the Church. If we do not follow the principles and procedures of this document, we will have failed according to our own criteria."

There was a similar statement contained in the 1996 version of Towards Healing. The Church, collectively, made a number of commitments. These included a commitment to truth (para 13):

"The Church makes a commitment to seek to know the full extent of the problem of abuse and the causes of such behaviour within a community that professes the values of Jesus Christ."
The Church also pledged its full cooperation with the police.

During the course of this review, it has become clear that in a few cases, the level of cooperation given to the police and other civil authorities in dealing with issues of sexual abuse has not met the standards to which the Church committed itself in 1996 and again in 2000.

One example is the efforts which were apparently made by one religious order to prevent the extradition of two of its members to face trial in New Zealand on charges of child sexual abuse. Those efforts to prevent extradition were ultimately unsuccessful, with the High Court of Australia in 2006 rejecting an application for special leave to appeal from the decision of a Full Federal Court.

Of course, if an individual priest or brother who is accused of sex offences against children wants to fight extradition charges, that is a matter for them. The issue is what assistance the Church should give them to do so, in particular by meeting legal costs. It is consistent with the principles voluntarily adopted by all dioceses and religious institutes, that any person found to be in Australia who is wanted to face charges in another country should be returned to face justice in that jurisdiction to the extent that the Church authority can ensure this. It can ensure this if the accused person continues to be under the authority of the religious order or diocese, since a failure to comply with the orders of Church leaders to return ought to result in disciplinary action against the person. The Church has leverage so long as a person wants to continue in the ministry of the Church and in receipt of financial provision from the Church.

It may be very damaging to the worldwide reputation of the Church if the Church in one country publicly commits itself to full cooperation with the police in relation to the investigation and prosecution of alleged crimes, while a Church entity in another country actively assists one of its members to resist a return to the country in which those crimes are alleged to have been committed.

Members of religious orders, particularly, may be in need of assistance with legal costs if they have no resources of their own (through family support, for example) to provide for a legal defence. The Towards Healing protocol envisages that a Church authority may provide assistance with legal representation, and this includes providing a legal defence to criminal charges in another country. However to fund at great cost, a legal fight to prevent extradition is to undermine the commitments that the Church has made to cooperate with the police and the criminal justice system in other countries. In the same way, it would be damaging to the reputation of the Catholic Church if a religious order or diocese in another country were to actively assist an accused priest in a fight to avoid facing justice in Australia for crimes allegedly committed on Australian soil.

A further issue concerns the way in which Church authorities deal with accused persons who leave Australia and continue in ministry in other countries. No Church leader should ever aid and abet an accused person to leave the jurisdiction when there are accusations of criminal offences. If a person is allowed to leave Australia to work in another country, under the auspices of the religious order, then issues may arise whether the Church leadership itself has conspired to pervert the course of justice. If a person is overseas and serious issues about criminal offences have arisen in Australia
and are being investigated by the Australian police, then the Church leadership in the
country to which that person has gone should insist on their return to be interviewed by
police in Australia, whether or not there is an extradition treaty between the two
countries.

Of course, whether an individual priest or brother answers questions put to them by the
police is up to them. They have the right to remain silent. The Church, for its part,
should do what it can to ensure that it is cooperating with the police investigation to the
greatest extent possible, by using its authority over those who remain submitted to the
Church leadership. In my view, the only exception to the requirement to return an
accused person to the jurisdiction in which they are under investigation should be
where there are reasonable grounds for grave concern that the person will be unable to
have a fair trial if returned to that other country. It is unlikely that Australia would
have an extradition treaty with a country about which such grave concerns could reasonably
be held. The Church should lend no assistance to an individual in frustrating a police
investigation in a country which is committed to the rule of law and to procedural
fairness in the conduct of criminal trials.

Recommendation 2

The Church should cooperate with police investigations concerning offences of child sexual
abuse or crimes of violence against adults by:

1. Requiring priests in a diocese, or members of religious orders, to return to the
country where the alleged offences occurred and refusing to fund legal costs to fight
extradition proceedings unless the Church authority receives written advice from
senior counsel or another legal expert with expertise in the law of that country; that
there are reasonable grounds for grave concern that the person will be unable to
have a fair trial if returned to that country.
2. Taking disciplinary action against any priest or religious who fails to comply with such
instructions.
3. Requesting Church authorities overseas to require priests or religious who are
situated in the relevant country and wanted for questioning in Australia to return to
Australia for the purposes of cooperating with a police investigation, and publicizing
any failure by the overseas Church authority to do so.

