



**Submission from the
Truth Justice and Healing Council**

**Royal Commission into Institutional Responses to Child Sexual Abuse
Consultation Paper | Redress and civil litigation**

16 March 2015



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Justice Peter McClellan AM
Chair
Royal Commission into
Institutional Responses to Child Sexual Abuse

Via email: solicitor@childabuseroyalcommission.gov.au

Dear Justice McClellan

As you know, the Truth Justice and Healing Council (the Council) has been appointed by the Catholic Church in Australia to oversee the Church's response to the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission).

We now provide the Council's submission in response to the Royal Commission's Consultation Paper on Redress and civil litigation.

Yours sincerely

Neville Owen
Chair
Truth Justice and Healing Council

16 March 2015



Our Commitment

The leaders of the Catholic Church in Australia recognise and acknowledge the devastating harm caused to people by the crime of child sexual abuse. We take this opportunity to state:

- Sexual abuse of a child by a priest or religious is a crime under Australian law and under canon law.
- Sexual abuse of a child by any Church personnel, whenever it occurred, was then and is now indefensible.
- That such abuse has occurred at all, and the extent to which it has occurred, are facts of which the whole Church in Australia is deeply ashamed.
- The Church fully and unreservedly acknowledges the devastating, deep and ongoing impact of sexual abuse on the lives of the victims and their families.
- The Church acknowledges that many victims were not believed when they should have been.
- The Church is also ashamed to acknowledge that, in some cases, those in positions of authority concealed or covered up what they knew of the facts, moved perpetrators to another place, thereby enabling them to offend again, or failed to report matters to the police when they should have. That behaviour too is indefensible.
- Too often in the past it is clear some Church leaders gave too high a priority to protecting the reputation of the Church, its priests, religious and other personnel, over the protection of children and their families, and over compassion and concern for those who suffered at the hands of Church personnel. That too was and is inexcusable.
- In such ways, Church leaders betrayed the trust of their own people and the expectations of the wider community.
- For all these things the Church is deeply sorry. It apologises to all those who have been harmed and betrayed. It humbly asks for forgiveness.

The leaders of the Catholic Church in Australia commit ourselves to endeavour to repair the wrongs of the past, to listen to and hear victims, to put their needs first, and to do everything we can to ensure a safer future for children.

Authorising Church Bodies

The following Catholic Church bodies have authorised the Truth Justice and Healing Council to represent them at the Royal Commission:

Dioceses

Archdiocese of Adelaide	Diocese of Broome	Diocese of Sandhurst
Archdiocese of Brisbane	Diocese of Bunbury	Diocese of Toowoomba
Archdiocese of Canberra-Goulburn	Diocese of Cairns	Diocese of Townsville
Archdiocese of Hobart	Diocese of Darwin	Diocese of Wagga Wagga
Archdiocese of Melbourne	Diocese of Geraldton	Diocese of Wilcannia-Forbes
Archdiocese of Perth	Diocese of Lismore	Diocese of Wollongong
Archdiocese of Sydney	Diocese of Maitland-Newcastle	Eparchy of Saints Peter & Paul of Melbourne
Diocese of Armidale	Diocese of Parramatta	Military Ordinariate of Australia
Diocese of Ballarat	Diocese of Port Pirie	Personal Ordinariate of Our Lady of the Southern Cross
Diocese of Bathurst	Diocese of Rockhampton	
Diocese of Broken Bay	Diocese of Sale	

