SUBMISSION TO ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE

STATUTORY VICTIMS OF CRIME COMPENSATION SCHEMES

RESPONSE TO ISSUES PAPER 7

TAX EXEMPT STATUS OF CHURCH ENTITIES

WHETHER CHURCH ENTITIES HAVE COMPLIED WITH TAX LAWS

INTRODUCTION

1. Issues paper 7 specified that the Terms of Reference required the Royal Commission to inquire into what institutions and governments should do to address child sexual abuse, including in ensuring justice for victims through the provision of redress. In particular, the Royal Commission is seeking submissions from interested parties concerning advantages and disadvantages of crime compensation schemes as a means of providing compensation to those who suffer child sexual abuse. The Royal Commission is also seeking submissions on those features, which are important to make compensation schemes effective for claimants.

2. Whilst this submission deals mainly with the Catholic Church, it would also apply to all religious institutions which have either obtained tax exempt status, or which operated on the assumption that they are entitled to such status.

3. I would also like to make it clear, at the outset, that this submission is not about the proposition that tax exemption and benefits, enjoyed by religious institutions, but not available to secular associations, is a form of institutionalised discrimination against non-believers.

4. What this submission does do, however, is to raise a legitimate query about whether religious entities which, by deliberate and calculated manoeuvres ensured they would not be called upon to make compensation payments to sexual abuse victims, are entitled to tax exempt status under the law. The argument will be advanced that any institution which takes active steps to ensure it does not pay compensation to sexual abuse victims is clearly not following canons of conduct, which would be expected of a religious institution, which is promoting or advancing religion.

5. I have taken an active interest in many case studies heard by the Royal Commission. In particular I believe those relevant to this submission include case study 8 relating to *Towards Healing* and John Ellis (Ellis case). This was the case study attended by the then senior cleric in Australia, Cardinal Pell. What is of genuine concern to me is that, despite the comments from the most senior Catholic Church leaders about the resources of the church being made available to pay compensation to victims of child sexual abuse, it is absolutely clear that these comments are only personal opinions and will not be binding on the Catholic Church in any way.

6. What is probably required is a legal and regulatory framework to ensure that undertakings by Church leaders are not empty promises and that Church entities will be compelled to pay compensation, whether or not a national compensations scheme is ultimately created. Alternatively, it may be the case that some Church entities are, as a result of the way they are treating victims, placing their tax exempt status at risk and the inducement for the church to be tax compliant across the board, may enable just compensation for victims and obviate the need for new legislation. This possibility will be canvassed in this submission.

BACKGROUND

7. During its hearings to date the Royal Commission has dealt extensively with the topic of compensation and, in the context of the Catholic Church, this has included *Towards Healing* and other case

studies. There has also been considerable discussion of the topic outside the Commission, including communications from the Truth Justice and Healing Council ("TJHC"). To develop this submission I would like to refer to some examples from both categories.

8. Firstly, the Royal Commission has heard from a number of church leaders on the matter of compensation. Perhaps most relevant was the appearance of Cardinal Pell on 26th of March 2014 in case study 8. On that day, during the course of his evidence, Cardinal Pell was asked a series of more than six questions by the Chair, Justice McClellan, relating to the crucial issue of whether, in every case where an action succeeds, would the resources of the Church be made available to the extent necessary o meet a judgement. Cardinal Pell finally agreed on the 26th of March, that the funds needed to meet a judgement, even to meet a sum of, for example, $2 million would come from Church funds, including the possibility they could be drawn from assets held by Church trustees.

9. However, when Cardinal Pell resumed giving evidence on the next day, he made it clear in an answer to a question from his legal Counsel, that the various answers given to his Honour, Justice McClellan on the previous day were his own personal view. I do not know the reason why Cardinal Pell found it necessary to qualify the answers he gave on 26 March on such an important topic. Whether he did not have the authority to commit the Church to find the funds to pay compensation to victims or whether he chose not to commit the Church to such action is not really the important issue here. What is of paramount importance is that the word of Church leaders, no matter how encouraging they may seem to victims, places no obligation whatsoever on the Church, or more specifically on its legal entities, to make financial restitution to abuse victims

10. Further examples of senior Church leaders making public comments on this topic can be readily found. One of the Church's most prominent leaders called upon to speak about the Church's handling and management of child sexual abuse is Mr Francis Sullivan, Chief Executive Officer of the TJHC. In terms of speaking out loudly in

support of victims, Mr Sullivan comes across as a shining light among the Church leadership group. He also has the ability to communicate simply and unequivocally.