3. Should claims for compensation be left to the courts as well?

A small number of submissions from complainants called for the Towards Healing
process to be entirely independent of the Catholic Church. There is a way in which
complainants’ claims can be dealt with independently of the Church. This is to
commence a ‘civil’ claim for compensation. Generally the basis of such a claim is that the
Church is in some way responsible for the wrongdoing committed by Church personnel
and for the harm that the wrongdoing has caused.
However, there are many issues involved for complainants in proceeding by way of filing a civil claim. First, the Limitation Acts of the various States may bar such an application if there was too long a delay between incident and the initiation of the proceedings. That hurdle may be overcome in some instances, particularly when the abuse occurred in the person's childhood and complaint was made within a few years of reaching adulthood, but the Limitation Acts still represent a significant barrier for many complainants.

Secondly, there is the cost and stress of litigation. Some lawyers will take cases on a no-win, no fee basis. That means there is no upfront cost, but the eventual legal bills may eat significantly into a settlement or award of damages. There is also the problem of the person or entity against whom litigation can be brought. Church organizations, such as dioceses or religious orders, are typically unincorporated associations. That is they are not constituted as companies that can be sued. Their legal structure is much more primitive. If the Bishop or Archbishop of a diocese at the time the events occurred, or the leader of the religious order at the time, is still alive, that person can be sued in his (or her) capacity as the leader of the organisation (*Ellis v Pelt*). However, many complaints arise in relation to events years and years beforehand, when those in leadership positions have long since died.

A third obstacle is establishing legal responsibility. That responsibility is most likely to be found if the leader of the time knew of the abusive behaviour and did not remove the person from ministry; but what if the leader knew nothing of the abuse, and nor did anyone else in the organization? Sexual abuse usually occurs in secret. The responsibility for the abuse is in the first instance that of the offender. Establishing the liability of an organization to which that offender belonged is not at all straightforward.

For these reasons, there are significant obstacles to civil claims. *Towards Healing* therefore offers another kind of response. It is a pastoral response which does not depend on proving that the Church is legally liable. It is a response to the needs of victims of abuse, rather than a response driven by settling legal claims. It aims to promote healing, and one of its central features is the meeting between the Bishop or leader of the religious order and the complainant. In this meeting, the complainant's suffering can be acknowledged, truth can be told, apologies offered and a response given to the needs of the complainant.

The closest analogy to *Towards Healing* is a Victims' Compensation Scheme. These have been established in the States and Territories to provide compensation for victims of violent crime. The funds come from the State. They are paid not because the State is legally liable, but out of concern for the victim. The State schemes provide monetary sums and money for counselling costs. In certain states, for example, Western Australia, state governments have set up special funds to compensate those who have been abused in children's homes. Typically, a deed of release is sought in return for a compensation payment. In the same way, if money is given as part of a resolution of a *Towards Healing* case, it is intended to be to help meet the needs of the victim rather than merely to provide compensation for pain and suffering. No sum of money can repair the damage from serious forms of child abuse. *Towards Healing* uses the term 'reparation' which is defined in the proposed new edition as follows:
'Reparation' may take the form of a monetary sum or some form of in-kind assistance that is directed to the provision of practical means of support in order to promote healing for the victim. It is provided by the Church Authority as a means of recognizing the harm suffered by a victim of a criminal offence or civil wrong, and as a tangible expression of the Church Authority’s regret that such abuse occurred. Reparation may be offered independently of whether the Church Authority is legally liable.

Complainants cannot expect the same level of compensation as if they had been able to prove a civil case in court and to show that the Church authority was legally liable. In some cases, a Church authority or its insurance company may be persuaded to pay substantial sums by way of compensation because there is a strong basis for a civil claim and the case is settled under the ‘umbrella’ of Towards Healing – usually with legal representation. However, in many other cases dealt with in Towards Healing, the difficulties in establishing the legal liability of the Church authority in a civil case would be very considerable – but even still the Church authority makes a response out of concern for the complainant.

4. Should Towards Healing be independent of the Catholic Church?

Because Towards Healing functions outside the court system, and because the Church is making its own response to the complainant, it must necessarily be a Church-run program. If people want to engage in an entirely independent process, the courts are there for that purpose. Towards Healing offers an alternative, but one which both the Church and the complainant engage in on an entirely voluntary basis.

Having said this, there is merit in the idea that Towards Healing should not be seen to be a purely internal process. The National Committee for Professional Standards already involves eminent people who are not adherents to the Catholic faith in its National Review Panel and review process. People from a range of backgrounds also serve on Professional Standards Resource Groups in some States. My own background is an evangelical Christian who currently attends a Baptist Church. There is a growing level of cooperation between Churches on these matters, which is a very positive development.

While it is not always easy to find suitable people to serve on committees, and in particular to conduct assessments, it would only enhance the credibility of the process if further efforts were made to involve more people who are not Catholics in the processes of Towards Healing.

Recommendation 3

Church authorities, Directors of Professional Standards and the National Committee for Professional Standards should endeavour to involve more people in its processes, particularly on Professional Standards Resource Groups, as assessors and on the National Review Panel, who are not adherents to the Catholic faith.
5. The tension between legal and pastoral approaches

Many of the submissions reflected the tension between two conflicting, but equally valid, approaches to the issue of dealing with victims of abuse.

