

25 March 2014

Mr Roderick Best  
General Counsel  
Royal Commission into Institutional Responses to Child Sexual Abuse  
GPO Box 5283  
Sydney NSW 2001

Email: [solicitor@childabuseroyalcommission.gov.au](mailto:solicitor@childabuseroyalcommission.gov.au)

Dear Mr Best

**Civil Litigation Issues Paper 5**

Attached is the Law Council of Australia's submission relating to the Civil Litigation Issues Paper 5 for your consideration.

The Law Council thanks the Royal Commission for the opportunity to make this submission and for the extension of time in which to lodge it.

Yours sincerely



**MARTYN HAGAN**  
**SECRETARY-GENERAL**

---

# Civil Litigation: Issues Paper 5

---

## **Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse**

**21 March 2014**

---

## Table of Contents

<b>Acknowledgements</b> .....	<b>2</b>
<b>Executive Summary</b> .....	<b>3</b>
<b>Introduction</b> .....	<b>4</b>
<b>Background</b> .....	<b>5</b>
<b>Comments</b> .....	<b>6</b>
Overarching comments .....	6
General .....	6
Victorian Inquiry findings .....	8
Specific comments .....	9
Elements of the civil justice system that raise issues for victims of child sex abuse in the conduct of litigation .....	9
Lack of defendant to sue .....	9
Lack of assets of the defendant .....	12
Vicarious liability of institutions .....	13
Vicarious liability – Victorian Inquiry findings .....	15
Limitation periods .....	17
Limitation periods - Law Council Position Paper .....	17
Limitation periods – Victorian Inquiry .....	21
Existence of relevant records .....	23
Process of giving evidence .....	24
Other elements of civil litigation systems that raise issues for victims of child sex abuse .....	25
The relationship between internal complaints processes and the rights of victims to access the civil justice system .....	25
The victim’s personal barriers .....	26
Lack of understanding of child sexual abuse matters within the court system .....	26
The cost of accessing the civil justice system .....	29
Dispute resolution and mediation .....	31
Changes to civil litigation systems to accommodate for victims of child sex abuse ...	31
<b>Conclusion</b> .....	<b>31</b>
<b>Attachment A: Profile of the Law Council of Australia</b> .....	<b>33</b>

## Acknowledgements

The Law Council acknowledges the assistance of the Law Institute of Victoria, the Law Society of New South Wales, the Law Society of the Northern Territory, its International Law Section and Federal Litigation and Dispute Resolution Section in the preparation of this submission.

---

## Executive Summary

1. The Law Council has considered civil litigation systems with careful regard to the serious nature, and the scale of the abuse suffered by children while in institutions, as well as the ongoing trauma for victims and their families.
2. This submission largely discusses civil litigation as it relates to victims of child sexual abuse in religious organisations. However, the Law Council's submission identifies a number of important barriers to victims successfully pursuing civil litigation claims that in several instances would be relevant to other non-government organisations. These barriers include:
  - i. the lack of a defendant to sue;
  - ii. the lack of assets of the potential defendant;
  - iii. lack of clarity regarding the vicarious liability of institutions;
  - iv. expiry of the limitation period for the cause of action;
  - v. issues with evidence - such as accessing relevant records;
  - vi. the process of giving evidence and being subject to examination and cross-examination;
  - vii. issues emerging from victims' engagement in internal complaints processes;
  - viii. personal barriers, such as shame and mistrust of the system;
  - ix. a lack of understanding of child sexual abuse matters within the court system itself; and
  - x. the cost of accessing the civil justice system.
3. The Law Council notes that there is a need to amend and strengthen the civil litigation system in a manner which specifically addresses each of these concerns and makes a number of recommendations in this regard.
4. In particular, the Law Council refers to the recommendations by one of its constituent bodies, the Law Institute of Victoria (LIV), for changes to limitation periods in respect of child sexual abuse cases; changes to the corporate and organisational structure of certain institutions; clarity around the issue of vicarious liability of institutions; and, consideration of issues of access to evidence.
5. Finally, the Law Council welcomes the approach of the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) in examining justice for victims as it relates to the criminal justice system; the effectiveness of past inquiries; the regulatory system; and through civil litigation, redress and compensation schemes.

---

## Introduction

6. The Law Council is pleased to provide this submission in response to *Issues Paper 5: Civil Litigation* (the Issues Paper), which was released on 6 December 2013 by the Royal Commission.
7. The Law Council strongly supports the establishment of the Royal Commission, which provides an important opportunity for Australians to better understand:
  - i. the experiences of people who have been affected by child sexual abuse within institutional contexts;
  - ii. what should be done by institutions and governments to better protect children against such abuse in the future;
  - iii. what should be done to respond appropriately to child sexual abuse in institutional contexts; and
  - iv. what institutions and governments should do to address or alleviate the impact of past and future child sexual abuse in institutional contexts.
8. The Law Council has previously made submissions regarding:
  - i. the Royal Commission's *Issues Paper 2: Towards Healing* on 13 September 2013 (the Towards Healing Submission);<sup>1</sup>
  - ii. the Royal Commission's *Issues Paper 1: Working with Children Checks* on 12 August 2013;<sup>2</sup>
  - iii. the Royal Commission's Draft Practice Guidelines on 19 April 2013;<sup>3</sup> and
  - iv. the Australian Government's consultation regarding the Royal Commission's establishment on 28 November 2012.<sup>4</sup>
9. The Law Council welcomes the examination of this important issue. In the Law Council's submission on the Terms of Reference for the Royal Commission it was noted that the LIV recommended that the Terms of Reference should address barriers to civil claims, including limitation periods and vicarious liability issues.<sup>5</sup> Its Towards Healing Submission also discussed a number of barriers to victims successfully obtaining redress through the both civil and criminal justice systems,

---

<sup>1</sup> Law Council of Australia, *Towards Healing: Issues Paper 2 – Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse*, 13 September 2013, available at: <http://www.childabuseroyalcommission.gov.au/wp-content/uploads/2013/10/12.-Law-Council-of-Australia1.pdf>.

<sup>2</sup> Law Council of Australia, *Working With Children Checks: Issues Paper 1 – Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse*, 12 August 2013, available at: <http://www.childabuseroyalcommission.gov.au/wp-content/uploads/2013/09/66.-Law-Council-of-Australia.pdf>.

<sup>3</sup> Law Council of Australia, *Royal Commission into Institutional Responses to Child Sexual Abuse: Submission regarding Draft Practice Guidelines*, 19 April 2013, available at: <http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2700-/2713%20-%20Draft%20Practice%20Guidelines.pdf>.

<sup>4</sup> Law Council of Australia, *Royal Commission into Institutional Responses to Child Sexual Abuse: Consultation Paper: Submission to the Secretariat, Royal Commission into Child Sexual Abuse*, 28 November 2012, available at <http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2664%20-%20Royal%20Commission%20into%20Institutional%20Responses%20to%20Child%20Sexual%20Abuse%20-%20Consultation%20Paper.pdf>.

<sup>5</sup> *Ibid*, p 8.

