

Contemporary Comment

Evaluating Towards Healing as an Alternative to Litigation as Redress for Survivors of Clerical Child Sexual Abuse

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Abstract

Towards Healing was adopted by the Catholic Church in Australia as a mechanism to receive and respond to disclosures of clerical child sexual abuse. Parkinson (2014:131) describes the protocol as a 'radical and proactive step' in the effective provision of redress for survivors of sexual abuse by clerics within the Catholic Church. This comment questions both the necessity and viability of this scheme, as posited by Parkinson, in light of the experiences of survivors brought before the Royal Commission into Institutional Responses to Child Sexual Abuse.

Keywords: Towards Healing – Catholic Church – child sexual abuse – redress – litigation – Royal Commission – Ellis – Parkinson – vicarious liability

Introduction

By the end of 2013, the Catholic Church in Australia had paid more than A\$43 million in compensation to victims of clerical child sexual abuse (Royal Commission 2013a:2478). Since 1996, Catholic Church authorities have received more than 2215 complaints nationwide (Royal Commission 2013a:2477). The Australian community has been understandably shocked by public revelations since the late 1980s of the extent and nature of the sexual abuse of children by clerics of the Catholic Church. For survivors, their families and advocates, however, the more shocking reality has been the scarcity of effective mechanisms for redress and support (McClellan 2015:2).

The Catholic Church in Australia has previously identified the need for a nationally coordinated, just and effective mechanism for responding to disclosures of child sexual abuse made to Church authorities. In 1996, the Australian Catholic Bishops' Conference promulgated *Towards Healing: Principles and Procedures in Responding to Complaints of Abuse against Personnel of the Catholic Church in Australia* ('Towards Healing') (Australian Catholic Bishops' Conference & the Australian Conference of Leaders of Religious Institutes

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2000). The *Towards Healing* protocol establishes mechanisms for receipt of disclosures of child sexual abuse, assessment of the veracity of such disclosures, and arrangement of redress and support as necessary. The protocol pursues a notionally independent process whereby an Office of Professional Standards in each state, separate from the diocesan chancelleries of insurance agencies, has carriage of the assessment and facilitation of claims. At a number of stages throughout the process, senior diocesan officials or lay Church staff (including lawyers and insurers) participate as agents of the Church in discussions and negotiations with survivors. The guiding principles of the *Towards Healing* process are that claims are intended to be settled compassionately and expeditiously in a manner consistent with the pastoral needs of the survivor.

The Royal Commission into Institutional Responses to Child Sexual Abuse ('Royal Commission'), established in 2012, has released public evidence of survivors' significantly varied experiences of the *Towards Healing* process. In early 2015, the Royal Commission released a 'consultation paper' on issues of redress for survivors of child sexual abuse within institutional contexts (Royal Commission 2015), which reviews various current processes, including *Towards Healing*.

Patrick Parkinson contended in a previous issue of this journal that within the Catholic Church in Australia 'there have been genuine efforts at reform and reparation, as well as flagrant breaches of trust' (Parkinson 2014:119). He believes *Towards Healing* to be one such genuine effort. Central to Parkinson's argument is that, in design — though perhaps not uniformly in implementation — the *Towards Healing* protocol serves as a necessary and viable alternative to litigation for redress and justice for survivors of clerical sexual abuse. Chiefly, Parkinson laid out what he considers to be deficiencies in litigious avenues of redress, and how he considers the *Towards Healing* protocol successfully addresses these deficiencies.

Parkinson's justifications for the *Towards Healing* process are primarily legal in nature. For the most part, he avoids the question of whether the protocol meets a moral or ethical standard appropriate to the Catholic Church. However, statements by prominent Church officials within Australia recognise processes such as *Towards Healing* as a realisation of the Church's moral, but not necessarily legal, obligation to survivors of child sexual abuse (Royal Commission 2014a:6546). In this sense, a proper evaluation of *Towards Healing* must consider the ethical obligations accepted by Church authorities in relation to survivors of child sexual abuse, in addition to their strict legal obligations.

This comment will consider the limitations of Parkinson's defence of the *Towards Healing* protocol, first, in terms of his arguments in relation to the necessity of an alternative avenue to litigation for redress and, second, in terms of the viability of *Towards Healing* as such an alternative.

It is important to clarify what in particular survivors may expect by way of 'redress'. In his speech announcing the 'consultation paper' on issues of redress, Justice Peter McClellan, Chair of the Royal Commission, noted that 'effective redress must have three elements — personal response by the institution to the survivor, guaranteed funding when needed for counselling and psychological care and a money sum which is paid in recognition of the wrong done to the individual' (McClellan 2014:6).

