

Case Study 44

Submissions on behalf of the Catholic Archdiocese of Sydney in Response to Submissions of Counsel Assisting

1. This submission is made on behalf of the Catholic Archdiocese of Sydney (**CAS**) to the Royal Commission Into Institutional Responses to Child Sexual Abuse (**Royal Commission**) in respect of case study 44, which examined the response of the:
 - (a) Catholic Diocese of Armidale;
 - (b) Catholic Diocese of Parramatta; and
 - (c) Special Issues Group for the Province of Sydney,to allegations of child sexual abuse against John Joseph Farrell (**Farrell**).
2. The public hearing in case study 44 was held on 12-15 September and 19-22 September 2016.
3. Prior to the hearing, CAS understood from information published on the Royal Commission's website that the scope and purpose of the hearing would not extend to examine any role that it may have had in relation to Farrell. Consistent with this understanding, the Royal Commission did not invite CAS to seek leave to appear and make submissions at the hearing, or give any other such notice that CAS' conduct and that of its personnel (other than Mgr Usher and Fr Lucas) would be examined.
4. CAS did not, nor could it reasonably be expected to, apprehend the possibility that it would be the subject of submissions from Counsel Assisting regarding actions taken by persons who were not called to give evidence or provide statements to the Royal Commission.
5. Accordingly, CAS had no reason to suspect that Counsel Assisting would subsequently criticise CAS and seek adverse findings against it.
6. On 30 June 2017, Counsel Assisting the Royal Commission served submissions in case study 44. Counsel Assisting's submissions were subject to Direction not to Publish O-PU-CTH-44-9 made on 30 June 2017, which prohibited disclosure of the submissions to CAS. That Direction was subsequently vacated on 3 July 2017.
7. Also on 3 July 2017, Direction not to Publish O-PU-CTH-44-10 was made, pursuant to which the submissions were allowed to be provided to CAS and its legal representatives.

4 Corners programme “Unholy Silence” and adverse findings sought against CAS in relation to a media statement issued on 4 July 2012

8. Part 15 of Counsel Assisting’s submissions examine events occurring after the 4 Corners programme “Unholy Silence” (**4 Corners Programme**) was aired on the ABC on 2 July 2012.
9. At paragraph 1598 of Counsel Assisting’s submissions a finding is sought that a media statement issued by CAS on 4 July 2012 (**Media Statement**) in respect of the 4 Corners Programme was incorrect and misleading.
10. The publication to CAS of Counsel Assisting’s submissions, on 3 July 2017, was the first occasion on which CAS received notice that CAS’ conduct and that of its personnel (other than Mgr Usher and Fr Lucas) would be examined in case study 44, and that there was the possibility that adverse findings would be sought against it.

Bases of submission

11. This submission is put on two bases. The first is that there has been a substantial breach of procedural fairness against CAS in the making of these submissions by Counsel Assisting. The second is that the submission misinterprets such evidence as there is in order to manufacture an assertion against CAS that the Media Statement is misleading.

Breach of procedural fairness

12. In the circumstances, where CAS was not invited to seek leave to appear, and given the scope and purpose of case study 44 as described on the Royal Commission’s website, we submit that there has been a breach of the procedural fairness which was required to be exercised.
13. A fundamental element of procedural fairness is the right to notice of the matter under investigation. Without adequate notice, it is simply not possible to prepare for and participate in a hearing, or to exercise other procedural rights that may exist during the course of the hearing.¹
14. Had CAS been given notice that its conduct would be examined at the hearing, it would have considered:
 - (a) making an application for leave to appear;
 - (b) seeking to be represented by lawyers representing its interests;
 - (c) whether to cross-examine witnesses that had been called;
 - (d) undertaking the necessary enquiries into the factual matters sought to be examined; and
 - (e) whether it ought to submit documents for tender into evidence.

¹ Donaghue, S. *“Royal Commissions and Permanent Commissions of Inquiry”* (2001) p.173.

15. Procedural fairness requires the Royal Commission to listen fairly to any relevant evidence conflicting with the evidence relied on by Counsel Assisting to support the finding now sought against CAS in relation to the Media Statement. However, CAS was “left in the dark” and had no opportunity to adduce additional material of probative value at the hearing which, if it were before the Royal Commission, might deter it from making the finding now sought.²
16. The fact that CAS was deprived of the opportunity to appear and be represented at the hearing, and to participate in the hearing as a party, means that the Royal Commission cannot proceed on the basis that all of the relevant evidence regarding the Media Statement is before it. Nor can the Royal Commission proceed on the basis that witnesses would not have given further evidence about the Media Statement if they had been questioned by lawyers for CAS in CAS’ interests.
17. It is further submitted that the fact that CAS has now been given an opportunity to respond to Counsel Assisting’s submissions, is not sufficient to cure the breach of procedural fairness.
18. If the Royal Commission is nevertheless minded to consider Counsel Assisting’s submissions on this issue, then CAS submits that there is insufficient evidence upon which the Royal Commission can be comfortably satisfied that the allegations implicit in the findings sought by Counsel Assisting at paragraph 1598 are true.

The Media Statement

19. At the outset it is important to highlight that Counsel Assisting did not call anyone from CAS who was directly involved in the preparation of the Media Release to give evidence on the matters in respect of which adverse findings are now sought.
20. To the extent that it might be suggested that Mgr Usher was directly involved in the preparation of the Media Statement, we note that no questions were put to Mgr Usher at the hearing regarding the preparation of the Media Statement.