---

and considered that the Royal Commission should focus on the barriers to civil and criminal justice in a subsequent issues paper. The Law Council looks forward to engaging with the Royal Commission in relation to its future Issues Papers on redress schemes and statutory victims' compensation schemes.<sup>6</sup>

10. As outlined above, this submission largely discusses the civil justice system in relation to victims of child sexual abuse in religious organisations; however, several of its observations are likely to be relevant to other non-government organisations.
11. The Law Council represents around 60,000 Australian lawyers through its constituent bodies: the State and Territory Law Societies and Bar Associations, as well as the Large Law Firm Group. The Law Council also has a number of specialist sections consisting of individual members of the legal profession with a particular interest in specific areas of law or legal practice. These sections are the Business Law Section, the Family Law Section, the Federal Litigation Section, the International Law Section (ILS) and the Legal Practice Section. Further details of the Law Council's structure and aims are included at **Attachment A**.

## Background

12. The Issues Paper notes that, in accordance with the Royal Commission's Terms of Reference, the Royal Commission will inquire into what institutions and governments should do to address, or alleviate the impact of, past and future child sexual abuse in institutional contexts, including in providing some level of justice for victims through financial compensation. Civil litigation is identified as one mechanism for achieving this.
13. The Law Council's submission draws substantially upon, and in many cases directly quotes, the work of the LIV, which considered several of the matters relevant to Issues Paper No.5 in its response to the recent Victorian Parliament Family and Community Development Committee (the Committee)'s *Inquiry into the handling of child abuse by religious and other organisations* (the Victorian Inquiry).<sup>7</sup> The Report of the Victorian Inquiry was tabled in Parliament on 13 November 2013.<sup>8</sup> It followed the *Protecting Victoria's Vulnerable Children Inquiry* (the Cummins Inquiry), which reported to the Victorian Government on 27 January 2012.<sup>9</sup>

---

<sup>6</sup> Ibid, p 10.

<sup>7</sup> Parliament of Victoria, Family and Community Development Committee, *Inquiry into the handling of child abuse by religious and other organisations*, referred 17 April 2012, information, including the Final Report, available at: <http://www.parliament.vic.gov.au/fcdc/article/1788>.

<sup>8</sup> Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the handling of child abuse by religious and other non-government organisations*, November 2013, available at: <http://www.parliament.vic.gov.au/fcdc/article/1788>. The Victorian Inquiry looked into: the practices, policies and protocols in religious and other non-government organisations for the handling of allegations of criminal abuse of children; whether there are systemic practices in such organisations that preclude or discourage the reporting of such allegations; and whether changes to law or practices, policies and protocols in such organisations are required to help prevent abuse, and to deal with allegations of abuse.

<sup>9</sup> The Honourable Philip Cummins (Chair), Emeritus Professor Dorothy Scott OAM and Mr Bill Scales AO, *Report of the Protecting Victoria's Vulnerable Children Inquiry*, 17 January 2012, available at: [http://www.childprotectioninquiry.vic.gov.au/images/stories/inquiry/volume1/cpi%207649%20web-pdf%20volume%201%20protecting%20victoria\\_s%20vulnerable%20children\\_%20inquiry\\_bm.2.pdf](http://www.childprotectioninquiry.vic.gov.au/images/stories/inquiry/volume1/cpi%207649%20web-pdf%20volume%201%20protecting%20victoria_s%20vulnerable%20children_%20inquiry_bm.2.pdf).

- 
14. In its submission to the Victorian Inquiry,<sup>10</sup> the LIV acknowledged the contributions made by its expert legal practitioner members, including those who act as representatives in matters relating to criminal abuse of children by personnel in religious and other non-government organisations.<sup>11</sup>
  15. The Law Council notes the specific examination by the Victorian Inquiry into civil justice reform, discussed further below, and encourages the Royal Commission to consider the recommendations made in its Report.

## Comments

### Overarching comments

#### *General*

16. The Law Council considers that access to justice, including appropriate remedies, is a fundamental requirement of a developed society, which must always be respected. In order to achieve access to justice, citizens and other legal entities must have not only the formal right to access legal institutions to enforce their rights and defend their interests, but the practical ability to do so, regardless of geographic location, economic capacity, health, education, race, sex, social status or any other factor.
17. It is important to recognise that restrictions on legal aid are now so severe that, in many jurisdictions, a substantial proportion of those living below the Henderson poverty line (which is a reasonable yard-stick for economic disadvantage) will not satisfy the means test for legal aid eligibility. Accordingly, many of those who might seek to litigate and retain a lawyer will do so at significant personal expense, which presents a significant barrier to proceeding.
18. Moreover, contraction of legal aid funding in real terms over the course of the last 20 years has led to increasingly severe restrictions on legal aid eligibility. There are significant category restrictions, under which no legal aid is available for certain types of civil claims. Accordingly, there will potentially be little or no legal aid available for child abuse victims who may wish to seek redress through the courts, resulting in a virtually impossible task for abuse victims in terms of representing themselves, in what are likely to be highly complex matters, in many cases involving a substantial elapse of time since the abuse finally ceased.
19. As noted in its Towards Healing Submission, the Law Council believes that internal complaints processes should not undermine the fundamental rights to which victims would be entitled, should they choose to pursue their claims through the civil litigation system. Similarly, the Law Council emphasises that any statutory compensation scheme, if established for victims of child sexual abuse within

---

<sup>10</sup>Law Institute of Victoria, *Submission to the Parliament of Victoria, Family and Community Development Committee regarding its Inquiry into the Processes by which Religious and other Non-Government Organisations Respond to the Criminal Abuse of Children by Personnel within their Organisations*, 21 September 2012, and Supplementary Submission, 28 February 2013, both available at: <http://www.parliament.vic.gov.au/fcdc/article/1789>.

<sup>11</sup>The LIV emphasises that its members may have been constrained from providing details relevant to the terms of reference due to strict confidentiality agreements they have been required to sign when settlement has been obtained through an internal complaints process of a given religious organisation or in a civil law action.

---

institutions, should be complementary to, and not replace the right of victims to pursue a claim at common law.

20. In this respect, the LIV has noted that in civil litigation, victims will ordinarily seek compensation for the personal injuries (both physical and psychological) suffered, and the losses consequent upon those injuries (for instance, medical expenses, out-of-pocket expenses, and loss of earnings/income). They might seek counselling and pastoral support, and in some cases admissions or apologies. In certain circumstances, damages for pain and suffering might be awarded and in rare cases exemplary damages. Compensation ordered by a court, in cases involving sexual abuse has exceeded \$250,000, with the possibility of interest and costs also being awarded.<sup>12</sup>
21. In making the above statements, the Law Council refers to its key objective of the maintenance and promotion of the Rule of Law. In 2011 the Law Council published its Policy Statement on Rule of Law Principles.<sup>13</sup> The Policy Statement is not exhaustive, but focuses on the most basic tenants of the rule of law. The Policy Statement is a guide to the framework often employed by the Law Council and its committees in evaluating the merits of government legislation, policy and practice.
22. The Law Council considers that the following Principles are important to the protection of the interests victims of child sexual abuse who engage with the civil litigation system, especially access to justice:
  - i. Principle 1 – the law must be both readily known and available, and certain and clear. This means that people must be able to know in advance whether their conduct might attract criminal sanction or a civil penalty. For that reason, legislative provisions which create criminal or civil penalties should not be retrospective in their operation;
  - ii. Principle 4 – everyone should have access to competent and independent legal advice in order to establish and defend his or her rights. The state should provide adequate resources to guarantee access to a lawyer in circumstances where individuals do not have the independent means to retain a lawyer;
  - iii. Principle 6 – the Executive should be subject to the law and any action undertaken by the Executive should be authorised by law; and
  - iv. Principle 7 – no person should be subject to treatment or punishment which is inconsistent with respect for the inherent dignity of every human being.