Necessity for alternatives to litigation

Parkinson (2014:132) identifies three impediments to civil litigation as a means of redress for survivors of child sexual abuse: (i) the statute of limitations; (ii) the absence of vicarious

liability of the Church in respect of priests; and (iii) the difficulties in identifying a Church authority as the proper defendant to litigation.

Statutes of limitations generally establish a time period within which an individual claiming to have been wronged may bring a legal action in respect of that wrong. This begs the question: to what extent do statutes of limitations present a meaningful impediment to civil mechanisms for redress in this instance? The mere fact that the limitation period established in legislation has expired does not *prima facie* defeat a claim. In all Australian jurisdictions a defendant must opt to plead expiry of time in order to bar a plaintiff's claim (Mathews 2014:21). Therefore, to the extent that the Catholic Church recognises the import of redress for survivors of clerical sexual abuse, it need not rely on legal technicality to defeat claims for civil redressance. Indeed, many prominent Catholic Church officials, including Archbishop of Melbourne Denis Hart, have suggested that statutory limitation periods in respect of child sexual abuse ought to be abolished. Hart argued that 'there shouldn't be any artificial restriction on our society's ability to redress such matters' (Munro 2012). This is one situation in which Parkinson's legal justification for *Towards Healing* does not appropriately consider whether the ethical obligations accepted by Church officials may be best fulfilled through the process.

However, the issues of vicarious liability and the identification of a proper defendant require more detailed consideration. Both issues arise as a direct result of the adversarial approach taken by Catholic Church lawyers to survivor-initiated civil litigation, rather than inherent impediments to civil claims in these cases. The issues Parkinson raises reflect legal tactics adopted by the Catholic Church, rather than its inherent legal position as a respondent to litigation. Parkinson (2014:132) himself notes that 'the Church did not need to plead these defences'. Ultimately, however, he (2014:133) excuses the conduct of the Church in litigation by saying: 'Churches and other faith-based organisations should have no privileges or special rights when it comes to liability under the civil law; but nor should they have lesser rights than any other organisation or citizen.' The defence, though, misses the point that the issue at hand is not whether the Church should have lesser rights in civil litigation, but whether, by virtue of the historical quirks of the Church's legal development, victims of sexual violations by its clergy ought to be prevented from seeking redress in this manner. Furthermore, Parkinson's defence again avoids considering the ethical responsibility that Church defendants may be said to owe to survivors of child sexual abuse.

Vicarious liability

Cardinal George Pell, giving evidence for the second time before the Royal Commission from his new home in Vatican City, seemed a world away from the authoritative Archbishop of Sydney, who delivered thousands of rousing sermons from the altar of St Mary's Cathedral. The Cardinal faced difficult questions regarding the system he initiated to manage disclosures of child sexual abuse, *The Melbourne Response*. During three hours of evidence via an unstable video connection, Pell acknowledged the Church's moral responsibility to deal compassionately with victims of clerical sexual abuse, while obfuscating any legal liability. The Church, Pell argued, was no more legally responsible for priests who abuse children than a trucking company that employs a driver who molests women. The comparison drew criticism from many quarters: parents of two victims described the Cardinal as betraying a 'sociopathic lack of empathy' (McKenna 2014), *The Sydney Morning Herald* headline asked 'How does George Pell Sleep at Night?' (FitzSimons 2014), while the Chair of the Australian Trucking Association described the comparison to the Catholic Church as a 'deep insult' to truck drivers across the country (Culzac 2014).

The story highlights the vexed question of the vicarious liability of Church authorities for sexual abuse perpetrated by their clerics. Issues arise because priests and other clerics are not — under the Church's Canon Law or in contract — 'employees' of Church authorities. Further, while each priest is appointed by, and swears an oath of loyalty to, a diocesan bishop, priests enjoy a significant degree of autonomy in the performance of their duties. Bishops retain limited authority to sanction a cleric (Royal Commission 2014b:7774). The most severe sanctions are imposed by the Congregation for the Doctrine of the Faith in Rome, and the right to dismiss an individual from the clerical state is reserved to the Pontiff alone (Congregation for the Doctrine of the Faith 2001).

The question of vicarious liability in this respect is not settled in Australian law. In the leading case on the identification of a proper defendant for clerical sexual abuse, *The Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* ('*Ellis*'), the judge explicitly avoided answering the question of the purported vicarious liability of Church defendants for conduct of an abuser priest. The issue in that case regarded the appropriateness of the defendants identified by the plaintiff in the litigation. (The issue of proper defendants, as distinct from vicarious liability, will be discussed below.) Indeed, the judge further noted that holding an ecclesiastical office was not necessarily incompatible with a legal relationship capable of giving rise to some incidents of an employment relationship (citing *Ermogenous v Greek Orthodox Community of SA Inc*). To that end, it may be open to an Australian court in the future to consider the vicarious liability of Church authorities in respect of clerical sexual abuse. McClellan (2015:5) noted in the context of the Royal Commission that 'it is not difficult to contemplate a duty which is owed by an institution which is absolute in nature ... A crime committed by a member of the institution becomes the responsibility of the institution itself'.