11. An instance of this is found in a blog, dated 11 February 2014, he issued on behalf of the TJHC. In responding to a report released by a United Nations Committee on the Rights Of The Child, Mr Sullivan wrote—" The findings in the U N Committee's report will once again disappoint many Catholics around the world who have lost faith and hope in the Church. This is why we need independent statutory bodies who can investigate the abuse issues and then determine just compensation. **It will be incumbent upon the Church to pay the compensation** and to establish ongoing pastoral support for the survivors of child sexual abuse. The days of the Church investigating itself are well and truly over."

12. I consider Mr Sullivan is the most believable of all the Church's leaders and, as can be seen in the quotation above, we are left in no doubt about his views regarding the responsibility of the Church to pay compensation. However, it must be said that, if Cardinal Pell does not commit the Church on this matter, and it is a reasonable assumption that other leaders such as Sister Annette Cunliffe, Archbishop Hart, Archbishop Coleridge etc, would adopt the same position, then Mr Sullivan would not, in a formal sense, be able to bind the Church to pay compensation.

13. I should add, at this point, that whilst I conveniently refer to the payment of compensation as a general term in this submission, I am aware of the complexities considered by the Royal Commission. For example, in the discussions between Cardinal Pell and Justice McClellan on 26 March, Cardinal Pell initially saw a distinction between prospective and retrospective situations. Furthermore, those discussions related to a verdict of a Court after litigation. In contrast, the statement by Mr Sullivan referred to above, appears to relate to compensation generally and is not restricted to compensation paid pursuant to a Court decision post litigation.

DEVELOPMENT OF SUBMISSION

14. Acting on the premise then that the Church may not, generally, be legally required to pay compensation to victims of child sexual abuse or, alternatively, it has put in place deliberate and orchestrated structures to stop the payment of compensation, I have considered what laws or regulations need to be examined to compel the Church to do so.

15. I understand that the creation of a national independent compensation scheme (" NICS") may be on the table and this may be under consideration by the Royal Commission. I also believe the Church's TJHC has indicated it would support the creation of a NICS. Whilst such an initiative would clearly increase the prospects of victims being awarded just compensation, the legal issues surrounding the obligations of the Church Authority or entity to provide the funds required would, no doubt be difficult and complex. I would imagine that new Federal and State legislation would be required and regulations would be necessary to ensure consistent compliance with such laws.

16. Whilst the Royal Commission may well recommend the creation of a NICS, involving new laws and regulations, I believe it is appropriate for the Royal Commission to fully examine the current legal framework in which the Church operates. One very important aspect of this framework is the tax free status enjoyed by Church entities as religious institutions.

17. As I have said in my introduction I am not concerned here with the time honoured argument that tax exemptions and benefits enjoyed by mainstream religions, but not available to secular associations, are institutionalised discrimination against non-believers. On the contrary I believe that genuine religious institutions, acting in accordance with the laws of Australia, should continue to benefit from taxation and other concessions.

18. However, in the light of information brought before the Royal Commission, including the circumstances surrounding the " Ellis "case (case study no 8), I believe there is uncertainty whether certain Church entities are entitled to tax exempt status under Australian law. A reader of this submission might wonder at this point—What is the connection between the tax exempt status of a Church entity and the ability of that entity to pay compensation to a sexual abuse victim? In my opinion the connection is clear and valid. If it is demonstrated, for example, that certain Catholic corporate or trust entities, which currently enjoy tax free status, have put in place financial arrangements or structures which have the effect of denying the payment of compensation to the victims of criminal acts committed by officials, members or employees of those entities, then I would submit those entities should lose their tax free status. Expressed in the simplest of terms I submit that it is the very act of removing access of its funds to abused victims that would disqualify an entity from being treated as a religious institution under the Australian Tax laws.

19. The corollary of this position, of course, is that in my view, the Church entities which do the right and moral thing, as a religious institution would be expected to do and ensure victims of abuse are justly compensated, should continue to enjoy the tax concessions provided under the law.

20. It is necessary to examine briefly the taxation law in this area. For convenience I shall only refer to the income tax provisions here, as it is not relevant to consider fringe benefits tax, goods and services tax, etc for the purposes of this submission. The meaning of the term 'religious institution' has been developed by the Courts in Australia (including the High Court) over many years. In the main the Courts were called upon to adjudicate on sub-section 23(e) of the Income Tax Assessment Act 1936(ITAA) which provided that the income of a religious institution was exempt from income tax. Section 50-5 of the Income Tax Assessment Act 1997 as amended replaced sub-section 23(e) of the 1936 Act but this new provision did not change the overall approach to providing income tax exemptions for religious institutions.

