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Sydney NSW 2000



COPY

9 January 2009

**PRIVATE AND CONFIDENTIAL**

Professional Standards Review  
PO Box 308  
KENSINGTON NSW 1465

Dear Bishop Morris and Fr Brennan,

**Submission to the Review of Towards Healing**

Thank you for the opportunity to make a submission to Professor Parkinson's review of Towards Healing.

The observations I wish to make on behalf of the Archdiocese of Sydney arise largely from a recent review carried out by our lawyers of all Sydney Archdiocese matters dealt with under the Towards Healing protocol since I became Archbishop of Sydney in May 2001. This review was initiated as a consequence of our experience of civil legal proceedings instigated as a direct result of a failure in the Towards Healing process (see for example *Jones v Goodall & Ors* NSWSC No 20323 of 2007), and the indirect criticisms of the Towards Healing process which have arisen in other civil proceedings involving the Archdiocese (for example, *Ellis v Trustees of the Roman Catholic Archdiocese of Sydney and Anor* NSWCA 117; and *Jones v Gatt & Ors* NSWSC 20127 of 2004).

This review encompassed both the Archdiocese's own files and the files kept on Sydney Archdiocese matters by the NSW Professional Standards Office (**PSO**). The purpose of this review was to ascertain any common weaknesses or failings in the Towards Healing process, particularly in light of the criticism which some aspects of the process have attracted from people both from within and outside the Archdiocese's jurisdiction who have made complaints under its protocols.

The review identified a range of problems, particularly in the areas of timeliness and the independent assessment process. These are detailed below. The other issues which arose from the review are: the role of the church authority; the use of Deeds of Release; the referral of complaints to the PSO in other states and territories; and some matters concerning the pastoral dimension of the Towards Healing process.

**1. Timeliness**

The most common issue that gives rise to complaints against the PSO and the church authority is delay.

In our experience the initial response to a complaint is generally made very promptly, but as the process progresses it has not been uncommon for

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M. Salmon ✓ ✓  
✓ Archb. Wilson per rebe  
(in confidence)



**Private and Confidential  
Submission to the Review of Towards Healing**

correspondence to go unanswered for several months. In effect, the onus for following up matters with the PSO or the church authority falls to the complainants themselves. If the complainant does not follow up the matter it may lie dormant indefinitely.

There may well be good reasons for the delay in corresponding with the complainant. The PSO may be waiting for the independent assessor to conduct interviews, or the assessor may be compiling his or her report, or there may be some other period of inactivity due to the unavailability of one or more parties to complete their role in the process. Some periods of inactivity are normal and expected, but the complainant may not be made aware of the cause of the inactivity. It is also common for the complainant not to be told when to expect each step in the process to be completed.

In some instances there has been no resolution of the Towards Healing process simply because no further action has been taken by the complainant to follow up the complaint, as distinct from withdrawing the complaint or instructing the PSO that he or she does not wish to continue the process. Although this is not an issue of delay, the cause of this problem is essentially the same; namely, a lack of effective or regular communication with the complainant.

From the analysis that we have carried out it seems that there are two principal causes of delay and communication issues in the Towards Healing process:

- (i) no single staff member at the PSO or church is allocated to a particular complainant's file; and
- (ii) the current Towards Healing process either does not prescribe time frames within which each step of the process is to occur, or prescribes time frames that are ill-defined and subjective – using words such as “promptly” or “as soon as possible”.

To remedy this problem the following changes to the Towards Healing process should be considered:

- (a) a representative from the PSO should be assigned to each particular file with the intention that it will be that person's responsibility for maintaining regular review of the file and regular correspondence with the complainant. This would encourage “ownership” of a file and prevent diffusion of responsibility;
- (b) the pro-forma cover sheet that is placed at the front of each file needs to be improved. This should have a check-list of the important steps in the process which would be ticked and dated once completed (such as “notification of the police”, “brief sent to the assessor”, etc). The sheet should also list dates when contact was made with the complainant. This would enable the reader to establish the status of each file at a glance;
- (c) a system should be implemented to ensure regular and timely correspondence with the complainant. Even where there is no new



## Private and Confidential Submission to the Review of Towards Healing

information to report to a complainant, contact should be made to update them on the progress of the PSO and explain any delay. When the file is opened electronic calendar entries could be programmed into the PSO representative's computer to act as regular reminders to contact the complainant, regardless of what is actually happening on the file;