Religious Institutes

Adorers of the Blood of Christ	Loreto Sisters	Sisters of Mercy Brisbane
Augustinian Recollect Sisters	Marist Brothers	Sisters of Mercy North Sydney
Augustinian Sisters, Servants of Jesus and Mary	Marist Fathers Australian Province	Sisters of Mercy Parramatta
Australian Ursulines	Marist Sisters – Congregation of Mary	Sisters of Nazareth
Benedictine Community of New Norcia	Ministers of the Infirm (Camillians)	Sisters of Our Lady of Sion
Blessed Sacrament Fathers	Missionaries of God's Love	Sisters of St Joseph
Brigidine Sisters	Missionaries of the Sacred Heart	Sisters of St Joseph of the Apparition
Canons Regular of Premontre (Norbertines)	Missionary Franciscan Sisters of the Immaculate Conception	Sisters of St Joseph of the Sacred Heart
Canossian Daughters of Charity	Missionary Sisters of Mary, Queen of the World	Sisters of St Joseph, Perthville
Capuchin Friars	Missionary Sisters of St Peter Claver	Sisters of St Paul de Chartres
Christian Brothers	Missionary Sisters of Service	Sisters of the Good Samaritan
Cistercian Monks	Missionary Sisters of the Sacred Heart	Sisters of the Good Shepherd
Columban Fathers	Missionary Sisters of the Society of Mary	Sisters of the Holy Family of Nazareth
Congregation of the Mission – Vincentians	Missionary Society of St Paul	Sisters of the Little Company of Mary
Congregation of the Most Holy Redeemer – Redemptorists	Oblates of Mary Immaculate	Sisters of the Resurrection
Congregation of the Passion – Passionists	Order of Brothers of the Most Blessed Virgin Mary of Mount Carmel (Carmelites)	Society of African Missions
Congregation of the Sisters of Our Lady Help of Christians	Order of Friars Minor Conventual	Society of Catholic Apostolate
Daughters of Charity	Order of Saint Augustine	Society of Jesus
Daughters of Mary Help of Christians	Order of the Friar Servants of Mary (Servite Friars)	Society of St Paul
Daughters of Our Lady of the Sacred Heart	Our Lady of the Missions	Society of the Divine Word Australian Province
De La Salle Brothers	Patrician Brothers	Society of the Sacred Heart
Discalced Carmelite Friars	Pious Society of St Charles – Scalabrinians	Sylvestrine-Benedictine Monks
Dominican Friars	Poor Clare Colettines	Ursuline Missionaries of the Sacred Heart
Dominican Sisters of Eastern Australia & The Solomons	Presentation Sisters – Lismore	
Dominican Sisters of North Adelaide	Presentation Sisters – Queensland Congregation	Other Entities
Dominican Sisters of Western Australia	Presentation Sisters – Tasmania	Australian Catholic Bishops Conference
Faithful Companions of Jesus	Presentation Sisters – Victoria	Catholic Religious Australia
Family Care Sisters	Presentation Sisters – Wagga Wagga Congregation	Catholic Church Insurance Limited
Franciscan Friars	Presentation Sisters – Western Australia	National Committee for Professional Standards
Franciscan Missionaries of Mary	Religious of the Cenacle	Professional Standards Office Tasmania
Franciscan Missionaries of the Divine Motherhood	Salesians of Don Bosco	Professional Standards Office NSW/ACT
Franciscans of the Immaculate	Salvatorian Fathers	Professional Standards Office NT
Holy Cross – Congregation of Dominican Sisters	Secular Institute of the Schoenstatt Sisters of Mary	Professional Standards Office Qld
Holy Spirit Missionary Sisters	Servants of the Blessed Sacrament	Good Samaritan Education & Lourdes Hill College
Hospitaller Order of St John of God	Sisters of Charity of Australia	Good Samaritan Education & Mater Dei
Institute of Sisters of Mercy Australia & Papua New Guinea	Sisters of Jesus Good Shepherd "Pastorelle"	Good Samaritan Education & St Mary Star of the Sea College



The Truth Justice and Healing Council

The Catholic Church in Australia (the Church) welcomes the establishment of the Royal Commission into Institutional Responses to Child Sexual Abuse as an opportunity to acknowledge the truth about child sexual abuse within the Church, and to have these issues investigated and considered, objectively and publicly. It is an opportunity to bear witness to the suffering of the many victims of this abuse.

The Church is committed to cooperating fully with the Royal Commission, without reservation or qualification.

In February 2013 the Australian Catholic Bishops Conference (ACBC) and Catholic Religious Australia (CRA)¹ jointly established the Truth Justice and Healing Council (the Council) to coordinate and oversee the Church's overall response to and appearance at hearings of the Royal Commission.