---

<sup>12</sup> See *GGG v YYY* [2011] VSC 429, a civil case concerning sexual abuse by an uncle in which the abused plaintiff was awarded \$267,000 (comprising general damages of \$200,000, aggravated damages of \$20,000, exemplary damages \$30,000 and special damages of \$17,000). See also *SB v State of NSW* [2004] VSC 514, a civil case concerning sexual abuse in and related to foster care arrangements, in which the plaintiff was awarded damages in the sum of \$281,461 (comprising general damages of \$195,000, past loss of earnings of \$26,461 and future loss of earning capacity of \$60,000).

<sup>13</sup> Law Council, 'Rule of Law Principles', Policy Statement, March 2011, available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementRuleofLaw.pdf>.

---

*Victorian Inquiry findings*

23. The Law Council agrees with the overriding findings of the Victorian Inquiry that:

*Victims of criminal child abuse have a fundamental right to sue non-government organisations for damage they have suffered at the hands of representatives of that organisation. This course is an important avenue for some victims of criminal child abuse to achieve justice.*<sup>14</sup>

24. The Law Council considers that this also extends to the rights of victims to sue government organisations for the damage that they have suffered at the hands of representatives or employees of those organisations.

25. The Victorian Inquiry also found that:

*Court judgments provide a valuable and practically available form of public condemnation for criminal child abuse, and create a powerful incentive for organisations to change their practices to prevent child abuse.*<sup>15</sup>

26. Given these findings, it is of concern that the Victorian Inquiry further found that no civil claims of criminal child abuse made against organisations have been decided by the Victorian courts.<sup>16</sup> Instead, civil litigation in such cases is usually resolved by private settlements.

27. The Law Council emphasises that a large proportion of all cases pursued through the civil justice system will be settled, and that mediation and early dispute resolution processes may often be the most appropriate pathway for victims of child sexual abuse. Nevertheless, the finding that *all* cases regarding institutional child sexual abuse in Victoria have been settled without proceeding to a court finding is perhaps troubling. This raises questions about the extent to which the current system delivers on the principle of access to open justice, as well as the role of the civil justice system in ensuring that serious criminal conduct is addressed consistently.

28. It should be noted that the Victorian Report found that there are significant barriers which can prevent victims from successfully pursuing civil litigation against organisations. In its list of such barriers, it identified the following broad categories of barriers:

- i. lack of financial means;
- ii. lack of emotional resources;
- iii. practical limitations associated with the typically lengthy delay in bringing cases to court; and
- iv. family considerations.

29. These, and other barriers, will be discussed in detail below.

---

<sup>14</sup> Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the handling of child abuse by religious and other non-government organisations*, November 2013, p 519, available at: <http://www.parliament.vic.gov.au/fcdc/article/1788>.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

---

## Specific comments

### Elements of the civil justice system that raise issues for victims of child sex abuse in the conduct of litigation

30. The Law Council recognises that there are several barriers faced by victims of child sexual abuse in institutional contexts to successfully pursuing claims through the civil litigation system.
31. In particular, it agrees that several of the examples in Question 1 of the Issues Paper raise particular concerns.

### *Lack of defendant to sue*

32. In many historical sexual abuse cases, the perpetrator of the abuse will be long deceased by the time a claim is made.
33. Further, the organisational structure of most religious organisations poses a significant barrier to civil law claims. As the Issues Paper notes, some institutions cannot be sued because they are not incorporated bodies or they no longer exist, or because decisions were made personally by an individual officeholder.
34. Religious organisations are typically unincorporated associations which cannot sue or be sued. Office-holders within a religious organisation may exist as sole corporations (a corporate structure effectively reduced to a single officeholder who can be liable for his or her predecessor's actions) or might have liability only as specific individuals. Caution is needed in asserting that a religious officeholder is a sole corporation in the case of roles or offices not explicitly designated as such.
35. In Victoria<sup>17</sup> and some other Australian states,<sup>18</sup> statutory corporations (known as 'trustee corporations') are created for the express purpose of holding property on trust for such religious entities. The lack of any sort of legal entity to represent the Catholic Church, for example, historically led to the development of such corporations to hold the Church's assets and have perpetual succession. These entities are defined by the legislation that establishes them, and their statutory purposes are precisely defined by the legislature – their role specifically encompasses the acquisition, disposal, holding and dealing with property on behalf of the Church, but invariably does not extend to any other aspects of the Church's operation.
36. While the trustee corporations are intended to hold and deal with property, they are by definition not set up to do anything more than that. Courts have found in relation to several such corporations that their activities did not extend into 'pastoral' activities, such as the work of clergy on their land, and therefore that they cannot be sued in relation to activities occurring outside their remit. Therefore, unless a personal injury claim can be configured effectively as an 'occupier's

---

<sup>17</sup> As identified in Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the handling of child abuse by religious and other non-government organisations*, November 2013, p 519, available at: <http://www.parliament.vic.gov.au/fcdc/article/1788>: *Anglican Trusts Corporations Act 1884* (Vic); *Coptic Orthodox Church (Victoria) Property Trust Act 2006* (Vic); *Presbyterian Trusts Act 1890* (Vic); *Roman Catholic Trusts Act 1907* (Vic); and *The Salvation Army (Victoria) Property Trust Act 1930* (Vic).

<sup>18</sup> See for example, in NSW: *Roman Catholic Church Trust Property Act 1936* (NSW), *Christian Israelite Church Property Trust Act 2007* (NSW); and *Anglican Church of Australia Trust Property Act 1917* (NSW). This list is not exhaustive.

---

liability' claim,<sup>19</sup> trustee corporations are likely to remain insulated from any common law liability to abuse victims.

37. The above issues are demonstrated in particular by the case of *Trustees of the Roman Catholic Church v Ellis & Anor* [2007] NSWCA 117.<sup>20</sup>

38. In that case, the plaintiff, Ellis, alleged that he was sexually abused by an assistant priest at the time that he was an altar boy in the Bass Hill Parish of the Roman Catholic Church between 1974 and 1979. In 2004 he brought an action against:

- i. His Eminence George Cardinal Pell Archbishop of Sydney for and on behalf of the Roman Catholic Church in the Archdiocese of Sydney (the first defendant) in various grounds in tort and for a breach of direct and vicarious fiduciary duty in equity;
- ii. the Trustees of the Roman Catholic Church for the Archdiocese of Sydney (the second defendant) in various grounds of tort, directly and vicariously; and
- iii. the alleged abuser (the third defendant) in negligence and assault.