The independent recollections of Fathers Lucas and Usher have not changed

21. As the documents demonstrate, 4 Corners made separate requests for information by email to Fathers Lucas and Usher, and separate responses were sent. Just because Fathers Lucas and Usher communicated with each other (and, we note, with Fr Peters) regarding their independent recollections - being that neither Fathers Lucas or Usher had a recollection of Farrell making any admissions of child sexual abuse, or admissions of criminal conduct during the meeting with Farrell on 3 September 1992 (**First Meeting**) - prior to responding to enquiries made by 4 Corners, does not support the submission that there was collusion between them. When two people seek to verify their independent recollections, this does not constitute collusion. Moreover, we note that when

² *Mahon v Air New Zealand Ltd* [1984] AC 808 at 821. See also Donaghue, S. “*Royal Commissions and Permanent Commissions of Inquiry*” (2001) p.181.

people are referring to 'something' which they believe did not occur, there are inevitably many possible ways in which this non-event may be described.

22. When preparing the Media Statement, CAS had no reason to question the recollections of:
- (a) Father Lucas, being:
- *"No admissions of a specific nature were made"³;*
- (b) Mgr Usher, being:
- *"I have been discussing this with Mgr John today and he is firm in his recollection that no admissions were made at the 1 meeting he attended"⁴; and*
 - *"JU says he did not take notes of the Meeting but later recorded short "aide de memoire" notes in his red bound diary. Mgr Usher said Fr F was unrepentant about his misconduct. He recorded that he should not have an appointment. He doubted his willingness to go to therapy, although Fr F said he would. If Fr F had made admissions of actual criminal conduct, he would have recorded this"⁵,*

as communicated to CAS at around the time the 4 Corners Programme was broadcast.

23. Accordingly, there is no evidence to suggest that CAS personnel involved in preparing the Media Statement intended to convey a misleading impression that Fathers Lucas and Usher did not collaborate in order to arrive at a 'common recollection' of what occurred at the First Meeting. The fact remains that Fathers Lucas and Usher independently provided responses to 4 Corners which were consistent, and the Media Statement was correct in making this point.

CAS had no cause to question the independent recollections of Fathers Lucas and Usher

24. As set out above, CAS personnel had no cause to question the recollections communicated by Fathers Lucas and Usher around 4 July 2012.
25. Indeed, as the Hon. Mr Antony Whitlam QC found in his report published 6 December 2012⁶:
- (a) there were *"honest differences"* in the recollections of Mgr Usher and Fathers Lucas and Peters;

³ Exhibit 44-0005 File note of Jennifer Cook re telephone attendance with Father Brian Lucas dated 4 July 2012 (Tab 286) CTJH.400.40001.7006

⁴ Exhibit 44-0005 Email from Jennifer Cook to Michael Casey, Danny Casey, Katrina Lee and John Usher dated 3 July 2012 (Tab 280) CTJH.400.40001.6702_R

⁵ Exhibit 44-0005 File note of Jennifer Cook re meeting with Monsignor Peters dated 4 July 2012 (Tab 285) CTJH.400.40001.6408_R

⁶ Exhibit 44-0009 Report Commissioned by the Bishops of Armidale and Parramatta into processes related to the management of "Father F" by Antony Whitlam QC (Tab W1) CTJH.400.30002.1200_R

- (b) he did not “*disbelieve*” the evidence given by Mgr Usher or Fr Lucas that Farrell made no admissions of paedophilic activity at the First Meeting; and
- (c) he made no adverse findings against Mgr Usher or Fr Lucas in relation to the First Meeting.

Description of the letter as “not an official record”

- 26. CAS submits that the opinion expressed by Fr Lucas in relation to the reference that the letter from Father Peters to Bishop Manning dated 10 September 1992 “*was not an official record of the 1992 meeting*” cannot support a finding that the effect of the reference in the Media Statement was to discredit the contents of the letter.
- 27. In this regard CAS submits that:
 - (a) the letter is not an official record of CAS, nor was it amongst CAS’ records relating to Farrell;
 - (b) as stated by Mgr Peters in a meeting on 4 July 2012 the letter was “*a private letter intended for the Bishop*”⁷); and
 - (c) Mgr Peters’ letter to Bishop Manning could not have been “an official record” of the meeting because, prior to being sent to Bishop Manning, it was not shown to Fr Lucas or Mgr Usher for their confirmation that it was a true and accurate record of the meeting. It could certainly not be suggested to have been an official record of the Special Issues Resources Group, which was the capacity in which Fr Lucas and Mgr Usher attended. It was not their record, does not reflect their recollection and they have not adopted it.

It is incorrect to attribute any conduct to CAS

- 28. The crux of the submission against CAS appears to be at paragraph 1598(e), which asserts:

The media release ‘reiterates its commitment to bringing sexual abuse to the light’. Contrary to that statement over the prior three or so months there had been a deliberate strategy by at least three priests to knowingly put inaccurate information in the public domain to protect their personal interests...
- 29. This submission is misplaced. It appears to be an attempt to manufacture a finding against CAS that is not based on the actions of those people within CAS who drafted the Media Statement, who were not called to give evidence. On the documentary evidence, the Media Statement was a fair reflection of the information that those within CAS who drafted the Media Statement had before them. Both the investigation of the Hon. Mr Antony Whitlam QC and the evidence before the Royal Commission establishes this to be the case.

⁷ Exhibit 44-0005 File note of Jennifer Cook re meeting with Monsignor Peters dated 4 July 2012 (Tab 285) CTJH.400.40001.6408_R

No finding against CAS should be made

30. In the circumstances, it is submitted that no finding should be made about the Media Statement that criticises CAS or those who drafted the Media Statement within CAS. To do so would be both a breach of procedural fairness and contrary to the evidence before the Royal Commission.

Corrs Chambers Westgarth

28 July 2017