The Council is a body of 12 people, with expertise spanning such fields as child sexual abuse, trauma, mental illness, suicide, psycho-sexual disorders, education, public administration, law and governance. The majority of Council members are lay, two of its members are bishops, and one of its members is a Brigidine sister. Three of the Council members are either themselves victims of abuse or have immediate family members who are victims. The Council provides independent advice to the ACBC and CRA, through a Supervisory Group, which is comprised of the Permanent Committee of the ACBC, and representatives of CRA. The Supervisory Group may accept or reject such advice. The Supervisory Group fully endorses this Submission. The members of the Supervisory Group are listed on the TJHC website [here](#).²

The Council is chaired by the Hon Neville Owen, former judge of the Supreme Court of Western Australia and former HIH Royal Commissioner. Mr Owen's appointment follows the death of the Council's inaugural Chair, the Hon Barry O'Keefe in April 2014.

The other members of the Council are:

- Archbishop Mark Coleridge, Archbishop of Brisbane
- Professor Maria Harries, Adjunct Professor at Curtin University and Research Fellow in Social Work and Social Policy at the University of Western Australia
- Mr Jack Heath, CEO of SANE Australia
- Associate Professor Rosemary Sheehan AM, Department of Social Work, Faculty of Medicine, Nursing and Health Sciences, Monash University
- Hon Greg Crafter AO, former South Australian Minister of Education
- Sr Maree Marsh, former Congregational Leader of the Brigidine Sisters and psychologist with Anti-Slavery Australia at the University of Technology Sydney, Faculty of Law
- Bishop Bill Wright, Bishop of the Diocese of Maitland-Newcastle

¹ CRA is the peak body, previously known as the Australian Conference of Leaders of Religious Institutes, for leaders of religious institutes and societies of apostolic life resident in Australia.

² <http://www.tjhcouncil.org.au/about-us/members-of-supervisory-group.aspx>

- Professor Greg Craven, Vice-Chancellor of the Australian Catholic University
- Ms Elizabeth Proust AO, former Secretary to the Victorian Department of Premier and Cabinet, and Chairman of the Bank of Melbourne and Nestlé Australia and member of other boards
- Mr Stephen Elder, former Member of the Victorian Legislative Assembly and Parliamentary Secretary for Education and currently Executive Director of Catholic Education for the Archdiocese of Melbourne, and
- Dr Marian Sullivan, child and adolescent psychiatrist.

The CEO of the Council, Mr Francis Sullivan, has worked in government and private practice and has held positions as Secretary-General of the Australian Medical Association, Chief Executive of Catholic Health Australia and consultant to the Pontifical Council for the Pastoral Care of Health Care Workers at the Vatican. He is also an Adjunct Professor at the Australian Catholic University.

The Council oversees the Church's engagement with the Royal Commission, including by:

- speaking for the Church in matters related to the Royal Commission and child sexual abuse
- coordinating the Church's legal representation at, and the Church's participation in, the Royal Commission.
- The Council's role extends to:
- initiating research into best practice procedures, policies and structures to protect children
- assisting in identifying any systemic institutional failures that have impeded the protection of children
- providing information to the Royal Commission concerning the various procedures, policies and structures that have been successively put in place by Church organisations over the past 25 years to deal with complaints and instances of child sexual abuse and any improvements which might be made to them to provide greater protection for children
- seeking to promote lasting healing for the victims and survivors of abuse.

To date, 31 dioceses and 97 religious institutes (commonly referred to as congregations and orders) have given an authorisation to the ACBC or CRA, authorising those bodies to represent and act for them in the engagement of the Church with the Royal Commission.

The ACBC and CRA have in turn delegated that authority to the Council. The Council therefore seeks to appear at the Royal Commission for all the authorising bodies, and will speak with one voice for all of them.

Pursuant to these arrangements, the Council acts for all archdioceses and dioceses in Australia, with the exception of three of the Eastern Rite Eparchies, and for all the major religious institutes. The Council also acts for a number of other Catholic organisations including Catholic Church Insurance Limited (CCI).