39. The plaintiff became statute barred from his claims in tort in 1985 pursuant to the *Limitation Act 1969* (NSW) (the NSW Limitation Act)<sup>21</sup>. An extension of time was sought by the plaintiff in respect of the first and second defendants.<sup>22</sup> The trial judge found that:

- i. the cause of action in tort could not be maintained against the first defendant in his personal capacity (he was not serving in the Archdiocese at the time of the alleged assault), or as a representative of the Archdiocese or its employees. The plaintiff's allegations that the Archbishop was a sole corporation, and thus assumed previous Archbishops' liabilities, failed – there was no clear legislative or other intent to establish the Archbishop's position as a corporate entity; and
- ii. the Trustees were arguably liable in tort on the basis that they constituted the corporate entity of the Archdiocese. The limitation period was therefore extended to allow the claim against the second defendant to proceed.

40. The third defendant died in 2004, and the plaintiff did not continue the proceedings against the deceased's estate.

41. In respect of the second defendant, the New South Wales Court of Appeal found that the statutory trustee corporation created to hold property for the Catholic Church in Sydney, pursuant to the *Roman Catholic Church Trust Property Act 1936* (NSW) (the Roman Catholic Church Trust Property Act), was limited to 'the

---

<sup>19</sup> In which an abuse victim was harmed as a result of their introduction to an inherently hazardous environment owned or held by the trust.

<sup>20</sup> The LIV outlined this case in their supplementary submission the Family and Community Development Committee of the Victorian Parliament *Inquiry into the processes by which religious and other non-government organisations respond to the criminal abuse of children by personnel within their organisations*, 28 February 2013, pp 20-1, available at: <http://www.parliament.vic.gov.au/fcdc/article/1789>.

<sup>21</sup> Sections 11(3), 14 and 52, *Limitation Act 1969* (NSW).

<sup>22</sup> Pursuant to sections 58 or 60G, *Limitation Act 1969* (NSW).

---

holding, management and disposal of property'<sup>23</sup> and did not extend to 'the ecclesiastical, liturgical or pastoral activities of the Archbishop' who had overseen the appointment of the alleged offender.<sup>24</sup> The Court found that while the trustees may be liable in contract or tort to repair Church property or transfer trust property,<sup>25</sup> the mere fact that the trust holds Church property did not make the trust liable for all claims associated with Church activities.<sup>26</sup>

42. *Ellis* illustrates the crux of the problems facing abuse victims seeking to claim compensation: in effect, there was no formal 'Catholic Church' defendant to sue. In this regard, the Law Council notes and welcomes the Royal Commission's Case Study 8, commencing 8 March 2014, that will address the issues raised in the *Ellis* litigation.
43. In its Supplementary Submission to the Victorian Inquiry, the LIV noted that a Bill had been put before the New South Wales Parliament to amend the Roman Catholic Church Trust Property Act.<sup>27</sup> This Bill remains before the Legislative Council, where it has been since 15 September 2011.<sup>28</sup> Its proposed amendments are intended to respond to the problems illustrated by *Ellis*. They provide that victims who have a judgment awarded in their favour regarding sexual abuse perpetrated by members of the clergy or other officials or officers of the Church, would be able to have their judgment debt paid from the assets of the Trust.
44. The Law Council notes that such legal barriers to claims against non-government organisations were identified in the findings of the Victorian Inquiry, as follows:
- i. *In Victoria, most not-for-profit non-government organisations are incorporated. This means they have a legal identity independent of their members and can be sued in their own name. However, not-for-profit organisations are not required to incorporate.*<sup>29</sup>
  - ii. *Trusts are used widely in Victoria in the for-profit and not-for-profit sectors. Amending specific statutes that establish trustee corporations for some organisations is unlikely to resolve the issue of establishing the legal identity of unincorporated associations and ensuring appropriate governance structures to address civil claims for criminal child abuse.*<sup>30</sup>
  - iii. *There is no evidence that non-government organisations have deliberately been structured to avoid liability for criminal child abuse claims. However,*

---

<sup>23</sup> *Trustees of the Roman Catholic Church v Ellis & Anor* [2007] NSWCA 117, [111] per Mason P, Ipp JA and McColl JA agreeing. This case overturned the finding of Patten AJ in *J Ellis v Pell and the Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (2006) NSWSC 109.

<sup>24</sup> *Ibid*, [112].

<sup>25</sup> *Ibid*, [116] and [120].

<sup>26</sup> *Ibid*, [149].

<sup>27</sup> *Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2011*(NSW), see: <http://www.parliament.nsw.gov.au/prod/parliament/nswbills.nsf/131a07fa4b8a041cca256e610012de1773cc52b622faad69ca25790c0012c745?OpenDocument>.

<sup>28</sup> Law Institute of Victoria, *Inquiry into the processes by which religious and other non-government organisations respond to the criminal abuse of children by personnel within their organisations – supplementary submission*, 28 February 2013, p 21, available at: <http://www.parliament.vic.gov.au/fcdc/article/1789>.

<sup>29</sup> Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the handling of child abuse by religious and other non-government organisations*, November 2013, p 531, available at: <http://www.parliament.vic.gov.au/fcdc/article/1788>.

<sup>30</sup> *Ibid*, 536.

---

*the lack of incorporation by non-government organisations that work with children can make it difficult for victims of abuse in organisational settings to identify an appropriate entity to sue for damages.*<sup>31</sup>

45. In the Victorian context, the LIV recommended to the Victorian Inquiry that:

- i. the Committee examine and identify the legal status of different religious organisations, and their capacity to sue and be sued; and
- ii. the Committee consider legislative options to remove the ability of religious organisations to use trusts and other such entities, and organisational and corporate structures to avoid criminal liability.

46. On this question, the Victorian Report recommended:<sup>32</sup>

- i. that the Victorian Government consider requiring non-government organisations to be incorporated and adequately insured where it funds them or provides them with tax exemptions and/or other entitlements; and
- ii. that the Victorian Government work with the Australian Government to require religious and other non-government organisations that engage with children to adopt incorporated legal structures.

47. The Law Council appreciates that issues of incorporation of religious and non-religious non-government organisations must be considered by State, Territory and Federal governments. The Law Council recommends that the Royal Commission consider how these recommendations at the national level. As a threshold issue, it notes that this raises questions for consideration regarding the Constitutional basis for any national requirements.

48. At the time of finalising this submission, it was reported through the media that the Cardinal George Pell had indicated his view that victims of child sexual abuse should be able to sue the Catholic Church of Australia.<sup>33</sup> The Law Council welcomes this announcement and looks forward to further detail as to how it will operate in practice. It considers, however, that this should not detract from consideration of the broader recommendations made in this area which are discussed above.

#### *Lack of assets of the defendant*

49. The Law Council agrees with the Royal Commission that key barriers posed to victims who wish to engage with civil litigation systems may include that some institutions: do not hold assets from which damages could be paid; are not insured; or their insurance status is not known.

50. In addition, the alleged perpetrator may personally lack adequate funds or assets from which they can pay damages to their victim. This is especially the case where an alleged perpetrator has been in the service of the Church and has taken a vow of poverty, for example as a Priest, and therefore has no personal assets. In circumstances where the alleged perpetrator is no longer in the service of the Church, they are still likely to be impecunious, as is their estate.