The first is the legal approach – both to complainants and accused. The strengths of this approach are the emphasis on due process including proving claims to the requisite standard, assessing compensation fairly in accordance with the objective gravity of the harm caused, and treating like cases alike.

The second is the pastoral approach of giving a compassionate response, seeking to promote healing for the victim, and to the extent that it is possible, bringing about some level of reconciliation between the victim and the Church, while also being fair to accused persons. This also has great strengths. It does not aim to offer a quasi-legal approach to the resolution of civil claims for compensation, but rather to engage in restoration and healing, acknowledging within that the importance in many cases of making reparation as a tangible expression of sorrow and also as one means, but not the only means, of promoting healing for the victim.

The provision of reparation, where there has been a criminal offence or civil wrong, is also intended to resolve, from a legal point of view, any issues of liability for the Church authority. While the payment of a sum by way of reparation is not dependent on the establishment of the Church’s civil liability, it is nonetheless appropriate that any potential legal claims are settled in the process of reaching a resolution. For this reason, the pastoral approach is not, and cannot be, entirely separated from the issue of potential civil claims. Such potential claims are also an issue for any insurer involved in meeting the costs of reparation.

Because the Church authority may have to take steps to deal with the future ministry of an accused person where there has been an adverse finding from the assessment process, the pastoral approach also needs to address properly the requirements of due process for the accused.

It follows from this that pastoral and legal approaches are not independent of one another, but they can be in tension. Resolving this tension between the pastoral and legal approaches is a critical issue – for both sets of demands are being placed every day upon the Towards Healing process, and are reflected in submissions to this review.

6. Towards Healing, reparation and compensation panels

One version of a legal approach, in terms of awarding monetary sums to complainant, is to establish a compensation panel to adjudicate on the amounts to be awarded. This is the approach taken, for example, by the Archdiocese of Melbourne. A compensation scheme of this kind has the advantage of providing consistency. One of the criticisms of Towards Healing is that there can be significant variation between the amounts of money provided in what are apparently similar cases of criminal offences or civil wrongs.
I gave serious consideration again in this review to the possibility of proposing compensation panels in each state. In the 2000 version of *Towards Healing*, there was reference to the option of establishing a compensation panel, but no diocese or religious order did so.

After careful reflection, I do not consider it desirable to establish compensation panels. They may offer some measure of consistency. However, I consider that while consistency in monetary awards is a desirable goal, it is difficult to achieve, and for three reasons.

a) The purpose of monetary payments is to meet the needs of the victim. The intention is, wherever possible, to tie the payments to something specific such as education for the person; paying for a drug rehabilitation program; providing a holiday that will mark the beginnings of a fresh start; helping to provide some accommodation; or paying for counselling costs and other treatment. Because people's needs vary, so may also levels of monetary payment. Furthermore, because a compensation panel can only award monetary sums, it is not a suitable means of working out the creative in-kind forms of provision that will meet tangible needs of the victim and which ties payments to those purposes.

b) Many claims brought under *Towards Healing* are uninsured. A compensation panel could make recommendations for an appropriate level of monetary compensation, but if that is not backed up by insurance, there may issues about whether the payment is affordable. The different dioceses and religious orders vary considerably in their resources. People often think the Catholic Church is a single organization. It is rather a collection of semi-autonomous organizations sharing a common faith and with a common recognition of the authority of the Vatican. As the Cumberlege report in the UK stated:

"The Church is collegiate, not a homogenous organisation working to a clearly established hierarchy with lines of accountability as generally understood by the secular world. Authority rests with each Bishop in his diocese and each Congregational Leader in his or her congregation. Though they come together through the Conference of Bishops and as a federation in the Conference of Religious respectively, they have differing priorities and, just as importantly, different levels of resources upon which to draw."


One Church authority may simply be unable to afford what another one might be able to pay in response to an uninsured claim.

c) Even in relation to insured claims, the amount awarded by a compensation panel may not be what the insurance company is willing to pay in the circumstances. The insurance company will look not only at the level of harm but also the risk of an adverse finding in court proceedings. Two people may have been abused in a similar way, and have experienced reasonably similar levels of harm, but one may have a strong civil claim and the other a weak one. The civil justice system will not treat both cases equally, and nor can an insurance company which has
obligations not only to shareholders but also to reinsurers to make commercially defensible decisions on the award of monetary compensation.

For these reasons, I do not believe that a compensation panel on a statewide or national basis would be an appropriate way forward. It is necessary to accept that there will be some variation in monetary awards through the Towards Healing process just as there will be in the courts. However, there is a degree of consistency provided by the fact that the insurer for most Church authorities is Catholic Church Insurances (CCI). In relation to insured claims at least, it can be expected that CCI will provide a similar level of consistency to that which could be expected from a compensation panel in cases where there is a similar likelihood of an adverse finding for the Church Authority in civil proceedings.

