

Criminal Justice:

Responses to the Consultation Paper

Submission to the Royal Commission into
institutional responses to child sexual abuse

31 October 2016



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Who we are

The Australian Lawyers Alliance is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence. While maintaining our plaintiff common law focus, our advocacy has since expanded to criminal and administrative law, in line with our dedication to justice, freedom and rights.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

¹ www.lawyersalliance.com.au

Introduction

1. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the issues raised by the Consultation Paper on Criminal Justice Issues. This submission makes comments on Issues raised under the headings 'Encouraging Reporting', 'Blind Reporting', 'Failure to Report' and 'Role of the DPP'.

Encouraging Reporting

2. ALA comments in response to the issues raised under the above heading are discussed with the issue of failures to report, below.

Blind Reporting

3. Blind reporting has been asserted as being desirable to encourage victims to disclose their abuse and often to meet their wishes that the abuse not be publicised.
4. However, the evidence from Operation Protea and the subsequent NSW Police Integrity Commission (PIC) Inquiry in 2015 clearly implied that in many cases blind reporting was intended to protect the institution and the abuser, not the victim. Whilst there was evidence that contact persons were supposed to ask victims whether they want to go to the police, there was no evidence from contact persons or victims that this in fact occurred or what the response of victims really was. In the report at 5.284, there was evidence that the standard form given to victims asked whether they had notified police or attempted to notify police but did not explicitly record whether they wished the police notified or wished their identifying details to be withheld from police. The form did not say the victim had been encouraged to go to the police. This, however, was treated at least by the Church, as indicating an

intention that information about the victim to permit identification would not be provided to the police. However, in the Executive Summary at xvii:

“The Commission accepts that an indicated unwillingness on the part of victims to make complaints to the police did not necessarily mean that the victims would be unwilling to cooperate with a police investigation, if one was commenced.”

5. Further, blind reports were generally added into the police data base as information reports, purely for intelligence purposes, with many not being investigated by police.² As such, the utility in terms of punishing and preventing crime is negligible.”
6. The Special Commission of Inquiry into matters relating to the investigation of certain child sexual abuse allegations in the Catholic Diocese of Maitland-Newcastle (the Maitland-Newcastle Inquiry) examined the failure by Father Brian Lucas to take admissions from an abuser to the police. The Maitland-Newcastle Inquiry’s reason for not then referring him to the Department of Public Prosecutions (DPP) was that the victim had asked that the information not be disclosed. However, the evidence of the victim given to the Maitland-Newcastle Inquiry said that the victim was never asked by Father Lucas whether they wanted their complaint reported.³
7. Similarly in respect of the long history of blind reporting in which the NSW Police representative participated (presumably therefore an accessory after the fact) seems to have had little serious regard to the will, let alone the interests, of victims in having the crimes committed against them investigated and punished.

² Police Integrity Commission, *Protea Report* (2015), <https://www.pic.nsw.gov.au/Report.aspx?ReportId=162>, xxii.

³ Special Commission of Inquiry into matters relating to the police investigation of certain child sexual abuse allegations in the Catholic Diocese of Maitland-Newcastle, *Report Volume 2*, (2014) [13.20]. The ALA has written to the NSW Attorney-General requesting that Father Lucas be prosecuted on the basis of the Inquiry’s finding that “there is reliable evidence confirming that at the meeting McAlinden made admissions of having sexually abused children”: Special Commission of Inquiry into matters relating to the police investigation of certain child sexual abuse allegations in the Catholic Diocese of Maitland-Newcastle, *Report Volume 1*, (2014), 15.