---

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> ABC Online, "Catholic Church signals major shift as Royal Commission investigates 'Ellis defence'", ABC Online, 10 March 2014

---

51. Such concerns, along with other factors, have led to the Victorian Report's recommendation that :

*...that the Victorian Government review the functions of the Victims of Crime Assistance Tribunal (VOCAT) to consider its capacity to administer a specific scheme for victims of criminal child abuse that:*

- i. *enables victims and families to obtain resolution of claims arising from criminal child abuse in non-government organisations*
- ii. *is established through consultation with relevant stakeholders, in particular victims*
- iii. *encourages non-government organisations to contribute a fee to administer the scheme*
- iv. *ensures non-government organisations are responsible for the funding of compensation, needs and other supports agreed through the process.*<sup>34</sup>

52. The Law Council recognises that issues of compensation and redress will be the subject of a separate Issues Paper released by the Royal Commission, and intends to provide specific comments in that regard.

53. As noted above, however, as a starting point, the Law Council notes that any statutory compensation scheme if established should be complementary to, and not replace the right of victims to pursue a claim at common law.

#### *Vicarious liability of institutions*

54. In the law of torts and under statutes creating liability, employers are made liable vicariously for the acts and omissions of their employees occurring within the scope of the employment. There is no need to show that the act or omission is that of the employer. The act or omission is that of the employee. The employer is simply made liable for another person's fault.<sup>35</sup>

55. One of the best known formulations of vicarious liability is in Salmond's *The Law of Torts*, which stated that:

*"A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised mode of doing some act authorised by the master".*<sup>36</sup>

56. Further, Salmonds has stated that:

---

<sup>34</sup> Ibid, 561.

<sup>35</sup> *Ford's Principles of Corporations Law* [16.050]. There can be circumstances where a company is vicariously liable for the actions of a person who is not an employee. In *Nationwide News Pty Ltd v Naidu* [2007] NSWCA 377, Mr Naidu was a security guard employed by ISS Security Pty Ltd. Mr Naidu's services were made available to Nationwide News Pty Ltd pursuant to a contract between ISS Security and Nationwide News. Mr Naidu was supervised by the Fire and Safety Officer of Nationwide News who engaged in bullying and harassment of Mr Naidu. The court held that because the Fire and Safety Officer was Mr Naidu's supervisor and this was with the consent of ISS Security, then ISS Security became vicariously liable for the actions of the Fire and Safety Officer, even though the Officer was not an employee of ISS Security.

<sup>36</sup> Salmond, *The Law of Torts*, 1<sup>st</sup> ed (1907)

---

*“...the employer is not responsible if the unauthorised and wrongful act is not so connected with the authorised act as to be a mode of doing it, but is an independent act.”<sup>37</sup>*

57. In this respect, the LIV has noted examples in which employers have been vicariously liable in civil law for the criminal acts of their employees. For example, an employer of a footballer was found to be liable for assault where the footballer bit another player in the course of defending the ball in a football game;<sup>38</sup> and a drycleaning service was found to be vicariously liable to a client when an employee stole a garment left with the employee for cleaning.<sup>39</sup>

58. However, the extent to which a religious organisation can be vicariously liable in civil law for the criminal acts of its personnel is unclear in Australian law. The LIV has discussed this issue by noting that two key questions arise in this context:

- i. is the person “employed” by the religious entity? – that is, there is doubt about whether religious personnel (in particular, ordained ministers) are employees or religious organisations, any changes to laws of vicarious liability might not in any case to extent to religious organisations; and
- ii. to what extent can abuse of a child by a person engaged by a religious entity to do acts that necessarily bring the person into contact with that child be considered “within the course” of the acts the person has been engaged to do?

59. With respect to the first question, the LIV has noted that:

- i. In the *Ellis* case, the NSW Court of Appeal did not consider it necessary “to decide whether a priest in the Roman Catholic Church who is appointed to a Parish is an employee in the eye of the law or otherwise in a relationship apt to generate vicarious liability in his superior”<sup>40</sup> but said “[i]t is wrong to see holding an ecclesiastical office as necessarily incompatible with a legal relationship capable of giving rise to some incidents of an employment relationship”,<sup>41</sup>
- ii. there are recent decisions in the United Kingdom finding that a lack of any formal employment relationship is not an impediment to imposing vicarious liability on a church for a priest’s actions. Specifically, in *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust*,<sup>42</sup> the UK Court of Appeal found that although there was no contract of service between a priest and the bishop appointing him, there was a relationship between the priest and the bishop so close in character to one of employer/employee that it can fairly be said to be “akin to employment”<sup>43</sup> and that it “it is just and fair to hold the employer vicariously liable”,<sup>44</sup> looking at it in terms of control.

60. With regards to the second question, the LIV has noted that an employer can be liable for the “intentional torts” (such as assault) of an employee in certain

---

<sup>37</sup> *Salmond on Torts*, 9<sup>th</sup> ed (1936) at 94-95, quoted by Gleeson CJ in *Lepore* at [42].

<sup>38</sup> *Canterbury Bankstown Rugby League Football Club Ltd v Rogers* [1993] Aust Torts Reports 81-246

<sup>39</sup> *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716

<sup>40</sup> *Ellis* para 32, per Mason P

<sup>41</sup> *Ibid.*, para 33 per Mason P

<sup>42</sup> *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938

<sup>43</sup> *Ibid.*, para [62] per Lord Justice Ward

<sup>44</sup> *Ibid.*, para [73] per Lord Justice Ward

---

circumstances<sup>45</sup>, but it is not clear under Australian law when an employer can be liable on a vicarious basis for an employee's abuse of a child.

- i. The High Court of Australia considered this question in *New South Wales v Lepore* [2003] HCA 4, which concerned a student who was sexually abused in 1978 by a teacher who was employed by a school authority. The case was decided without the Court having to form a concluded view on the issue of whether an employer could be vicariously liable for the deliberate illegal act of an employee.<sup>46</sup> Separate judgments decided the claim without resolving the question:
  - i. Gleeson CJ and Kirby J considered that the employer could be vicariously liable as the abuse in question satisfied the 'sufficient connection' test;
  - ii. Gummow and Hayne JJ disagreed, however, on the basis that the abuse was not within the scope of or sufficiently connected with the employee's authority; and
  - iii. Callinan J considered that there could not be any vicarious liability for a criminal act.

61. The LIV has noted that vicarious liability for child sexual abuse has been considered in cases in Canada and the United Kingdom, finding liability where the sexual abuse is "so closely connected" with the wrongdoer's employment that it would be "fair and just" to hold the employer vicariously liable.<sup>47</sup>

62. In Victoria, a 2012 decision of the Victorian Supreme Court of Appeal considered vicarious liability for the unauthorised acts of an employee in *Blake v JR Perry Nominees Pty Ltd*.<sup>48</sup> The majority of the Court agreed with the lower court decision that an employer was not vicariously liable for an injury to a person caused by an employee's prank.

63. In the Victorian context, the LIV recommended that options be considered for legislative reforms to clarify when a religious organisation will be vicariously liable for criminal abuse of children by its personnel.

#### *Vicarious liability – Victorian Inquiry findings*

64. The Victorian Report canvassed these issues from the starting point of the duty of care held by non-government organisations. It considered that:

---

<sup>45</sup> Halsbury's Laws of Australia [165-1050]

<sup>46</sup> The teacher pleaded guilty to the charge of a number of offences of common assault. He received a good behaviour bond, for which he received a deferred sentence, and a fine of \$300. He subsequently resigned as a teacher and took no part in the proceedings involving the school authority.