For practical purposes, the Council will ordinarily speak for the whole Church: its dioceses, its religious institutes, its priests and religious, in the Royal Commission.

The Catholic Church in Australia today is an extensive and diverse religious organisation committed to worship, prayer and pastoral care. It is involved in providing pastoral, educational, health, human and social services across Australia.³

Notwithstanding that all the dioceses and religious institutes are autonomous and independent, each from the other, with no one central or controlling authority, and with each free to govern its affairs separately and independently, all are united in their support for the principles stated in the Commitment at the head of this Submission.

Those principles are also fully shared by all the innocent and high-minded priests and religious whose long years of devoted and selfless service have been admirable and who are heartbroken by the revelations of sexual abuse which have emerged in recent decades.

The Council's aim is to do everything in its power to ensure that the Royal Commission has available to it from the Church all the material that it needs for the work it seeks to do, so as to ensure that a light is shone on dark places and times and events, and to ensure that nothing is concealed or covered up in respect of what Church personnel did or failed to do.

The Council seeks to fulfil that role, on behalf of the Church, in a spirit of honesty, openness and genuine humility.

³ See Annexure B, TJHC Submission to Royal Commission Issues Paper No 2: Towards Healing, 30 September 2013
<http://tjhcouncil.org.au/media/39435/30549468_2_TJHC-Towards-Healing-submission-30-Sep-2013.pdf>

1 Introduction

- 1 In its submission of 11 August 2014 in response to Royal Commission Issues Paper No. 6, *Redress Schemes*, the Truth Justice and Healing Council reiterated its position of support for the establishment by governments of an independent national redress scheme to provide financial redress to the victims of child sexual abuse and for that scheme to be funded by the institutions responsible for the abuse. The Council said that a national scheme was necessary to ensure consistency of treatment of victims across Australia and to remove the justifiable criticism that the investigation and determination of abuse claims by the very institutions against which the claims were brought lacked transparency.
- 2 A national redress scheme should be designed in such a way as to uphold the individual dignity of each person, restore his or her life and provide just outcomes for all.
- 3 The present submission responds to the Royal Commission's Consultation Paper, *Redress and Civil Litigation*, which was released on 30 January 2015. It does so by addressing the issues in the order in which they are set out in the Consultation Paper.

2 REDRESS

2.1 Structural issues (Chapter 2)

- 1 Having regard to the position the Council has consistently taken, the Council favours what the Royal Commission has described as the ideal position, namely, a single national redress scheme led by the Australian Government and with the participation of state and territory governments and non-government institutions. As was stated in the Council's submission in response to Royal Commission Issues Paper No. 6, *Redress Schemes*, it is important that any scheme be developed first and foremost with claimants in mind. A uniform national scheme will best achieve that. A uniform national scheme will also deal more effectively with claimants and respondents who are no longer located in the same jurisdiction or the jurisdiction in which the alleged abuse occurred. All claimants, wherever they are located and whichever institution was involved, should be subject to consistent entitlements and be treated fairly and consistently.
- 2 If the ideal position is unachievable, the Council would favour another option canvassed by the Commission, namely, the establishment by each state and territory of a uniform redress scheme for the state or territory, with the participation of relevant governments and non-government institutions based on models already in existence for harmonised state-based legislation. If this option were to be adopted it would be important that, so far as practicable, the uniform model mirror the principles the Commission recommends. Otherwise, fair and consistent treatment of claimants would be jeopardised and institutions operating across jurisdictions would face a considerable cost burden in meeting the different requirements of different schemes.
- 3 Desirably, the scheme or schemes should be established by legislation, in a way that ensures the independence of the scheme or schemes from relevant institutions, including government institutions. Participation in the scheme or schemes by relevant government and non-government institutions should be mandatory.
- 4 The Council considers that the redress scheme or schemes should deal with claims for "past child sexual abuse", as that term is used by the Commission. The Council notes that the Commission raises the question whether the scheme or schemes should also deal with "future" abuse, given the reforms it proposes to civil litigation. In the Council's view, the scheme or schemes should be set up in a flexible way in this regard. Even with the civil litigation reforms proposed, the adversarial nature of the civil litigation system means that in many cases it will not be a suitable means of pursuing compensation in child sexual abuse cases. On the other hand, of course, the Council considers that the stronger safeguarding practices institutions are putting in place as a consequence of the Royal Commission's work should substantially reduce the workload of redress frameworks in relation to "future" abuse.
- 5 The Council notes that the Royal Commission has not dealt with access by "secondary victims" to a redress scheme and that their needs will be considered further through separate work the Royal Commission is doing on support services. The Council may make further comments on the issue of secondary victims when the Royal Commission publishes the outcomes of its additional work.