7. The qualifications of assessors

The investigation needs to be thorough while also being conducted sensitively and in a manner that does not cause undue distress. Assessors need a sufficient degree of independence to be able to evaluate the evidence impartially.

One proposal that was made in submissions was that all assessments be carried out by lawyers. The Melbourne approach was given as the archetype. A retired QC conducts a trial into all disputed allegations.

While lawyers may well be suitable assessors, an advantage of having a range of assessors and not insisting on a particular qualification is that the right people can be recruited for the demands of the task. Having investigative skills may for example, be as important as having the skill needed to evaluate the evidence in terms of its probative value. Assessors need to travel to see people and conduct interviews. The barrister who may be highly qualified to evaluate material according to the laws of evidence applied by courts, may be much less skilled at gathering it. A barrister may or may not also have the degree of sensitivity needed to interview a very distressed complainant who is recalling events that have caused great anguish. A retired detective or a clinical psychologist with experience in sexual assault matters may well be able to provide a much more nuanced and more expert assessment of a case than a lawyer who does not have the benefit of such professional experience and expertise.

In some cases, lawyers are used in assessments, and this practice should continue. In a few cases, an assessment has taken the form of a hearing, with counsel assisting being appointed to 'prosecute' the case and witnesses being subjected to examination and cross-examination by lawyers. In my view, however, it is best to choose the most appropriate assessors, and the most appropriate process, for each case and not to apply a rigid formula.

There is also no reason to proceed routinely by a process that mimics a criminal trial. In the secular world, investigations leading to a written report by an investigator, are a common means of dealing with allegations of serious misconduct for the purposes of determining a person's future in employment. They do not involve a quasi-criminal hearing run by barristers and judges. Court proceedings may in a few cases be a part of
the process if complaint is made of unfair dismissal following such an investigatory process, but they are not the norm as a first response to complaints of misconduct.

To improve the quality of assessments, I recommend the greater use of lawyers to assist assessors who are not legally qualified.

Recommendation 4

That the Professional Standards Resource Group responsible for each State or Territory should endeavour to recruit a panel of lawyers or retired judges who would be willing, on a pro-bono basis, to look at draft assessment reports referred to them by the Director of Professional Standards. The Director should refer a draft assessment report to a lawyer for advice in circumstances where the case appears to be a complex one and/or where the consequences for the accused from an adverse finding could be permanent removal from ministry or dismissal as an employee. The role of the lawyer should be to review the assessment of the evidence and to advise on whether he or she considers that a finding could be made on the balance of probabilities given the information available. The lawyer may then make recommendations to the assessors, but the final responsibility for the report should remain with the assessors.

8. Making decisions in relation to future ministry

Towards Healing deals only in general terms with what should happen in cases where complaints are substantiated against an accused person who is still in active ministry. All the circumstances of the case need to be considered since complaints brought under Towards Healing vary considerably – some involve the most serious criminal offences while others do not involve a criminal offence or civil wrong at all, but still represent boundary violations that are inconsistent with the pastoral relationship. What action is taken must also be consistent with the employment laws governing that person’s position.

One of the issues that has emerged from submissions in this review is how serious the offending needs to be to justify removal from ministry. The previous versions of Towards Healing have stated the principle that: “Serious offenders will not be given back the power they have abused” (para 27).

So what is a serious offender? Clearly a case of child sexual assault is by any definition a serious offence. What about situations where a priest or religious has sexual relations with a consenting adult for whom the priest or religious has pastoral responsibility? Examples include where a priest has a sexual relationship with a woman who is a member of the parish congregation or a leader of a religious order has sexual relations with a novice brother who is under his spiritual charge. Of course, sexual misconduct of this kind is a sin, but does it represent a sufficiently serious offence to disqualify a person from pastoral ministry?
What is often not adequately understood is that such relationships can be the result of the most serious exploitation of spiritual authority. The leader of the religious order who engages in homosexual activity with a new recruit to the Order is not necessarily just engaging in homosexual behavior. There is a vast differential in power between the two, and the leader of the order is also in a position of being a spiritual teacher and mentor to the novice. Similarly, the priest who has a sexual relationship with a member of the parish faith community may well be exploiting his status as priest, and the spiritual authority and mystique that goes with that office. Such exploitation may not be at all conscious. Indeed the other person may be the initiator of the sexual relationship. Towards Healing is nonetheless clear that:

"Even when the other person concerned is the one who seeks to sexualise the relationship, it is the professional responsibility of clergy or religious to guard the boundary against sexual contact."

Our sexuality is an inherent part of what it means to be human, and in as large an organization as the Catholic Church, in which a call to pastoral ministry as priest or religious also means a call to celibacy, it should not be surprising that some fail to maintain that high standard required by the Church. Towards Healing is not a protocol to investigate breaches of the vow of celibacy nor to monitor the adherence of Catholic lay people to the teachings of the Church on sexual relationships. That people sin is not at all a reason to remove them from ministry.