At first instance, the District Court found that the teacher was liable based on the finding of assault, but that the appellant had not breached its duty, and was not liable. Lepore appealed against this decision on the basis that the trial judge did not address the issue of a non-delegable duty of care. A majority of the Court of Appeal found that the appellant was liable on the basis of a non-delegable duty of care. A new trial was ordered to determine damages. The school authority appealed to the High Court.

As stated, the High Court did not form a concluded view on vicarious liability. The majority of judges decided in favour of the school authority, for different reasons, and in separate judgments. The appeal was allowed in part, and a new trial ordered.

<sup>47</sup> *Lister and Hesley Hall Ltd* [2002] 1 AC 215

<sup>48</sup> [2012] VSCA 122

- 
- i. while criminal child abuse is generally not perpetrated with the consent or even direct knowledge of non-government organisations, the perpetrators nevertheless rely on their reputation within the organisation in developing trusting relationships. Because of this special relationship of trust, a non-government organisation has a duty of care to take reasonable steps to protect children from criminal child abuse by employees, volunteers and others whom it has engaged;
  - ii. this duty of care extends beyond the need to act based on direct knowledge. It includes a responsibility to screen, monitor and keep records in order to take reasonable steps to prevent abuse of children by members who misuse the trust generated by their association with the non-government organisations; and
  - iii. organisations should have a clear legal duty to take appropriate measures to minimise the risk of abuse that arises because of the creation of relationships of trust for which they are responsible.
65. The Victorian Report noted that the argument that criminal child abuse is a breach of non-delegable duty of care by the organisation has not been successful in Australian courts. It also noted that there were difficulties in establishing vicarious liability for criminal abuse of children in organisations, agreeing with the LIV's reasoning set out above.
66. The Victorian Report further noted that although there is no employment relationship between, for example, an organisation and its religious personnel, some members of religious or non-government organisations do have a relationship with characteristics similar to formal employment. It referred with approval to the United Kingdom decisions<sup>49</sup> which suggest that it is possible to establish vicarious liability for criminal child abuse by religious personnel, despite the lack of any formal employment relationship, noting that this approach recognises that there is a sufficient connection between the risk of criminal child abuse and the opportunity for intimacy and power, the circumstances of which were created by the organisation.
67. The Victorian Report concluded that there were two options for legislative change that would legally require organisations to take reasonable care to protect children from abuse by members of their organisations. These options were:
- i. legislating non-delegable duty of care in the *Wrongs Act 1958* (Vic) (the Victorian Wrongs Act) – for example, that organisations have a non-delegable duty to take reasonable care to prevent intentional injury to children in their care; or
  - ii. a provision regarding vicarious liability in the Victorian Wrongs Act, based on the examples in Victorian and Commonwealth discrimination legislation.
    - i. In this respect, the Victorian Report referred to the provisions regarding vicarious liability in the *Equal Opportunity Act 2010* (Vic). These provisions hold employers and those who engage agents under contract vicariously liable for discriminatory acts by employees or agents in the course of employment or while acting

---

<sup>49</sup> *Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256 and *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938

---

as an agent, unless reasonable precautions were taken to prevent the behaviour.<sup>50</sup> Similar provisions in the *Sex Discrimination Act 1984*(Cth) were noted.<sup>51</sup>

68. The Victorian Report did not state which of these options it preferred, recommending that the Victorian Government undertake a review of the *Wrongs Act 1958* (Vic) ‘to identify whether legislative amendments could be made to ensure organisations are held accountable and have a legal duty to take reasonable care to prevent criminal child abuse’.<sup>52</sup>
69. The Law Council anticipates that the Royal Commission will take the Victorian Report’s recommendations on these matters into careful regard, considering their possible adoption across Australian state and territory jurisdictions. While the Law Council does not have a particular preference for either of the options for reform which were canvassed in the Victorian Report, it notes that both of these options would clarify the onus which rests on organisations to take reasonable measures to prevent criminal child abuse from occurring by their personnel. Any provisions adopted could usefully describe actions which might form examples of reasonable measures – for example, as well as screening, monitoring and keeping records, these might include policies, training and processes to respond effectively to allegations.

#### *Limitation periods*

70. The Law Council has previously raised with the Royal Commission the issues faced by victims of child sexual abuse concerning limitation periods,<sup>53</sup> an issue that also arose in the *Ellis* case, discussed above. Limitation periods have also been identified as a barrier by various constituent bodies of the Law Council, as well as a member of the ILS.

#### *Limitation periods - Law Council Position Paper*

71. The Law Council has noted there are significant differences in limitation periods for personal injury compensation claims across Australian jurisdictions. These differences were outlined in a 2011 Law Council position paper entitled *A Model Limitation Period for Personal Injury Actions* (the Position Paper).<sup>54</sup> They include variations regarding:

- i. the existence of long-stop provisions;

---

<sup>50</sup> Section 109, *Equal Opportunity Act 2010* (Vic)

<sup>51</sup> section 106 of the *Sex Discrimination Act 1984* (Cth) provides similarly for vicarious liability – the relevant exception is that the person “took all reasonable steps” to prevent the conduct occurring: subsection 106(2)

<sup>52</sup> Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the handling of child abuse by religious and other non-government organisations*, November 2013, p 552, available at: <http://www.parliament.vic.gov.au/fcdc/article/1788>.

<sup>53</sup> For example, see the Law Council’s submission on the Royal Commissions’ Terms of Reference: Law Council of Australia, *Royal Commission into Institutional Responses to Child Sexual Abuse: Consultation Paper: Submission to the Secretariat, Royal Commission into Child Sexual Abuse*, 28 November 2012, available at <http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2664%20-%20Royal%20Commission%20into%20Institutional%20Responses%20to%20Child%20Sexual%20Abuse%20-%20Consultation%20Paper.pdf>. See also the Law Council’s Towards Healing Submission: Law Council of Australia, *Towards Healing: Issues Paper 2 – Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse*, 13 September 2013, available at: <http://www.childabuseroyalcommission.gov.au/wp-content/uploads/2013/10/12.-Law-Council-of-Australia1.pdf>.

<sup>54</sup> Law Council of Australia, *A Model Limitation Period for Personal Injury Actions: Position Paper* (June 2011), copy available from the Law Council on request.

- 
- ii. the treatment of minors and those under a disability;
  - iii. the relevance of knowledge about fault, negligence and seriousness of injury to discoverability;
  - iv. the burden of proof;
  - v. objective or subjective assessment of discoverability; and
  - vi. the availability and extent of judicial discretion to extend the limitation period.

72. As noted in the Position Paper, the general rationale for imposing time limits on commencing court action through limitation periods was outlined by the High Court of Australia in *Brisbane South Regional Health Authority v Taylor*.<sup>55</sup> According to the High Court, the four broad reasons for imposing time limits on commencing court action were:

- i. relevant evidence may be lost over time;
- ii. It may be oppressive to a defendant to allow an action long after the circumstances that gave rise to it have occurred;
- iii. people, commercial enterprises, insurance companies and public entities should be able to arrange their affairs in the knowledge that their liabilities will not run beyond a certain period; and
- iv. the public interest requires that disputes be settled as quickly as possible.