8. It has been suggested that blind reporting is still continuing. Detective Inspector Fox has certainly indicated this is the case. The PIC merely recommended an urgent review of blind reporting in its report at 11.48, which clearly implies that it is continuing. Yet this is clearly criminal on the PIC's own findings at 11.45 and 11.46. If blind reporting is continuing, this is wholly unacceptable.
9. In our view, the victim's sensibilities can be appropriately and delicately handled by properly trained police. The wish to avoid publicity can often be achieved. However, the wishes of a victim must be subordinated to the interests of other potential victims who may suffer from the abuse not being reported.
10. In our view, and notwithstanding that it may discourage some complaints, blind reporting is unacceptable and should be clearly identified as inconsistent with the legal obligation relating to concealing serious indictable offences which, in NSW, is s316 of the *Crimes Act 1900* (discussed more fully below). This position was clearly articulated by the PIC in its Report to Parliament on Operation Protea:
 1. 'the Commission is of the opinion that these matters relied on as justifying blind reporting would not, in general, amount to a reasonable excuse within s 316(1) of the Crimes Act and that, in general, blind reporting contravenes s 316'.⁴
11. There are statutory requirements to report in respect of institutions such as schools and it is arguable that even the abuser as a teacher has him or herself a legal obligation to report injury to a child even if caused by that individual. The general obligation in the community should be no different.

⁴ Police Integrity Commission, *Protea Report* (2015), <https://www.pic.nsw.gov.au/Report.aspx?ReportId=162>, xi.

Failure to Report

12. Misprision of felony was replaced in 1990 by s 316(1) of the *Crimes Act 1900* (NSW). That provision adopts the words of Lord Denning in *Sykes v DPP* [1961] 3 WLR 371, apart from changing felony to serious offence and some other minor amendments, including giving the Attorney-General a discretion in some circumstances.
13. There have been a dearth of prosecutions, although one is currently underway against Archbishop Philip Wilson in respect of matters said to have occurred to his knowledge in Newcastle.
14. Suggestions have been made that s 316 should be amended or abolished. The ALA thinks that in substance, s 316 is appropriate, the obligation is one which should be on every citizen (subject to some exceptions for victims, legal privilege and perhaps the confessional), and would not wish to see it abolished. Indeed, the history of cover-up in institutions strongly suggests that the criminal offence should apply not just to individuals but to the institutions which have failed victims by exposing them to abuse and then, too often, protecting their abusers.
15. In our view, it is hard to see why serious criminal offences of all types should not be reported and not merely child sexual offences. Equally, it is appropriate to make institutions responsible as well as individuals, as discussed at page 30 of the Consultation Paper.
16. As to whether any penalty should lie with a victim who fails to report, we would suggest that there be a broad discretion as to whether or not any action be taken, having regard to the injury inflicted, psychological state and the particular circumstances of the individual. There will be many circumstances where children and indeed, some adults, could not reasonably be expected to report their own abuse. This will often be the case in Indigenous and Torres Strait Island communities, for example. On the other hand, individuals who were able to and could readily have reported and thus saved others, having reached adult years, should have an obligation to report appropriately. The involvement of an institution in the decision to report or withhold

information about the abuse from the police may be a relevant consideration, especially if the institution has discouraged or failed to explore the possibility of reporting the abuse with the victim.

17. It has been asked whether civil liability of the kind recommended in the Redress and Civil Litigation Report published by the Royal Commission in 2015, if implemented, would be sufficient. The ALA's answer is, resoundingly, no. We refer to the submissions we have provided to the Royal Commission in the past, including in response to Issues Paper 11 on the Catholic Church⁵ and in response to the Consultation Paper on Redress and Civil Litigation.⁶ The ALA is particularly concerned that the form of liability recommended with respect to organisations such as the Roman Catholic Church will be ineffective in securing compensation in the event that liability is disputed, such as in the *Ellis* case.
18. In respect of the Roman Catholic Church, under the various legislative regimes in all parts of Australia, all of the assets are held by trustees and the Church lacks any legal entity. The *Ellis* defence⁷ means that this legal arrangement renders the Roman Catholic Church able to evade its responsibilities to individuals injured by the actions of priests or other associated persons. Whilst unincorporated associations can be sued at common law, in *Ellis* it was held that the Church is too amorphous to permit nominated representatives to be sued. Effectively it, and more significantly its enormous assets, are immune from suit. In every diocese in Australia the assets of the Catholic Church are held by trustees. Until the *Ellis* decision, the Church accepted that its trustees were the appropriate body to sue. In England and Wales that continues to be the Church's position, where the trustees are regarded as the Church's secular arm.