However, even if the sexual relationship occurred in circumstances where the priest or religious had no intention to exploit his position of spiritual authority, and perhaps was responding to the sexual advances of the other, it must be recognized that great harm can result from the confusion of roles that is involved in combining the role of father in faith with lover, and in circumstances where the private behavior so clearly violates the public teaching. The harm of such sexual activity often lies in the betrayal of the values for which the priest or religious stands. The secretive and surreptitious manner of engaging in such a relationship adds to the guilt it engenders.

So when does engaging in sexual relationships with adults represent a serious offence such that the appropriate response should be withdrawal from pastoral ministry? The proposed revised procedures answer this by an amended version of paragraph 27:

"Account will be taken of how serious was the violation of the integrity of the pastoral relationship, and whether there is a likelihood that such behaviour could be repeated. Serious offenders, in particular those who have been found responsible for sexually abusing a minor or whose record of abuse of adult pastoral relationships indicates that they could well engage in further sexual exploitation of vulnerable adults, will not be given back the power they have abused."

It is the experience of the Catholic Church, as well as other mainstream churches, that some priests or ministers engage in serial relationships with adults in their congregations. That is, their behavior is not just sinful. It is predatory. They exploit their position of trust, spiritual power and influence, to draw people into sexual relationships. Sometimes such ministers have more than one such relationship at the.
same time. In other cases, they discard one relationship after a while and then move on to another, and then another.

Predatory behavior ought to lead to complete removal from pastoral ministry. This new guidance in the revised version of *Towards Healing* may assist the assessors and Church leaders to ask the right questions in determining the future of priests and religious who have had sexual relations with adults. Does the past history, and the circumstances in which the consent of the other was procured, indicate a pattern of predatory behaviour? Is the behaviour likely to be repeated? If so, the priest or religious should "not be given back the power they have abused."

Whether other behaviour that is not predatory and likely to be repeated should lead to permanent removal from pastoral ministry is of course, a matter for the Church to determine in relation to the circumstances of each case. The Church will, no doubt, be concerned not only with the risk of further abuse, but also with the seriousness of the breach of the Church's own teaching and moral standards. It is damaging to the witness of the Church if its leaders willfully and persistently ignore in private what they proclaim in public. The proposed new version of *Towards Healing* for that reason requires an assessment to be made in such cases of how serious was the violation of the integrity of the pastoral relationship. No doubt reasonable minds will differ on the place of repentance and forgiveness in making such difficult determinations, and how much weight to give to contrition that is only evident after discovery.

9. **Risks in ministry with children**

A further issue concerns the circumstances in which a person should be removed from ministry with children. In most cases, the assessment process will yield a conclusion one way or another concerning whether on the balance of probabilities, a complaint can be substantiated. However, there are cases where a conclusion cannot be reached on the balance of probabilities, but where the question must be faced, taking all the circumstances into account, should an accused person continue in a ministry that involves unsupervised work with children?

The test laid down in *Towards Healing* is one of unacceptable risk. Paragraph 30 states:

"No person shall be permitted to work in a position if the Church authority believes, on the basis of all the information available, that there is an unacceptable risk that children or young people may be abused."

A few submissions argued that any risk at all is unacceptable, and for that reason, wanted to delete the word 'unacceptable'. That would be to set the bar too high. It would mean, for example, that people who have built their careers working with children would not be able to do so if there was any concern that they might have abused children.

The test of 'unacceptable risk' was developed by the High Court of Australia in the context of determining when a father should be denied contact with his child in the absence of convincing proof that he had in fact, sexually abused her (*M v M*, 1988). The High Court considered a number of words which could give expression to the gravity of
the risk that ought to be required before taking the grave step of denying a parent contact with his own children. The Court concluded that the term 'unacceptable risk' best captured the balance to be found.

The unacceptable risk test requires a decision-maker to go beyond the mere fact that an allegation has been made. The decision-maker must consider the degree of likelihood that the person has abused a child or may do so, given the behavior that has been demonstrated. The unacceptable risk test looks to the future, in the light of what is known in the past. If, for example, investigators were to find a collection of child pornography at a person's home or on his computer, there would clearly be an unacceptable risk if that person were allowed to work with children. Even if a jail sentence were not imposed for the offence, the person ought to be dismissed from ministry involving children.

10. Lawyers representing complainants

Another issue concerns the role of lawyers representing complainants. Although this has long been a feature of Towards Healing in practice, the policy does not really indicate how, if at all, lawyers fit into the process.

It needs to be recognized that lawyers may make a very positive contribution in assisting vulnerable and damaged people to come forward and to seek healing. Many victims need advocacy, and cannot manage to negotiate the process without support from someone that they trust is promoting their best interests.