73. However, the Position Paper also noted that these concerns must be balanced against fairness to the plaintiff, who should be given every opportunity to bring their claim in a timely fashion once they become aware of the facts giving rise to the claim. Limitation periods that contain no reference to the plaintiff's knowledge or state of mind have great potential to operate unfairly.

74. The Position Paper sets out the general position agreed by the Law Council's Directors in 2011 that a model limitation period should be developed and applied in all jurisdictions, with the certain key features, including:

- i. time should expire 3 years after the date the material facts giving rise to the claim become discoverable by the plaintiff;
- ii. the test for discoverability should be subjective, having regard to the personal antecedents of the plaintiff;
- iii. there should be a general judicial discretion to extend the limitation period;
- iv. there should be a special limitation period for child sexual abuse victims;
- v. time should not commence running against a minor or those under a disability until they reach 18 years of age or cease to be under a disability; and

---

<sup>55</sup> (1996) 139 ALR 1, at 9

- 
- vi. there should be no “long-stop” provisions (a long stop period exists in many jurisdictions to provide a final cut-off date for the commencement of proceedings, regardless of whether a cause of action has been discovered).
75. In respect of child sexual abuse cases, the Position Paper discussed the existing provisions in different Australian jurisdictions in relation to child sexual abuse cases. It noted that NSW, Tasmania and Victoria take a similar approach to limitation periods with regard to sexual abuse victims, following recommendations of the *Review of the Law of Negligence* report, which was commissioned by Commonwealth, State and Territory Treasury and Finance Ministers in 2002 (the Negligence Panel Review).<sup>56</sup> In these jurisdictions:
- i. time may commence running against a plaintiff who is injured as a minor by a relative or “close associate” at age 25, or the date on which the relevant facts become discoverable by the plaintiff;<sup>57</sup> and
  - ii. the 12 year long-stop provision has the effect that such claims become statute barred when the plaintiff reaches 37 years.<sup>58</sup>
76. A “close associate” is defined, for example, in Victoria as a person whose relationship with a parent or guardian is such that the person could influence the parent or guardian not to bring an action on behalf of a minor against him or her, or the minor might be unwilling to disclose to the parent or guardian that they had been harmed by that person.<sup>59</sup>
- i. Here, the Law Council notes that personnel in religious or other organisations which are responsible for the care of a child could arguably fall within this definition, with the result that the special limitation periods apply.
  - ii. However, it is also possible that there would be situations of institutional abuse in which no such relationship existed between an alleged abuser and a parent or guardian which would meet the “close associate” test. In these situations, the more general limitations periods would apply, including any long-stop periods and available exceptions.
77. The Position Paper further noted that the test for discoverability in NSW and Victoria is “when the cause of action is actually discoverable by the victim”, removing any possible arguments by the defendant as to what the plaintiff or a reasonable person ought to have known.
78. Queensland, NT, SA, ACT and WA do not have any special limitation period for cases of child abuse or sexual abuse.
79. The Law Council has adopted the position that child sexual abuse cases form a special category of intentional tort, where policy considerations strongly favour allowing proceedings to continue where there is a possibility of a fair trial.

---

<sup>56</sup> Justice D. Ipp, Prof D Sheldon, Prof P Cane, I Macintosh, *Review of the Law of Negligence*, September 2002, Commonwealth of Australia

<sup>57</sup> Section 271 *Limitation of Actions Act 1958* (Vic); section 50E, *Limitation Act 1969* (NSW)

<sup>58</sup> In NSW and Tasmania, there is no general discretion for extension beyond the 12 year long stop period, however, in Victoria, such a general discretion does exist.

<sup>59</sup> Subsection 271(2) *Limitation of Actions Act 1958* (Vic). A similar definition applies under subsection 50E(2) of the *Limitation Act 1969* (NSW)

- 
80. In this respect, it was noted that ordinary standards of “reasonableness” are often not appropriate in relation to persons whose psychological injuries may be profound and continue long after the physical symptoms of abuse have resolved. A person subject to abuse over an extended period may take an extended period of time to connect the abuse with their psychological injuries or to engage in any process which requires them to recollect their abuse.<sup>60</sup>
81. The Position Paper referred to the United Kingdom decision of *A v Hoare*,<sup>61</sup> where it was found to be inconceivable that Parliament had intended to preclude an extension of time for victims of intentional torts, but to permit a broad discretion for those injured through mere carelessness.<sup>62</sup> The *Hoare* decision touches upon the policy rationale for limitation of actions, which is widely considered to be different in cases of intentional torts, particularly those involving crimes against the person.
82. The Position Paper refers to a number of arguments against applying the ordinary limitation period to civil actions arising out of criminal enterprise, including that:
- i. there is no limitation on when the State may commence criminal proceedings against a person for more serious crimes, such as sexual abuse. Accordingly, there appears to be little justification for protecting perpetrators from civil consequences for their actions through application of a limitation period; and
  - ii. while there is a public interest in ensuring civil proceedings are brought quickly and without unnecessary delay, there is a greater public interest in allowing a person, who has suffered horrifically due to the callousness of another person, as much time as is necessary.
83. While there is a possible counter-argument that people should not be subject to claims without evidentiary foundation, which may be the case for civil actions brought many years after the alleged fact, the Position Paper concluded that the gravity of harm to the victim and the public interest strongly suggest that a special limitation period for child abuse cases is justified – and essential – where the court has ultimate discretion to extend the limitation period to three years after the relevant facts become discoverable by the plaintiff. It further noted that there was no public interest in applying a bar in the form of a “long-stop” period, as the Court should have discretion to ensure that justice can be served in the circumstances.
84. In addition, the Position Paper suggested issues surrounding limitation periods in child sexual abuse cases could be implemented by listing as one of the factors the Court must consider in relation to an application for an extension of time, whether there is evidence that the plaintiff’s injuries arose from an intentional tort or criminal act by a parent or guardian, or a close associate of the parent or guardian.
85. It further emphasised that time should not run against minors and disabled persons in the care of an adult guardian, having regard to their limited legal status and thus inability to take action in their own right. Time should not run against minors or disabled persons until they cease to be a minor or under a disability.