2.2 Direct personal response (Chapter 4)

- 6 The Council supports what the Royal Commission says about the need for mechanisms to be in place for the making of apologies by institutions as a concomitant element of the redress scheme or schemes. The mechanisms should be available for any survivor who wishes to engage with the institution concerned. They should provide for an apology to be delivered as a direct personal response by the institution, an opportunity for the survivor to meet with a senior representative of the institution and the giving by that representative of an assurance as to the steps the institution has taken, or will take, to protect against further abuse. Institutions in which the abuse occurred must approach the giving of apologies with genuine humility, fully demonstrating understanding and care for the individual.
- 7 In New South Wales the *Civil Liability Act 2002* and in the Australian Capital Territory the *Civil Law (Wrongs) Act 2002* give legal protection to apologies, so that an apology is not admissible in any civil proceedings as evidence of the fault or liability of the person on whose behalf the apology is made. In other states and the Northern Territory, it may be necessary for the legislation establishing the redress scheme or schemes to provide similar statutory protection to apologies given in association with the scheme or schemes.

2.3 Counselling and psychological care (Chapter 5)

- 8 Consistently with the view it expressed in its submission in response to Issues Paper No.6, the Council supports the proposal of the Royal Commission that counselling and psychological care should be supported by providing funding, not services. That is to say, the redress scheme or schemes would not have its or their own counselling and psychological care service.
- 9 Access to counselling and care should be available through existing services, which may include services established by institutions and services provided by government funded organisations. Existing counselling services have a deep knowledge of the history and impact of abuse on individual survivors, as well as strong networks with external health and allied professionals who are able to support survivors and help them on the path to healing.
- 10 Some survivors of sexual abuse will not want, or will not be able, to engage with an agency of the very institution in which the abuse occurred. To cater for these people, the redress scheme or schemes will need to provide an option under which a body independent of the institution is available to arrange the counselling and care.
- 11 However the counselling or care is made available, the institution in which the abuse occurred should fund it.
- 12 It will be important to ensure as part of the counselling or care arrangements that regular reviews are undertaken to ensure that the counselling or care is having a beneficial effect. In the Archdiocese of Melbourne, Carelink undertakes a review after 10 sessions with the external counsellor or other practitioner.
- 13 The Council notes that the Royal Commission has sought the views of the Australian Government and state and territory governments on options for expanding the public provision of counselling and psychological care for survivors of child sexual abuse.

2.4 Monetary payments (Chapter 6)

- 14 The Council supports a capped scheme that has a table or matrix that takes account of the severity of the abuse and the impact of the abuse. A capped scheme with such a table or matrix is an important way of ensuring that all claimants are subject to consistent entitlements and that the same set of considerations are taken into account in the making of determinations.
- 15 The Royal Commission says in the Consultation Paper that the actuarial modelling it commissioned on possible payment ranges was based on possible maximum payments of \$100,000, \$150,000 and \$200,000 respectively. While noting that the information set out in the Discussion Paper shows that the cost of payments under the scheme will be affected by where the average payment sits rather than by where the maximum payment is set, the Council considers that a maximum of around the Commission's middle figure of \$150,000 is likely to reflect community standards and expectations concerning redress.
- 16 If a past monetary payment received under a redress scheme, civil litigation award or settlement or victims of crime compensation scheme is to be taken into account when a claimant approaches the proposed redress scheme, the Council agrees with the suggestion that the past payment should be adjusted for inflation and then deducted from any proposed payment under the redress scheme.