- (d) where it is not possible to respond to queries from a complainant immediately, the complainant should be contacted to acknowledge receipt of his or her query and that they will be provided with an answer as soon as possible;
- (e) realistic timeframes should be set for responding to complainants. Some complainants may not understand that the assessment process may take a long time, so it is important to manage expectations at the outset. Where an unexpected delay arises the member of the PSO assigned to the particular file should take it upon themselves to notify the complainant;
- (f) as an alternative to (e) above, specific timeframes should be formally prescribed for each step of the Towards Healing process; and
- (g) before closing a file (apart from circumstances where the complainant has been resolved) the PSO should make reasonable attempts to contact the complainant with a view to determining that the complainant does not wish to pursue the complaint any further.

In most cases the complainant's family (spouse, parents, etc) may be particularly involved in the matter and formal steps need to be taken to ensure that they too are kept informed of developments, if the complainant wishes this to occur.

I **attach** to this letter a flow chart which sets out the time frames currently prescribed for each step of the Towards Healing process and our suggested alternative time frames for the same steps in the process.

### **2. The Assessment Process**

Presently, the assessor is appointed from a panel maintained by the Resource Group. The assessor will often be a retired police officer, teacher or private investigator.

The role of the assessor is to investigate the facts, collate the available evidence and, finally, determine whether and to what extent the alleged abuse occurred. The final decision is produced in a written report which sets out the reasons for the assessor's decision. Under the existing protocols, the assessor's report is not provided to the complainant. Instead, under Clause 40.11.3, the relevant findings of the report are communicated to the complainant by the Director of the PSO.



**Private and Confidential  
Submission to the Review of Towards Healing**

A major problem in many of the assessors' reports we reviewed is an apparent misunderstanding of the standard of proof that should be applied. The applicable standard of proof in civil proceedings is the balance of probabilities. This means that the existence of a fact is more probable than not. While many of the assessors refer to this standard, they appear in fact to be applying the criminal standard of "beyond reasonable doubt". There are several instances of the rejection of complaints on the grounds that it is the complainant's word against that of the accused, that the accused is of good character, and that therefore it is not possible to make a decision in such circumstances. In one such instance an assessor noted that he was inclined to believe the complainant who presented as a reliable witness, but the absence of corroboration from an independent source meant that he could not make a finding that the abuse occurred.

There are of course many instances in civil proceedings in which the only evidence is the word of one party against that of his opponent. In such cases, the court as an arbitrator of fact is able to determine, on a balance of probabilities, whether the plaintiff's case should succeed or fail. I see no reason why the same decision cannot be made by a suitably qualified assessor. In short, there is no reason why a complaint should be disbelieved only because there is no corroboration.

Our review also revealed that in some cases the same assessor was appointed to consider multiple complaints received in a similar timeframe against the same accused. In order to ensure that a fair and unbiased investigation is conducted, more than one independent assessor should be engaged in such circumstances, and separate reports be prepared on each complaint. It is for the church authority and the Director of the PSO to weigh the cumulative findings of multiple reports against the one accused in deciding whether the complaints should be accepted.

A further consideration is that in civil claims the assessor's report is not privileged and often required to be produced to the complainant (plaintiff) through the coercive processes of the court (subpoenas, notices to produce, discovery etc). In such cases the assessor's report is normally scrutinised by both the parties and the court. Much is made of the assessor's conclusion where it is favourable to the plaintiff; or, if the report is unfavourable, the report is subject to criticism because it demonstrates a lack of rigour in the investigation stage. For this reason it is important that the report is prepared with the care and detail that one would expect from a report which purports to decide, on the civil standard of proof, on very serious issues of fact and fault.

In dealing with these problems, the strong view of the Archdiocese of Sydney is that assessments should be undertaken by a panel of senior lawyers (or retired judges), rather than the assessors currently engaged by the Resource Group. Undertaking an assessment requires a finding to be made on the balance of probabilities. This is a legal exercise, and therefore one best undertaken by lawyers. The use of senior lawyers or retired judges in the assessment process would also give an additional level of independence to the process. It is



**Private and Confidential  
Submission to the Review of Towards Healing**

important to respect the distinction between the assessment and the pastoral care and support of the complainant.