21. The overall approach to determining whether an entity is a religious institution in the Australian context is covered in Taxation Ruling TR 92/17 that dealt with the exemption under sub-section 23(e) of the ITAA. Some of the key points contained in TR 92/17, relevant to this submission, are summarised in the following three paragraphs.

22. Firstly, a body (or entity) is an " institution" for the purposes of the ITAA if it is an establishment, organisation or association, instituted for the promotion of some object that is religious, charitable, educational, etc. That definition was accepted by the High Court of Australia in YMCA of Melbourne v FC of T (1926) 37 CLR 351 and later in Stratton v Simpson (1970) 125 CLR 138.

23. Secondly, a body is a " religious institution " if it is instituted for religious purposes. For a body to be regarded as a religious institution:

(a) its objects and activities must reflect its character as a body instituted for the promotion of some religious object; and

(b) the beliefs and practices of the members of that body must constitute a religion.

24. Thirdly, the most important factors for determining whether a particular set of beliefs and practices constitute a religion are:

(a) belief in a supernatural Being, Thing or Principle; and

(b) acceptance of canons of conduct which give effect to that belief, but which do not offend against the ordinary laws.

25. The factors mentioned in paragraph 24 above were established by the High Court in The Church of the New Faith v Commissioner of Pay-roll Tax (Vic) 83 ATC 4652;(1983) 14 ATR 769(the Scientology case). This case determined that, if these two factors are satisfied, it is likely the body will be characterised as religious. On the other hand, if these two factors are not satisfied it is unlikely the body will be characterised as religious.

26. Private schools, private universities and residential university colleges established or conducted by religious institutions generally are not religious institutions for the purposes of the ITAA. That question must be determined having regard to the primary or dominant object of the body as ascertained by reference to the objects as stated in its memorandum of association or other constituent documents and by consideration of its activities: see Commissioner for ACT Revenue Collections v Council of the Dominican Sisters of Australia 91 ATC 4602: (1991) 22 ATR 213.

27. Before examining the application of these tax provisions to the Catholic Church and its entities I need to address an important issue and I know the Royal Commission has had to come to terms, on many occasions, with the same issue. The broad issue is "Who" or "What" is the Catholic Church? The specific issue, for purposes of this submission, is what bodies or entities have enjoyed income tax exemption as religious institutions. To paint the picture, the TJHC, in its submission on Issues paper no 2—" *Towards Healing*", informed the Royal Commission that the Catholic Church in Australia is not a single or discrete entity, but is a community of faith, made up of many different groups and individuals. In fact, according to the TJHC, there are 34 dioceses and over 180 religious institutes and societies within the Church in Australia—refer page 20 of the TJHC submission.

28. Based on this information, and assuming that some Church bodies will have more than one tax entity, I am proceeding on the basis that well over 200 Church entities will have been notified by the Australian Tax Office of their exempt status or, alternatively, have operated on the basis of tax exemption. I have not researched the procedures required by religious institutions to gain a tax exemption but I understand that, following the introduction of new tax arrangements in July 2000, religious institutions had to register for the new tax system and obtain an Australian Business number before they can receive deductible gifts or be exempt from income tax. I also understand if the religious institutions were not endorsed from July 2000, they would lose income tax exemption status.

29. Turning now to the principal issue raised in this submission, I believe it is apparent, having regard to the matters summarised in paragraphs 22 to 26 above, that many of the Church's entities would legitimately be regarded as religious institutions and qualify for tax exempt status under the law. Based on available public information I express this view because, clearly, there are entities which are institutions created for the purposes of promoting a religious object and, also, because they would meet the criteria set down by the High Court in the Scientology case for determining whether they constitute religious institutions. I would describe these Church entities as " compliant" entities.

30. On the other hand I also believe there are some Church entities which, clearly, do not warrant tax exempt status because they fall into one or more of the following categories:

(a) Church entities that, having regard to the manner of their financial structure and operation, are not created with a primary or dominant object of promoting religion but, rather, a different object such as the protection and preservation of that entities wealth or the wealth of another entity within the Church structure;

(b) Church entities that, by deliberate and calculated steps, ensure they will not be required to pay compensation payments to sexual abuse victims. Such steps run contrary to the activities that would normally be expected of a religious institution;

(c) Church entities which knowingly accepted a canon of conduct including failure to protect children, failure to bring known perpetrators of criminal acts against children to account, transfer of perpetrators to other Church entities where it could reasonably be assumed more children would suffer abuse and, finally, failure to provide real justice and healing to those children abused by personnel within the entity. Such conduct would hardly be considered a canon of conduct of a religious institution that does not offend against the ordinary laws of Australia.