One of the problems, however, is that in many cases, Towards Healing seems to have been reduced to a quasi-civil law negotiation between lawyers for the complainant and lawyers for the Church with the pastoral aspects of the process being marginalized. The complaint is initiated by a lawyer who represents the client, and the lawyer manages the process from beginning to end on behalf of the complainant. At the facilitation, the lawyer for the complainant negotiates on the complainant's behalf, often with the lawyer for the Church authority or for CCI (or both). In some cases, lawyers refuse to allow the Director of Professional Standards to talk directly to the complainant. The complainant may not want to engage with the Church in any way beyond receiving compensation.

Many of these lawyer-run cases which occur ostensibly under Towards Healing follow processes in fact that look very much like the normal process for resolving civil claims. In resolving a civil claim, the lawyer on behalf of the complainant puts forward his or her case; the insurance company, effectively representing the Church authority, determines the likelihood that the complainant could be successful in civil litigation and the magnitude of damages that could be awarded in the event of such success; it then makes a commercial decision about whether to try to settle rather than to litigate. If settlement is the preferred option, there is a process of negotiation between lawyers and perhaps mediation, to try to broker a settlement. The process is no different than in relation to any other kind of civil claim, such as for medical negligence or unfair dismissal.
So what difference does it make if the case is ostensibly brought under *Towards Healing*? If the case is essentially a lawyer-run case and the complainant's interest in the matter is only to gain compensation, then what *Towards Healing* does is to provide an investigation and assessment, and to involve the Bishop or Provincial personally in what is essentially just a mediated settlement process between lawyers. There may well be no pastoral work being done at all.

In these circumstances, it is better in my view to recognize that the process is really not one which is occurring in the spirit of *Towards Healing* and that involving the Church authority personally in a negotiation about money which is mainly conducted between the insurance company and the lawyer for the plaintiff is at best unnecessary and at worst unhelpful. It may very well be that after a settlement of an actual or potential civil claim, the Church authority may want to write to the complainant personally to express regret for the harm caused or to offer to meet with the complainant. Saying sorry is often very important indeed even where the Church and the complainant have been on opposite sides of civil litigation. However, that pastoral step can be achieved without going through the *Towards Healing* process in its entirety. Furthermore, it undermines and debases the process of *Towards Healing* if it is little more than a label under which negotiations occur between lawyers in the shadow of the law concerning civil liability.

For these reasons, my recommendation is that if what the complainant is seeking is nothing more than to pursue a claim for compensation, this should occur without invoking the apparatus of *Towards Healing*. There is no need for the Church to take the initiative of an assessment, for it is up to the plaintiff to gather evidence and to prove his or her case; the Director of Professional Standards would need to be informed of the case but would otherwise take no active part; nor would a facilitation be appropriate, although the lawyers on each side might decide to use a mediator to help negotiate a settlement. The review of process would not be available to a complainant either. The well-known and familiar pathway of trying to settle the matter by negotiation between lawyers is the appropriate way forward.

Of course, in a case where the accused is still serving in ministry, an accusation brought against that person will need to be investigated, not to resolve the civil claim, but as a matter of risk assessment for the Church in terms of the future ministry of that person. The assistance of the complainant may need to be sought for the purposes of such an investigation. A referral to the police will be appropriate if a criminal offence is alleged.

Making this clear distinction between *Towards Healing* and the alternative pathway of pursuing a civil claim should resolve some of the issues concerning the current process. Fewer cases will be dealt with under the *Towards Healing* process which will relieve some pressure on Directors of Professional Standards and the National Office. The problem of lawyers refusing to cooperate with the Director of Professional Standards and acting as a barrier between the Church and the complainant/client will no longer be an issue because if the complainant does not want to participate directly in the process, then by definition, it is not a *Towards Healing* case.
11. Legal advice on a deed of release

Recognising that in some cases under *Towards Healing*, there is the potential for a civil claim, the insurance company may well require a deed of release, in which the complainant gives up an entitlement to bring a civil claim in the future.

A deed of release should not be sought unless there is a reasonable likelihood that there could be a subsequent civil claim. A simple letter of closure on the letterhead of the diocese or religious institute may be all that is needed in many cases.

Where there is a deed of release required, it is essential that the complainant has independent legal advice. This is standard practice already, however one complainant who went through the Melbourne process indicated that he was asked to sign - and did sign - a deed of release without any legal advice whatsoever. The requirement is now specified in the proposed third edition. The proposed new edition of *Towards Healing* states that the Church authority should pay the reasonable costs of legal advice for the purposes of obtaining a deed of release, and a contribution towards the reasonable costs of representing the complainant.