As you are aware, the Archdiocese of Melbourne has successfully employed a system whereby complaints are assessed by a practising senior barrister. This may be one useful model to consider adapting to strengthen the assessment process. Another aspect of the Melbourne system which should be considered seriously is the use of an independent panel of experts and lay people to make recommendations on the quantum of any ex gratia award when a complaint is established. There are obvious advantages in having this determination made at arms-length from the church authority, and it would also help to improve consistency of outcomes. Such a panel would augment (and to an extent replace) the role of the facilitator in Towards Healing, as it would consider and act upon the evidence in support of both the financial and non-financial (or indirect financial assistance such as meeting the cost of counselling) needs of the complainant. Such a process ought not preclude making more immediate responses (financial and non-financial) to a complainant when deemed appropriate by the church authority, a point I discuss further at the conclusion of this submission.

### **3. Role of the Church Authority**

Often complainants send their correspondence directly to the church authority. Naturally it is entirely appropriate (and indeed desirable) for the church authority to respond directly to the complainant to acknowledge their correspondence, apologise for their suffering and to set out the next steps in the process.

It needs to be remembered that whatever is said by a church authority or their delegate, either personally or in writing, may be used by the complainant in the assessment process or in a criminal or civil action at a later date. For this reason, clearer guidelines are required on how the church authority should communicate with complainants during the stages of assessment and facilitation. Particular care is required in any correspondence between the church authority and complainants when it comes to expressing a view on the complaint, either by on the merits of the case or by reference to an alleged offender, and in communicating the decision of the assessor.

Assessment and facilitation is often an emotional, stressful and difficult process for complainants. It requires them to revisit traumatic events in their lives in great detail and to take stock of the harm that they have suffered. To minimise the dangers of misunderstanding and further hurt, communication with the complainant during assessment and facilitation should be conducted personally, either by telephone conversation or, whenever possible, by meeting. The church authority should nominate a senior and experienced person to serve as their delegate for contact and communication with the complainant during the assessment and facilitation process, and for conveying the outcome of the assessment. Once assessment and facilitation has been completed, a pastoral meeting with the church authority should be offered to the complainant.



## **Private and Confidential Submission to the Review of Towards Healing**

Measures along these lines would strengthen the pastoral dimension of the Towards Healing process, give complainants a stronger sense of being heard and taken seriously, and provide them with a point of personal contact with the church, so that they can have a greater sense that they are dealing with people who care for them rather than with a faceless institution. They would also assist in minimising the complications which often lead to a complaint being extended to litigation or into the realm of the media.

### **4. Deeds of Release**

There is no provision in Towards Healing which relates directly to deeds of release. Formal recording of the agreement is however acknowledged at the conclusion of the process. Clause 41.3.7 states that "the facilitator shall ensure that there is a record of any agreement reached and of any outstanding areas of disagreement". In addition, Clause 41.4 states that "no complainant shall be required to give an undertaking which imposes upon them an obligation of silence concerning the circumstances which led them to make a complaint, as a condition of an agreement with the church authority".

Deeds of release are used by many dioceses and religious orders in Australia. While there are good reasons for requiring a deed to be signed, especially to provide both the church authority and the complainant with finality in bringing a process to closure, the legalistic nature of a deed of release can send mixed messages about the church's ongoing concern for the complainant, and its willingness to continue providing pastoral care, and counselling and medical care when this is required or requested.

In addition to this, asking a complainant to sign a deed of release when they are unrepresented by a lawyer often provokes suspicion and concern. It is difficult to ensure that the complainant will seek independent legal advice before signing a deed of release, and there are also questions about the enforceability of such deeds, especially when the complainant is suffering from a psychological disorder or has a cognitive impairment.

For these reasons, deeds of release should only be required when the complainant has involved a lawyer in the process as their representative or advocate. In all other circumstances it is appropriate to record the agreement as envisaged at Clause 41.3.7. If it is the intention of the church authority to make only one financial ex gratia payment, this should be clearly stated in the agreement. The agreement should be then signed by both the church authority and the complainant.