⁵ <http://www.lawyersalliance.com.au/documents/item/634>.

⁶ <http://www.lawyersalliance.com.au/documents/item/353>.

⁷ In this case, the Roman Catholic Church was able to avoid paying compensation to a survivor of child sexual abuse due to the administrative arrangements under which the assets of the Church were held by a trust: *Trustees of the Roman Catholic Church v Ellis* [2007] NSWCA 117.

19. Lest it be thought that the Catholic Church will no longer take the *Ellis* point, we draw attention first to the undertakings given by the Archbishops of Melbourne and Sydney on behalf of all bishops in Australia.
20. In a speech of 15 July 2015 to the Triennial Assembly of the Uniting Church in Australia, the Hon. Justice Peter McClellan AM said:

‘In his evidence to the Royal Commission in the case study concerning the Melbourne Response Denis Hart, the Archbishop of Melbourne, stated that the Melbourne Archdiocese has recommended that the Church, throughout Australia, provide an entity for survivors to sue. The Truth, Justice and Healing Council, in submissions to the Commission, has recommended that legislation be enacted requiring unincorporated associations to establish or nominate an entity to be the proper defendant to any claims of child sexual abuse brought against the institution. The Archbishop of Sydney, Anthony Fisher, has stated publicly that it is the “agreed position of every Bishop and every leader of a religious congregation in Australia that we will not be seeking to protect our assets by avoiding responsibility in these matters” and that “anyone suing should be told who is the appropriate person to sue and ensure that they are indemnified or insured so that people will get their damages and get their settlements”.’
21. In a press release by the Truth, Justice and Healing Council, quoting Francis Sullivan and dated 22 May 2015 (less than a week later), it was said that:

‘If a survivor wants to take a claim to court, then at the very least they must have an entity to sue.’

‘... The Church position in relation to the identification of a proper defendant in civil claims calls for:

The enactment of legislation in the states and territories imposing a requirement on an unincorporated association which appoints or supervises people working with children to establish or to nominate a body corporate to be the proper defendant to any claims of child sexual abuse brought against the association.

The identity and corporate structure of the body corporate should be left to the institutions to determine in accordance with their internal structures, provided that the body corporate has sufficient assets or is appropriately insured or indemnified.’

22. The press release quoted Archbishop Fisher as saying, ‘... the *Ellis* defence is no longer a legal tactic used within his archdiocese.’
23. Unfortunately, it appears that the Church has recanted on these undertakings.
24. Several bishops have refused requests from media organisations to undertake that they will not rely upon the *Ellis* defence, according to Fairfax articles published on 18 May 2015.⁸
25. Further, the Archdiocese of Sydney issued in late 2015 a document entitled ‘The *Ellis* Decision - a Restatement of the Law’ and saying ‘There is no such thing as the “*Ellis* defence”. The *Ellis* decision did not create new law.’⁹
26. This document is currently on the website of the Archdiocese of Sydney. It goes on to assert:

⁸ Chris Vedelago, Cameron Houston, “Church to block victims’ court bids despite promise to abandon practice by Pell”, *The Age*, 18 May 2015, available at <http://www.theage.com.au/victoria/church-to-block-victims-court-bids-despite-promise-to-abandon-practice-by-pell-20150517-gh3jkr.html>.

⁹ Sydney Catholic Archdiocese “The *Ellis* Decision – a Re-statement of the Law”, [undated], available at <https://www.sydneycatholic.org/justice/royalcommission/ellis.asp>.

'While the court found that the body corporate was not responsible for the assistant priest, it did not set up a so-called "Ellis defence" or any new law. This decision is consistent with the longstanding rule of law that you cannot be liable for the criminal actions of others unless you are directly or indirectly responsible for supervising their conduct, and there has been negligence or other actionable conduct.'¹⁰