2.5 Redress scheme processes (Chapter 7)

- 17 The scheme should apply to the sexual abuse of a child that is perpetrated by an adult who was engaged by an institution or who provided services for the institution in circumstances where there is a nexus between the alleged offender, the misconduct complained of, the institution and the complainant suffering loss or harm as the result of the misconduct.
- 18 The Council believes that it is the issue of responsibility that should ground access to (and institutional responsibility under) the redress scheme and is concerned that the formulations in the second and third bullet points at p. 163 of the Consultation Paper may be too wide and too uncertain to be able to be applied to all claimants on a consistent basis. In particular, the second bullet point's formulation, "... *in any way contributed to (whether by act or omission) the risk of abuse or the circumstances or conditions giving rise to that risk*", may create a situation where institutions become liable or jointly liable on an increased risk theory when, properly considered, primary responsibility for the abuse lies elsewhere. Similarly, the third dot point's formulation to include "*should be treated as being responsible...*" imports a subjective assessment that would be difficult to apply consistently.
- 19 The Council submits that the criteria that govern access to the scheme should be as clear and unambiguous as possible. Those criteria should be directed to ensuring that focus is placed on the institution or institutions that had the most direct responsibility for the contact between the perpetrator of the abuse and the claimant.
- 20 The Council agrees with the suggestion that the application process for accessing the scheme should be as simple as possible.
- 21 Noting what the Royal Commission says about the standard of proof, the Council remains of the view it expressed in its submission in response to Issues Paper No.6 that claims should be determined on the balance of probabilities, which is a standard well understood under the law. While

it is true that there may be a dearth of evidence against which an allegation of abuse can be balanced, such a situation is not uncommon for a decision making tribunal.⁴

- 22 The Council is concerned that the redress scheme proposed by the Royal Commission would not make findings that any named person was involved in abuse, as part of determining eligibility for redress. This approach creates the risk that redress will be awarded in circumstances where the claim is untested and the accused person, if alive, does not have the opportunity to refute allegations. While every step must be taken to avoid trauma to claimants in the claims process, the redress scheme must accord procedural fairness to persons accused and to the relevant institution. The accused person and the institution must have the allegations put to them and be given the opportunity to test the allegations and to respond to them. The redress determination will necessarily reflect an assessment of whether the abuse took place as alleged, and it seems impossible that this assessment could fairly occur without considering and determining whether a particular person was involved in abuse.
- 23 To avoid traumatising or distressing complainants, the Council is also concerned to avoid a circumstance where they are required to tell their story more than once. This circumstance would arise if the process of claiming redress is separated from dealing with the allegation against the alleged abuser.
- 24 Of course, the redress scheme should be compliant with the mandatory reporting requirements in force in the jurisdiction concerned. This may require redress processes to be put on hold pending the outcome of any police investigations.
- 25 The Council agrees with the view expressed by the Actuaries Institute of Australia that is reported at p. 174 of the Consultation Paper that, if the redress scheme is to be most efficient, affordable and sustainable, there should be no option to pursue civil litigation. A deed of release or other mechanism having similar effect should be required.
- 26 Deeds of release should be uniform across the scheme, they should not preclude claimants from accessing counselling and psychological support on an “as needs “ basis and they should not contain confidentiality clauses.

2.6 Funding redress (Chapter 8)

- 27 The Council notes the modelling set out in Chapter 8 of the Consultation Paper which suggests that the redress scheme would require total funding of \$4.3 billion to meet monetary payments and administration, of which the contribution required of non-government institutions in meeting their share of payments would be \$2.4 billion. These figures assume that governments would be funders of last resort in cases where a non-government institution that otherwise would have a payment responsibility has no assets or has ceased to exist.
- 28 The Council is not presently in a position to comment on the actuarial calculations on which the estimated funding figures are based. The Council is aware that Catholic Church Insurance is doing its own actuarial calculations to assist an assessment of its future liabilities arising out of the redress

⁴ For example, material tending to support or contradict an applicant’s claim for refugee status is often wanting in cases before the Refugee Review Tribunal.

scheme proposed by the Royal Commission. In due course the Council may wish to make a further submission to the Royal Commission on the Commission's actuarial calculations.