Elsewhere in the world, courts have been more definitive on the issue of vicarious liability for Church-defendants. The English Court of Appeal in *JGE v Trustees of the Portsmouth Roman Catholic Diocesan Trust* decided that the trustees of a charitable trust associated with the Diocese of Portsmouth, standing in the place of the Bishop of Portsmouth, ought to compensate a survivor of sexual abuse by a priest of the Diocese. The Court found that, while a priest may not be an 'employee' under either Canon Law or contract, vicarious liability of the Dioceses arose out of a 'relationship akin to employment'. The decision followed a similar authority from the Canadian Supreme Court in *Doe v Bennett*.

In light of the above, it would be a mistaken to characterise the issue of vicarious liability as a barrier to litigation initiated by survivors against some Church authorities for damages suffered as a result of clerical sexual abuse.

Proper defendant

Another issue suggested by Parkinson is the difficulty for plaintiffs in identifying a juridic entity that holds sufficient assets and is capable of being named as a defendant in litigation relating to clerical child sexual abuse. The Catholic Church in Australia, and in many other countries, is constituted as a number of voluntary, unincorporated associations. In order to facilitate the management of property and the conduct of financial affairs, dioceses frequently establish charitable trusts in their name. However, while these trusts are legally responsible for the assets of 'the Catholic Church', they are not entities associated with the management or oversight of clerics, or the conduct of religious business within the Church. As such, their legal liability for clerical sexual abuse is a vexed issue.

As mentioned, *Ellis* is the leading Australian case on the issue of the identification of the 'proper defendant'. Between 1974 and 1979 as an altar boy at Bass Hill Parish, John Ellis was

repeatedly sexually assaulted by Reverend Aidan Duggan. In 2004, Ellis commenced proceedings against then Archbishop of Sydney, George Pell, the Trustees of the Roman Catholic Church for the Archdiocese of Sydney ('Trustees') and Duggan. Ellis sought, among other things, an order that Pell and the Trustees 'jointly and severally represent the unincorporated association known as the Catholic Archdiocese of Sydney'.

On appeal to the New South Wales Court of Appeal, Mason P concluded that neither Archbishop Pell (as he then was) nor the Trustees were proper defendants for the action by Ellis. Mason P ultimately concluded that the Archbishop, in his personal capacity, was neither a 'corporation sole' nor liable under the common law pertaining to unincorporated associations as a representative defendant. Furthermore, under the terms of the *Roman Catholic Church Trust Property Act 1936* (NSW), the Trustees did not execute functions in relation to the administration of the Church that would render them proper defendants.

The case law in relation to the issue of the determination of a proper defendant for Church authorities in this instance, however, offers only a partial insight. Prominent Catholic Church leaders in Australia have suggested that amendments should be made to their legal character to enable victim-initiated litigation. For example, in his evidence before the Royal Commission, Pell noted his belief that dioceses ought to be structured as a 'corporation sole ... so that the successors, if God forbid there were any after Mr Ellis, would have somebody to sue' (Royal Commission 2014a:6355). The decision in *Ellis* supports the notion that such an amendment may facilitate victim-initiated litigation at Australian law (per Mason P at 591). As Parkinson (2014:132) notes: 'Church leaders ... rely upon legal advice; but ultimately they must make the ethical decisions about legal strategy.' What ethical decisions are made by Church authorities in light of developments associated with the Royal Commission will likely determine whether the issue of the identification of a proper defendant presents an impediment to survivor-initiated litigation.

Nature of civil litigation process

Nothing posited above is intended to suggest that there are not various reasons for survivors to seek alternatives to civil litigation. Cost barriers, the length of the process, the requirement to engage legal counsel and the adversarial nature of the process are all compelling reasons to suggest that some alternative may be necessary. Further, Parkinson (2014:131) persuasively suggests that the exacting civil standard of proof applicable in these cases may serve as a further disincentive in respect of claims relating to abuse occurring many years prior to the litigation. However, it is a mistake to conclude that some special position of the Catholic Church necessarily impedes such litigation. The following section will consider the extent to which, as suggested by Parkinson, *Towards Healing* satisfies this potential requirement for an alternative to litigation.