What is reasonable, in circumstances where no other representation is being provided, may depend on the complexity of the case. Redress WA, a compensation scheme for those who have suffered abuse in children's homes in Western Australia, currently pays lawyers $1000 for advising on a deed of release. Such a figure can be justified on the basis that while in some cases, investigation of the prospects for a successful civil claim will require more time, other cases will be more straightforward, and one lawyer may well see many complainants who are in similar circumstances. A set fee averages out the time involved in providing advice across a range of cases. Any set fee should exclude the reasonable cost of disbursements incurred in providing such advice.

In more complex cases, particularly where there is a reasonable possibility of pursuing civil litigation, a higher sum, together with the costs of disbursements, may well be appropriate.

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Recommendation 5:

The National Committee of Professional Standards should determine from time to time a reasonable level for legal fees for the purposes of giving advice on a deed of release in a case which does not involve particular complexity.

The Church should meet the reasonable costs of giving advice on a deed of release and for necessary disbursements. A lawyer should be able to seek payment above the scheduled fee in cases certified as complex. The process for determining whether a matter is complex should be determined by the National Committee for Professional Standards.
12. Alternative processes to Towards Healing for some kinds of claim

Experience shows that a great variety of complaints are made under Towards Healing. Some may not fall within the definition of abuse at all. Other complaints, while formulated in the language of abuse, may involve complaints which are not close to the serious end of the spectrum. In relation to sexual conduct, the complaint may be of inappropriate behaviour, falling well short of any deliberate and unwanted sexual contact, that is offensive or upsetting. In relation to the cases concerning children’s homes, there may be issues of care practices which while not acceptable by today’s standards, were not regarded as unacceptable at the time, or standards of care which reflected the poor resourcing of these charitable institutions.

In the 2000 version of Towards Healing, there was a provision that the Director of Professional Standards could divert such cases to more informal dispute resolution pathways. In response to requests from the directors of professional standards, the new version incorporates more specific guidance about this.

It ought to be expected that from now on, most children’s homes cases, other than those alleging child sexual abuse, will be dealt with informally, perhaps by a meeting between the leader of the religious order, or her or his delegate, to listen, to express regret and to take any other appropriate measures, without engaging in the whole Towards Healing process. This also ought to reduce the number of cases being run as Towards Healing matters.

Recommendations for Changes to Towards Healing

In the light of the very helpful submissions and other comments, I have prepared a third edition of Towards Healing for the consideration of the Australian Catholic Bishops Conference and Catholic Religious Australia. The proposed revision contains many textual emendations in the light of the submissions received. Mostly, these clarify aspects that respondents consider unclear, specify ‘best practice’ where hitherto the document has been silent, and address areas of misunderstanding, confusion or inconsistent practice. While these emendations are reasonably extensive, they do not alter the essential characteristics of the process and the values which underpin it.

Significant changes include the following:

- An expanded definitions section is included as Part One of the document, rather than appearing at the beginning of the Procedures section, as previously.
- More precise language is used to describe Church personnel and office-holders in order to be consistent with usage in Church law.
- Definitions of ‘reparation’ and ‘vulnerable adult’, and other new definitions, are included.
- There are references to the importance of confidentiality in the handling of the complaint, particularly prior to the conclusion of an assessment and for expedition in dealing with matters, particularly when a person has been stood aside from ministry.
• Examples are given to assist Church leaders in identifying ‘serious offenders’ who ought to be removed from ministry.
• The sections which refer to the Church’s strategies for prevention have been expanded.
• There is clarification that the procedures of Towards Healing are subject to specific legislation in States and Territories, such as the Ombudsman Act in NSW, under which the Ombudsman’s Office has certain specific requirements for the investigation of complaints of child abuse.
• Directors of Professional Standards are to be given particular responsibility for ensuring, as far as possible, the expeditious resolution of cases and for keeping complainants and accused persons who cooperate with the process informed of progress in the resolution of the matter.
• There is clarification of the roles of contact persons and support persons for accused people.
• There is more explicit direction about how to deal with cases that should have a pastoral response, such as issues of inappropriate care practices in children’s homes, but which are not of sufficient gravity to warrant the full implementation of the processes of Towards Healing.
• There is clarification of how complaints are to be received and dealt with. All complaints, whether initially received by a Contact Person, the Director of Professional Standards or the Church authority, are to be managed by the Director of Professional Standards. The Director will also ensure that if the complaint is sent to a Church authority (such as the Cardinal or an Archbishop) who does not have responsibility for the matter, the complaint gets to the correct Church authority.
• Where complaints concern more than one Church authority (for example where a complainant who was brought up in foster care or children’s homes experienced a number of different placements over the years, for which different religious orders were responsible), the Director should identify a ‘lead agency’ who had most responsibility in relation to the matters about which complaint is made, and who can liaise with others in relation to any response.
• Experience in NSW has shown that there is great value in a personal meeting, at an early stage, between the Church authority, the Director of Professional Standards and the complainant. This establishes the human connection and helps to mitigate the notion that the Church and the complainant are adversaries. In some cases, the process of assessment can take a considerable period of time and establishing a personal connection early can help alleviate the feeling that the complainant is caught up in a bureaucratic and uncaring process in which his or her personal needs and concerns have no relevance from the Church’s point of view. The revised procedures now encourage such an early meeting.
• The revised procedures now make clear that assessors are to make findings on the balance of probabilities.
• New provisions provide guidance in cases where the assessment process is by means of a formal hearing with counsel assisting.
• Changes are proposed to the process of facilitation in cases where there are significant issues about monetary reparation because there has been a criminal offence or civil wrong, and an insurance company is involved. As far as possible, the ground work should be done prior to the facilitation or in a second stage of the process afterwards, so that the pastoral aspects of the process are not
displaced by a focus on the legal and monetary issues. There were complaints made in submissions about the numbers of people attending facilitations where a representative of the insurance company was in attendance along with lawyers. It can be particularly daunting to a woman if there are five people present, all of whom are male.