- 29 The only comment the Council presently makes about the Royal Commission's figures is that it would not agree with the suggestion made on p.188 of the Consultation Paper that governments might negotiate with, or require, non-government institutions to contribute funding of last resort.

2.7 Interim arrangements (Chapter 9)

- 30 Because the redress structure the Royal Commission is proposing will take some time to implement, the Catholic Church is giving consideration to modifying its present redress arrangements based on the principles for redress schemes outlined by the Royal Commission. However, the Council acknowledges that any interim arrangement will be far less satisfactory for survivors of abuse than an independent national scheme.

3 CIVIL LITIGATION

3.1 Civil litigation (Chapter 10)

- 1 The Council again submits that civil litigation is not the most appropriate mechanism for dealing with claims for child sexual abuse.

3.2 Limitation periods

- 2 In its submission dated 15 April 2014 to the Royal Commission's Issues Paper No.5, Civil Litigation, the Council noted the approach that had been taken in some of the Provinces of Canada in abolishing limitation periods for civil actions involving sexual abuse claims if the misconduct concerned occurred while the complainant was a minor. The Council said that one option the Royal Commission might wish to consider was the making of a recommendation to all governments in Australia for similar amendments to be made to their statutes of limitation.
- 3 However, the Council also said in that submission that the adoption of this course could have an adverse impact on the fair and efficient administration of justice in cases where the timing of a claim caused significant prejudice to a defendant. The Council therefore submitted that the preferable option was for the Royal Commission to recommend that limitation periods be maintained for civil claims where a child had been sexually abused but that the limitation period be lengthy and that it be capable of being extended, with the defendant having an onus to satisfy the court that it not be extended. In particular, the Council submitted that, in child sexual abuse matters:
 - The limitation period should expire 25 years after the claimant attained his or her majority; and
 - The period be capable of being extended on the application of the claimant, unless the defendant was able to satisfy the court that the granting of the extension would result in significant prejudice to the defendant.
- 4 On 25 February 2015, the Victorian Government introduced into the Parliament the Limitation of Actions Amendment (Child Abuse) Bill 2015. The Bill proposes the removal of limitation periods that apply to actions relating to death or personal injury arising from child abuse. The Opposition in Victoria has announced that it will support the Bill. It is likely, therefore, to pass into law. The Bill contains a provision which is intended to ensure that the amendments do not limit the jurisdiction of the court to summarily dismiss or permanently stay proceedings if the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible.⁵
- 5 In a further development the Department of Justice of NSW released a discussion paper in January 2015 on limitation periods in civil claims for child sexual abuse. One of the options canvassed in the paper is the removal of limitation periods for causes of action based on child sexual abuse.
- 6 The Council acknowledges that the Royal Commission will have to take these developments into account and appreciates the desirability of uniformity across States and Territories in laws, practices and procedures relating to child sexual abuse cases, including limitation periods. Nonetheless,

⁵ This reflects the principle established by the High Court in *Batistatos v Roads and Traffic Authority of NSW* (2006) 226 CLR 256.

Statutes of Limitation and the equitable doctrines (such as laches) that preceded and run in parallel with them have long been an important part of the justice system and ought not lightly be dispensed with. They are there for a reason: to advance the public interest in the fair and efficient administration of justice.

- 7 The Council has given further consideration to this issue but adheres to the position stated in its response to Issues Paper No. 6, namely, that there should be a limitation period of 25 years after the claimant attains his or her majority, subject to conditions. One of the reasons the Council takes this stance is uncertainty about insurance arrangements in a scenario where there is no limitation period at all.