Viability of *Towards Healing* as an alternative to litigation

The story of Ms Jennifer Ingham, brought to light by the Royal Commission, demonstrates a range of experiences with the *Towards Healing* protocol. Ingham initiated the *Towards Healing* process in 2012. Her initial Contact Report noted that her desired outcomes from the process were: a meeting with a particular Church official who was aware of her abuse at the time it occurred; monetary compensation; and an official apology (Ingham 2014:5). Initially, she noted that her engagement with Church officials within this process was 'very professional and supportive', but that, within 12 months of her initial contact, 'the *Towards Healing* Process got murky' (2014:7). The Catholic Church Insurance Agency attended

portions of her facilitation process, and Ingham believed that the Church was ‘treating [her] abuse as though it was a commercial negotiation’ (Ingham 2014:8). Ingham’s experiences of procedural injustice resonate in many of the stories examined by the Royal Commission.

Parkinson recognises a number of these shortcomings in the implementation of the *Towards Healing* process, but he nonetheless endorses the policy as a ‘radical and proactive step’ towards a more appropriate Catholic Church response to survivors of clerical sexual abuse (Parkinson 2014:131). He defends the core tenets of the scheme, which he sees as ‘aimed at responding to the needs of victims’ (2014:131). However, this author suggests that it is clear that a number of the shortcomings of the *Towards Healing* protocol reflect inadequacies in the process itself.

In 2013, the Royal Commission called for submissions in relation to the procedures and experiences of the *Towards Healing* protocol. Twenty-three of those submissions have been made public on the Royal Commission website (Royal Commission 2013b). Of these, a number raise concerns regarding perceived procedural deficiencies in the *Towards Healing* protocol. The Law Council of Australia (2013) noted in its submission a range of issues with the *Towards Healing* protocol, including the extent of the privilege against self-incrimination, the lack of clearly defined standards of proof, and the relationship between the *Towards Healing* process and the rights of victims to access the civil and criminal justice systems (2013:4).

One of the most commonly cited criticisms of the *Towards Healing* protocol regards the independence and impartiality of the processes of the assessment of complaints and the determination of appropriate redress. The central criticism is that Directors of Professional Standards and *Towards Healing* facilitators may be seen to be unduly influenced by their close relationships with other diocesan officials. Other procedural fairness issues concern the involvement of other interests within the Church in the *Towards Healing* process. In some cases, insurers (typically the Catholic Church Insurance Agency) have been seen to participate extensively in the process in an attempt to mitigate financial damage (Royal Commission 2013a:2528). In other instances, diocesan lawyers were seen to intervene to prohibit the provision of pastoral support at certain stages of the *Towards Healing* process (Royal Commission 2014a:6352). The Law Council of Australia (2013:14) recognised that a key tenet of procedural fairness in relation to institutional redress schemes concerns ‘a decision-maker who is free from any interest in the outcome of the matter in dispute, who is free from the appearance of having prejudged the matter or having any bias or prejudice’. The Council went on to note in respect of *Towards Healing* that ‘the independence and impartiality of decision-making appears to be somewhat compromised’ (Law Council of Australia 2013:17).

Some of these public criticisms may account for the decision by Catholic Church entities in Australia, in a subsequent submission to the Royal Commission, to recommend ‘the establishment by governments of an independent national redress or compensation scheme to provide financial reparation to victims of child sexual abuse’ (Truth Justice and Healing Council 2014:9). The Church entities stressed that an important feature to ensure the effectiveness of such a scheme would be assessment by an independent and suitably qualified individual ‘to ensure claimants have confidence in the outcomes of their claims’ (Truth Justice and Healing Council 2014:15). These submissions appear to respond to doubts regarding the efficacy and viability of redress schemes that are internal to institutions which are the subject of claims.

Evidence before the Royal Commission suggests, however, that institutional design of *Towards Healing*, quite apart from its problematic implementation, is not necessarily viable as a mechanism for the provision of redress to survivors of clerical child sexual abuse.

Conclusion

The Royal Commission has undertaken to provide a specific interim report on the issue of redress for survivors in 2015. No doubt, as further evidence becomes publicly available, the experiences of the *Towards Healing* protocol will be better understood.

Patrick Parkinson's arguments in relation to the necessity for and viability of the *Towards Healing* scheme cannot be sustained in light of the evidence adduced before the Royal Commission thus far. This comment has questioned, first, the actual position in relation to the alleged legal impediments to victim initiated litigation identified by Parkinson. Second, it has established that, given there may be a requirement for an alternative avenue of redress to civil litigation, the *Towards Healing* protocol is procedurally lacking in providing effectively for the needs of survivors.

Cases

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