27. In a press release from Francis Sullivan of the Truth, Healing and Reconciliation Council, it was said that the Church should assist victims to find someone to sue.¹¹
28. The point of the *Ellis* defence is that in many of these cases, there will be no-one to sue. Refusing to acknowledge that the *Ellis* defence exists indicates that Church officials will continue to protect Church assets from survivors of childhood sexual abuse seeking to sue it if they so choose.
29. The ALA acknowledges the limitations that might exist as a result of the organisational structure of the Catholic Church in Australia. We believe, however, that it is not sufficient that the rights of survivors of child sexual abuse to sue the institution that facilitated that abuse will depend on the attitude of the diocese or archdiocese in question.
30. Given the statements outlined above, it is clear that legislative change is required. In this regard we refer to our submission to the Royal Commission's Issues Paper 11.¹² In that submission, we supported recommendations 89, 91, 92 and 94 of the Final Report on Redress and Civil Litigation as minimum benchmarks. We further recommended that the legislation recommended in 94 should be modelled on the *Roman Catholic*

¹⁰ Sydney Catholic Archdiocese "The Ellis Decision – a Re-statement of the Law", [undated], available at <https://www.sydneycatholic.org/justice/royalcommission/ellis.asp>.

¹¹ Truth Justice Healing Council, *Media Release: Senior Church leaders commit to no Ellis Defence*, 22 May 2015, <http://www.tjhcouncil.org.au/media/102237/150522-MEDIA-RELEASE-Senior-church-leaders-commit-to-no-Ellis-defence.pdf>.

¹² <http://www.lawyersalliance.com.au/documents/item/634>.

Church Trust Property Amendment (Justice for Victims) Bill 2014 (NSW). While the limitations provisions in that Bill are now superfluous in NSW and Victoria,¹³ other provisions constitute a fair basis for ensuring liability for historical sexual abuse claims.

The Role of the DPP

31. The role of the DPP is clearly key in ensuring that perpetrators of crimes are prosecuted.
32. Historically, however, DPPs have at time played an obstructive role in terms of pursuing prosecutions in instances of child sexual abuse. There have been numerous instances of this nature brought to light since the advent of the Royal Commission, and earlier in the Maitland-Newcastle Inquiry.
33. Royal Commission Case Study 15 presents a useful illustration regarding the types of challenges that can exist in seeking prosecutions for historical sexual abuse. In that Case Study, there were numerous factors that inhibited prosecution, despite a strong desire for prosecutions on the part of the victims who had come forward. Some of these factors included:
 - Unusual contact between the Office of the DPP and defence lawyers, including the DPP accepting statements from the lawyers on the condition that the statements not be used in the prosecution;
 - Basing the decision not to prosecute on ‘medically misinformed’¹⁴ advice; and
 - Assumption that prosecuting perceived ‘minor’ offences would corrode public confidence in the office of the DPP.

¹³ The ALA advocates for the adoption of legislation mirroring that of Victoria and NSW in relation to limitations periods for historical child abuse in all jurisdictions in Australia.

¹⁴ Royal Commission into institutional responses to child sexual abuse, *Report of Case Study No. 15*, 2015 (Case Study 15 Report), 93

34. Many of these problems emanated from the advice of one of the most senior prosecutors in Australia. As such, it is not just a matter of better supervision ensuring better outcomes in decisions whether or not to prosecute. Rather, a system of independent review could be usefully implemented to safeguard against the risk of DPPs deciding not to prosecute cases in which prosecutions would be possible and beneficial.
35. The Case Study also highlighted a number of procedural concerns with the role that the DPP played in the decision not to prosecute. These concerns largely centred on involvement of victims in the process, including keeping them informed of decision-making. Many of these concerns would have been ameliorated had the Office followed its own protocol.
36. In England and Wales, the Victim's Right to Review Scheme (VRRS) offers a useful model that could be adopted in Australia to ensure that mistakes such as those outlined above, and others, do not operate to stop prosecutions that should proceed. Under that system, victims of crime are able to request a review of a decision not to prosecute. If such a request is made, the case will be looked at afresh by an investigator unrelated to the initial investigation.
37. The Royal Commission held a round-table discussion in April 2016, inviting representatives of Commonwealth, state and territory prosecutions offices and victims' rights offices, including all Directors or Deputy Directors of Public Prosecutions, to discuss decision making within DPP offices.
38. This round-table examined the procedures in place for all jurisdictions in Australia when making decisions whether or not to prosecute alleged perpetrators and the role of victims in prosecutions processes. It compared these procedures with those that exists in England and Wales, as outlined above.
39. When compared with the clear rights and protocols that exist in England and Wales, the various Australian systems appear haphazard. Different jurisdictions have different levels of formality and victim engagement in review options. While all provide some avenues for review, all would benefit from clearer procedures. As can be seen from