3.3 Duty of institutions

- 8 The Royal Commission's Consultation Paper discusses the changes to the common law that have occurred in the United Kingdom and Canada relating to the vicarious liability of institutions for the abuse of children in their care. The Consultation Paper also discusses the more restrictive scope of vicarious liability that has applied in Australia and that is reflected in the decision of the High Court in *New South Wales v Lepore*.⁶
- 9 One of the options for reform in Australia which the Royal Commission puts forward in its Consultation Paper is making institutions liable for child sexual abuse committed by their employees or agents unless the institution proved that it took reasonable precautions to prevent the abuse. The introduction of this new duty on institutions would presumably need to be introduced by legislation in each of the states and territories.
- 10 The Council would support this change to the law on two provisos. The first is that the change only applied prospectively, ie, applied only in respect of incidents of abuse that occurred after the change in the law took effect, with a suitable period of time allowed before the new law took effect to allow appropriate time to prepare for its commencement. As the Royal Commission notes at p. 219 of the Consultation Paper, applying a new duty to institutions in respect of past conduct would be likely to alter significantly the potential liability of institutions. That is why historical claims are better dealt with through a national redress scheme than through retroactive legislative reform.
- 11 Retrospective legislation would fundamentally alter the assumptions upon which organisations previously arranged their affairs, including obtaining insurance. It is quite likely that persons and entities within institutions that had no role in relation to working with children (or supervising or employing those who worked with children) were either not insured or were underinsured in relation to potential liabilities associated with child sexual abuse, on the basis that those activities never formed part of their operations. It is also likely to be the case that insurance arrangements were historically purchased based on prevailing standards of the day as to the reasonableness of measures of child protection (see p.209 of the Consultation Paper). Legislative amendments imposing retrospective liability on such organisations would create liabilities that would have been insurable had they existed or been foreseeable at the time but are no longer insurable. It is highly unlikely that it would be possible to purchase insurance covering an historical liability for child sexual abuse that is created by legislative amendment.

⁶ (2003) 212 CLR 511

- 12 Prospective operation of the change to the law put forward by the Royal Commission would give institutions an opportunity to ensure that appropriate protocols and practices for the safeguarding of children were in place and suitable training programs in relation to the protocols and practices were being conducted before the institutions became exposed to the new potential liability.
- 13 The second proviso on which the Council would support the change to the law suggested in the Consultation Paper is that the change applied to all institutions, both non-government and government.

3.4 Identifying a proper defendant

- 14 Consistently with what it said in its submission responding to Issues Paper No.5, *Civil Litigation*, the Council supports 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.
- 15 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. The legislation should apply equally to all institutions and not interfere with the right of religious institutions to arrange their affairs according to their norms or beliefs but instead should simply provide that there be an identifiable body corporate that is appropriately insured or indemnified.
- 16 The Council opposes the suggestion at p.224 of the Consultation Paper that amendment of the legislation providing for statutory property corporations for religious organisations may be required to provide that any liability of the religious body that the property trust is associated with for institutional child sexual abuse can be met from the assets of the trust. Trust corporations established under the law for religious institutions act as trustee for a wide variety of works of the church or religion with which they are associated. In many cases the trust corporations have no responsibility for, or relationship with, the abuse which has occurred.
- 17 As discussed above, there would be further difficulties if any legislative amendments affecting trust corporations were to apply retrospectively.
- 18 The Council notes that the Royal Commission's Consultation Paper seems to suggest that only religious bodies should be subject to the requirement to establish or nominate a body corporate. The paper says at p.224 that imposing a requirement for incorporation and insurance on small, and perhaps temporary, unincorporated associations may deter people from forming them, with potential loss to the community of the various sporting, cultural and other activities they provide. While understanding this point, the Council would be opposed to any change to the law that singled out Church institutions for special treatment.

3.5 Model litigant approaches

- 19 The Council agrees with the Royal Commission that both government and non-government institutions against which civil claims in relation to child abuse are brought would benefit from adopting more specific guidelines for responding to civil claims in relation to allegations of child sexual abuse. The Council is considering whether it is feasible for all Catholic Church authorities to adopt a consistent set of model litigant guidelines in this area.