### **5. Referral of Complaints between States and Territories**

There have been several cases in which a complaint has been received from a complainant living within the jurisdiction of the Archdiocese concerning abuse which is alleged to have occurred in another diocese or another state. Reports of this nature are often received by the Archdiocese due to the public's common



**Private and Confidential  
Submission to the Review of Towards Healing**

misconception that the Archbishop of Sydney is the head of the church in Australia.

In such cases the practice of the Archdiocese is to refer the complainant to the church authority or PSO in the correct jurisdiction. This referral is made in writing and the PSO contact at the correct jurisdiction is sent a copy of the correspondence. After this letter is sent there is no further communication from the Archdiocese to the complainant.

Unfortunately there have been several instances where, after this referral has been made, the complainant has not been contacted by the correct jurisdiction and the complaint goes unanswered for several months. There are several possible reasons for this, the main one apparently being an uncertainty as to which party was to write or call next.

This is a frequently occurring issue which causes considerable dismay to complainants. One possible solution is for church authorities which receive complaints from outside their jurisdiction to copy their referral letter to the National Professional Standards Office, which should thereafter monitor the matter to ensure that the complaint is responded to efficiently by the appropriate diocese, religious order or state PSO.

#### **6. Pastoral Care of Complainants during the Towards Healing Process**

Under the current process, and in accordance with the dictates of natural justice, the needs of the complainant are often not articulated or addressed until an assessment has been carried out and the complaint found to be established (see Clause 41.1). This approach often creates a tension between the pastoral role of the Church authority and the need to follow due process. On the one hand there is a requirement to carry out a forensic exercise to test the validity of the complaint, and on the other, there is a pastoral obligation to look after the complainant who is often clearly upset or hurt, before the facts of the complaint have been tested.

It is difficult for the delegate of the church authority to serve both as the person responsible for ensuring that the process of assessment and facilitation is duly followed, and as a support person for the complainant during the process. It is not clear that there is any easy resolution for this tension. Allocating these two roles to different people, even when this is practicable, could make the process more bureaucratic and complicated, and could reinforce the erroneous and unhelpful perception of a divide between the caring work of the church and its "institutional" structure. In any case, pastoral and process issues are often not neatly separable, least of all for the complainants themselves.

I think it would be helpful for the Towards Healing protocol to acknowledge this tension in some form, and for the review to consider what guidelines might be offered to assist the Church authority and their delegate in this area.

A further pastoral issue arises around establishing the needs or expectations of the complainant. Doing this at the beginning of the process is often an important



**Private and Confidential  
Submission to the Review of Towards Healing**

exercise. As mentioned earlier in this submission, in some circumstances, typically when the needs or expectations of the complainant are relatively modest or non-monetary, it may be pastorally appropriate to provide for these needs at an earlier stage in the process, and even before a formal assessment has been undertaken. This issue has emerged in our experience particularly in cases where a new complaint has been brought forward against clergy or religious who: a) are deceased; and b) have well established records of abuse.

There are problems with this approach and I acknowledge that it is difficult to reconcile this suggestion with Part 2 of the Towards Healing process. There are two different solutions which might be considered.

When the alleged offender is deceased the church authority (under Clause 38.7) is still obliged to refer the matter to assessment. Where the complainant is, in the opinion of the church authority, a cogent and apparently honest witness, and where there is no contradictor to the complaint, we wonder if there is really a necessity to undertake an assessment. Instead, the matter could be expedited to the facilitation stage of the process (as it can be apparently when there is no significant dispute about the facts of the case; see Clause 38.6).

Another possibility may be to make provision within the Towards Healing protocol for a limited discretion for church authorities to meet the needs of complainants outside the process. This discretion could be confined to cases where the accused is deceased and has a well established record of abuse, and where the Church authority (possibly together with the Director of Professional Standards) is convinced of the honesty and cogency of the complainant. Any such discretion should only be exercised on the condition that it is clearly explained to the complainant (verbally and in writing) that the particular pastoral response has been made outside the Toward Healing process, and that the complainant's right to take the matter to the police or to request a formal Towards Healing assessment is not in any way effected or diminished by the pastoral response.

Thank you again for the opportunity to make these submissions to Professor Parkinson's review. I would be happy to discuss the suggestions and observations I have made in this letter, and if you have any queries or require any further information please let me know.

With every good wish,

Yours sincerely  
+ *George David Pell*

ARCHBISHOP OF SYDNEY

Enc.