- Case Study 15, the existence of procedures itself does not ensure that they will be implemented. A formal review mechanism would be much more likely to achieve compliance. Uniformity across jurisdictions would also be a positive development.
40. Reviewability of decisions not to prosecute was considered at length by the Royal Commission round table. The real strength of the system in England and Wales, according to participants, was the combination of reviewability, victim engagement, and the clear procedures that exist concerning both reviewability and engagement.¹⁵
41. Anecdotally, it appears that the quality of all prosecutions decision-making has been enhanced by the existence of the VRRS, although there is no data available to verify that. As well as providing feedback to the areas whose decisions have been reviewed, the unit provides training for prosecuting rape and serious sexual offences, and information about regular issues it confronts. As such, a centre of expertise developed.¹⁶
42. Most Australian jurisdictions incorporated automatic review into the initial decision-making process, by way of a supervision. Before a decision not to prosecute is taken, the lawyer with carriage of the matter will usually consult at least with their supervisor and often more senior colleagues will review the file and decision-making process. This contrasts with the procedure in England and Wales, whereby review of the first decision-maker is only undertaken as a part of the review process.¹⁷ There is a capacity to review decisions not to prosecute in the first instance across the jurisdictions. Victims' access to information about this avenue vary, however, undermining the value of the system.
43. The existence of human rights legislation was flagged as a possible mechanism facilitating judicial review of decisions not to prosecute. South Australia's Commissioner for Victims' Rights, Michael O'Connell APM, noted that the persuasive

¹⁵ Criminal Justice Transcript, see above note 17, 81, 85-6.

¹⁶ *Ibid*, 32, 34, 36.

¹⁷ *Ibid*, 102.

law from Europe may give rise to successful arguments for judicial review in the ACT in Victoria.¹⁸

44. While jurisdictions in Australia on balance may have more supervision of decisions as to whether to prosecute a crime, the independence of the review afforded by the England and Wales system remedies the concerns outlined in Case Study 15. The England and Wales system further benefits from a formal victim engagement process, including formalised notification of rights to appeal, meaning victims are not so much at the mercy of the particular investigating authority or officer.¹⁹

Recommendations

The ALA makes the following recommendations in response to the Royal Commission's Criminal Justice consultation paper:

- Blind reporting should be prohibited, in view of the fact that the primary beneficiary of this practice has been institutions connected with abusers of children, rather than victims and survivors. The ALA believes that form of reporting falls foul of legislation prohibiting the concealment of an offence, and thus leaves both reporters and police who accept such reports liable for prosecution.
- The issue of whether there should be a penalty imposed on victims who do not report abuses against them must be handled sensitively. There will be many victims who feel unable to report abuse due to mental health, cultural, religious, family or other reasons. It would not be appropriate to impose penalties on such individuals for failing to report. However, it must be acknowledged that a failure to report may give rise to later incidents of abuse if an abuser is able to continue to have access to children. The ALA believes that reporting should be required, but

¹⁸ *Ibid*, 76.

¹⁹ Royal Commission into institutional responses to child sexual abuse, *Public Hearing – Criminal Justice DPP complaints and oversight mechanisms*, Round Table transcript 29 April 2016 (Criminal Justice Transcript), 81, 85-6.

there should be broad discretion not to prosecute, having regard to social, cultural, family and psychological circumstances which might reasonably explain the failure to report. The discretion would need to be exercised sympathetically in respect of victims.

- There is a need for national consistency and merits review of decisions of DPPs not to prosecute historical sexual abuse. The system currently in place in England and Wales presents a useful model to emulate in Australian jurisdictions.
- Human rights legislation in all jurisdictions could be a useful development in ensuring that rights are appropriately balanced between victims and alleged perpetrators in navigating criminal justice solutions to child sexual abuse.