31. I would refer to those Church entities that fall within (a), (b) or (c) of paragraph 30 above as " non-compliant " entities.

32. I am not aware of the nature or formal structure of any of the Church's tax entities. I also do not know if the TJHC has provided the tax records of any of the 200 plus Catholic bodies it represents before the Royal Commission. I understand the Royal Commission can, however, obtain whatever relevant records it requires. Therefore I am in no position to comment on any individual Church entity. In any event they are protected by confidentiality provisions under the tax laws. Any review of the tax status of specific Church entities is a matter for the ATO or, if relevant to its terms of reference, for the Royal Commission.

33. It is, of course, possible to offer general comments because of the extensive details published during the course of the many case studies heard by the Royal commission. For example, relying on the evidence given in case study number 8 (Ellis case), it would be reasonable to conclude that the particular Church entities which comprise the Catholic Archdiocese of Sydney would fall within the categories described in paragraph 30 above and would be considered non compliant entities.

34. Furthermore, the Royal Commission has considered other case studies where it has been clearly demonstrated that the actions of personnel in the particular diocese or religious institution has been manifestly criminal. See, for example, case study 11 dealing with the Christian Brothers in Perth. I would argue that the Church entities involved would also fall within the categories described in Para 30 above and should lose their tax exemption.

CONCLUSION

35. Issue Paper 7 is about what governments and institutions should do in the context of compensation schemes for the victims of child sex abuse. It appears to be common ground now that Government should introduce a national compensation scheme, and this would, generally, have the support of institutions. Whilst I support such a scheme I will leave the details and complexities for other respondents to issue Paper 7, except for the crucial task of ensuring participants in the scheme actually provide the funds necessary to pay victims. This aspect is currently a problem in the Catholic environment, as demonstrated by the Ellis Case, and one cannot assume that it will not be a difficulty in a new national scheme.

36. The John Ellis case is an example of a victim of sexual abuse who was subjected to horrendous treatment at the hands of the Archdiocese of Sydney under the leadership of Cardinal Pell. I note that the Catholic Church has responded to this case by announcing a major reform proposal within the Church. The reform would, it is reported, see every Bishop, diocese and religious order make available a legal entity, covered by insurance and wealth, that survivors of child sexual abuse can sue. It is also reported that this is a major change in the legal approach of some Church bodies to litigation—refer to Mr Sullivan's blog of the 12 March 2014, on behalf of the TJHC.

37. If such a proposal is implemented it would be helpful to survivors if they want to take legal action against the Church, assuming of course that every one of the Church's bodies are included. However, the proposal does not come across as one of significance for the thousands of victims of sexual abuse as it only relates to litigation and, as I understand the position, very few victims have resorted to this course of action. The proposal will not assist the great majority of victims who do not wish to sue for a just compensation. I cannot help but wonder why the Church's proposal to provide legal entities, covered by

insurance and wealth, is not linked to a national compensation scheme that would be available to all victims.

38. *If the Catholic Church were genuine in actually paying compensation to all victims of child sexual abuse, it would immediately implement measures to ensure, by insurance or other means, that all its entities are fully funded for those purposes.*

39. *I have concluded in this submission that some Church entities have by deliberate and calculated legal manoeuvres, either ensured they would not be required to make compensation payments to sex abuse victims or, alternatively, minimise such payments. I have concluded that these Church entities, in so doing, have lost their entitlement to income tax exemption.*

40. *Furthermore, I believe other Church entities have engaged in conduct in relation to the overall treatment and management of child sex abuse victims, which is so contrary to that expected of a religious institution and is so offensive against ordinary laws, that such conduct disqualifies those entities from tax exemption.*

41. *Whilst I believe the Catholic Church, through its own actions, has placed the tax exempt status of many of its entities at risk, for the reasons stated, I concede that the views that I have expressed in this submission are arguable and would, no doubt, be strongly defended by a church entity before a Court in the event of a legal dispute. However, I also believe that any Church authority or entity would prefer to be given the opportunity to get its own house in order rather than publicly defend its privileged tax free position in the face of the horrendous treatment of its own sexually abused children which treatment, in my submission, undermines the very basis of its privileged tax position.*

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