- A new section is included concerning the significance of support for the faith community of which an accused person is, or was, a member, in the aftermath of the resolution of a case.
- It is proposed that the National Review Panel should have the power to substitute its own findings for those of assessors. In certain situations it is clear from the papers what the findings should have been on the evidence available, and there is no point in having to order another assessment if the Review Panel can deal appropriately with the matter.

Recommendation 6

The Church should adopt the changes proposed and issue a third edition of *Towards Healing*.

I note that it would be possible, with some relatively modest adaptations, for the Melbourne processes to be reconciled with the processes of *Towards Healing*. The changes recommended in the new version of *Towards Healing* will further narrow the differences between the two processes. Consequently, the Archdiocese of Melbourne may wish to reconsider its position in the light of the proposed changes.

In addition to these changes proposed for the *Towards Healing* procedures, many other helpful suggestions were made concerning matters of detail in the implementation, for example, that all facilitators should adhere to the Australian National Mediator Standards. These matters of detail will be considered in revising the documents that assist Church authorities and Directors of Professional Standards in carrying out their roles.

It is inevitable that the processes laid down in *Towards Healing* are quite detailed. Complainants and accused persons want to know how the complaint will be dealt with, and significant divergences from the principles and processes can lead to an application for Review of Process. The document is also used by Directors of Professional Standards, assessors, facilitators and Church authorities. For these reasons there is a need for the processes to be laid down clearly and to provide detailed guidance for all those involved.

It was suggested in a few submissions from Church leaders that for many complainants, a simple two or three page summary would be very useful. Such a document already exists. There is also a document for accused persons. It may be that these documents need to be more widely circulated.
The future structure of the Offices of Professional Standards

Two of the main complaints that came through the submissions were delay and lack of communication. Some of these issues can be dealt with better if the Directors of Professional Standards receive better administrative support.

Another issue is confidentiality: This is a particular problem in small states such as Tasmania where for complainants who remain actively involved in the life of the Catholic Church, it may be particularly difficult to have a complaint examined in a discrete and confidential manner given the size of the Catholic community.

For these reasons I consider that the structure of offices of professional standards needs to be seriously re-examined. There are some significant inefficiencies in having offices for professional standards organized on state/territory lines and directors appointed to each. Some offices carry a substantial workload, while others are limited, just because of the size of the population. There are likely to be significant savings to be made if the administrative management can be centralized while still utilizing the personnel 'on the ground' in each state to assist in aspects of the processes. In a more centralized system, administrative staff can track cases to follow up, if time thresholds (such as for the completion of an assessment report) have been crossed. They can make sure letters go out on a regular basis updating people on the progress of the matter. A centralized team may also be able to deal with other aspects of administration, such as making arrangements with facilitators and handling accounts, more efficiently.

State identity aside, there is little difference between a complainant who lives in Cairns contacting an office in Brisbane or one in another State further south. The fact that offices are organized on state lines does not mean that they are local to complainants or others involved in the process.

One option is to have just one national office handling all matters. Another is to have three regional offices covering different parts of the country. A reform of this kind may help deal with the resourcing issues for some State offices. It would also help to rationalise the contributions required of religious orders that have a presence in several different states or territories.

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Recommendation 7

The National Committee for Professional Standards should consider whether the offices of Directors of Professional Standards should be organized on some basis other than having a separate office for each State and Territory.

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Conclusion

Responding to the problem of abuse in church communities has many dimensions. The policies and procedures for dealing with complaints of abuse is only one dimension. Other issues include prevention; learning about best practice in working with survivors
of abuse, and working out how to respond to grieving faith communities in the aftermath of the discovery that a beloved pastor has been guilty of abuse.

This review has only dealt with one aspect of the Church's response to complaints of abuse: It is to be hoped nonetheless, that with the benefit of the input of so many people through the various submissions, the Church will be able to work with an improved document and to commit itself afresh to faithful implementation of the principles and processes that it has undertaken.

P. Parkinson
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