---

<sup>60</sup> Dr B Matthews (2003) “Limitation periods and child sexual abuse cases: law, psychology, time and justice” *Torts Law Journal* 11(3), 218, page 3

<sup>61</sup> *Av Hoare* [2008] UKHL 6

<sup>62</sup> *Ibid*, per Lord Brown of Eaton-Under-Heywood at paragraph 80

---

## Limitation periods – Victorian Inquiry

86. Since the Position Paper was agreed by the Law Council's Directors, the Law Council notes that there has been further public discussion of how limitation periods apply to victims of child sexual abuse within institutions in Victoria as part of the Victorian Inquiry. In this context, the LIV has noted that:

- i. Statutory time limits operate to restrict the period within which common law claims for compensation can be commenced.<sup>63</sup>
- ii. For claims for personal injuries, these periods range from three to six years from the date of discoverability of the cause of action.<sup>64</sup>
- iii. A long stop period exists in Victoria of 12 years after the date of the injury, or 12 years after the claimant turned 25 in the case of a personal injury caused by a parent/guardian or a close associate of a parent/guardian, in Victoria.<sup>65</sup>
- iv. Exceptions exist for circumstances in which a plaintiff was under a relevant disability,<sup>66</sup> or where the person has a legal incapacity (including where the person is a child at the time the injury occurs), allowing the time to effectively be paused for some period, however beyond the long-stop date a claimant will require a court's permission to continue a claim.
- v. Where a claimant is out of time to commence proceedings, it is possible to apply to a court for an extension of the time limit.<sup>67</sup> The LIV's members have reported that this process is typically difficult and hard-fought, however, and is usually not successful without a claimant being able to provide a compelling reason for not commencing proceedings within the relevant time limit.<sup>68</sup> They have further reported that the likelihood of having a potential claim dismissed at the outset on this basis is a significant impediment to more claims being pursued.
- vi. Further, the LIV's members have reported that defendants will rely on limitations provisions in applying to have claims struck out or dismissed early;<sup>69</sup> and anecdotally at least some claimants have considered the potential for defeat on this basis as a major factor in accepting early settlement offers for potentially low amounts.

87. The LIV has discussed the rationale for limitation periods in civil claims – that is, that defendants will be unfairly prejudiced by the passage of time since the occurrence of the alleged wrong.<sup>70</sup> In this respect, the LIV has noted that there is

---

<sup>63</sup> *Limitation of Actions Act 1958* (Vic) s5(1AA).

<sup>64</sup> In Victoria, the relevant limitation period is 3 years from date of discoverability of 12 years from act or omission, whichever expires first: *Limitation of Actions Act 1958* (Vic) s27D. In Victoria, the relevant limitation period for a cause of action that is founded on a personal injury to a person who was a minor ('under a disability') at the date of the act or omission is 6 years from the date on which the cause of action is discoverable by the plaintiff or 12 years from the act or omission alleged to have resulted in the injury, whichever expires first: *Limitation of Actions Act 1958* (Vic) s27E.

<sup>65</sup> *Limitation of Actions Act 1958* (Vic) ss27D(1)(b), 27I(1)(b)

<sup>66</sup> *Ibid*, ss27D(2), 27E.

<sup>67</sup> See *Limitation of Actions Act 1958* (Vic) s 27K.

<sup>68</sup> See *Spandideas v Vellar* [2008] VSC 198; *Caven v Women's and Children's Health* [2007] VSC 7.

<sup>69</sup> Law Institute of Victoria, *Inquiry into the processes by which religious and other non-government organisations respond to the criminal abuse of children by personnel within their organisations*, 21 September 2012, p 25, available at: <http://www.parliament.vic.gov.au/fcdc/article/1789>.

<sup>70</sup> *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 per McHugh J.

---

a strong argument that the prejudice suffered by religious or other organisations through the passage of time, should be balanced against the harm to the victim and should not receive significant weight in all cases. In these cases of historical abuse of children by personnel in religious organisations, the passage of time also significantly prejudices the rights of a claimant.

- i. For example, in many cases, the alleged perpetrators may be deceased, eliminating the opportunity for them to be examined (and in many cases, meaning that the police may not investigate the alleged offence).
- ii. As time passes, a claimant will likely have greater difficulty producing witnesses who can corroborate his or her claims.
- iii. The purpose of limitation periods is, therefore, not necessarily supported in cases of abuse of children by personnel in religious organisations.

88. The LIV referred to the observations of Justice La Forest of the Supreme Court of Canada, which were cited favourably in a judgment of Justice Osborn of the Supreme Court of Victoria when considering the rationale for limitation periods in the context of sexual abuse:

*There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations. In my view this is a singularly unpersuasive ground for a strict application of the statute of limitations in this context. While there are instances where the public interest is served by granting repose to certain classes of defendants, for example, the cost of professional services if practitioners are exposed to unlimited liability, there is absolutely no corresponding public benefit in protecting individuals who perpetuate incest from the consequences of their wrongful actions. The patent inequity of allowing these individuals to go on with their life without liability, while the victim continues to suffer the consequences, clearly mitigates against any guarantee of repose.<sup>71</sup>*

89. In response to concerns raised by the LIV and other respondents, the Victorian Inquiry made the following findings in regard to the legal barriers regarding limitation periods in Victoria:<sup>72</sup>

- i. The application of the statute of limitations is currently at the discretion of the defence and judges. However, there is evidence that non-government organisations have aggressively pursued the limitation defence in civil trials. There is also evidence that the limitation defence adversely affects the bargaining position of victims in settlement negotiations for victims.
- ii. Statutes of limitations disadvantage victims of child sexual abuse because these victims typically take decades to understand the harm arising from their abuse and to act on that understanding and decide to issue proceedings.

---

<sup>71</sup> La Forest J for the majority of the Supreme Court of Canada in *M.(K.) v. M.(H.)* [1992] 3 S.C.R. 6. (La Forest, Gonthier, Cory and Iacobucci JJ) cited by Osborn J in *GGG v YYY* [2011] VSC 429, para 187.

<sup>72</sup> Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the handling of child abuse by religious and other non-government organisations*, November 2013, pp vii-viii, available at: <http://www.parliament.vic.gov.au/fcdc/article/1788>.

- 
- iii. There is no public policy justification for applying limitation periods to civil cases relating to criminal child abuse.
  - iv. Because reporting in cases of criminal child abuse is typically delayed for several decades, it is necessary to amend the *Limitation of Actions Act 1958* (Vic) to allow victims of criminal child abuse sufficient time to initiate civil legal action.
90. Having regard to these findings, the Victorian Report recommended that:
- i. the *Limitation of Actions Act 1958* (Vic) be amended to exclude criminal child abuse from the operation of the limitation periods under the Act; and
  - ii. the *Victims of Crime Assistance Act 1996* (Vic) be amended to specify that no time limits apply to applications for assistance by victims of criminal child abuse in organisational settings.
91. The Law Council's Directors have not had the opportunity to consider the specific recommendations in the Victorian Report and whether they, or the Royal Commission's subsequent investigation into this issue, are likely to result in any adjustments to the specific positions taken in the Law Council's earlier Position Paper regarding limitation periods for child sexual abuse victims.
92. However, the Law Council notes that there is broad consistency between the underlying themes which support the Position Paper, the LIV's concerns and the Victorian Report's conclusions. These themes are, generally, that:
- i. the rationale which supports the retention of limitation periods generally does not carry weight in relation to the situation of child sexual abuse victims; and
  - ii. a different approach is required in this context, given their special nature, which involves torts against the person and the particular trauma involved, likely delays in pursuing claims, the fact that victims were children at the time of the abuse, and the public interest in justice being done.
93. The Law Council hopes that the above information assists the Royal Commission's deliberations on this important issue. It considers that, as expressed in its Position Paper, reforms in this area should be pursued in a manner which ensures consistent and fair outcomes for victims of child sexual abuse between different jurisdictions.

#### *Existence of relevant records*

94. The Issues Paper identifies the location and retrieval of relevant records as a further barrier to redress by way of civil litigation.
95. The LIV has also referred to access to evidence concerning victims' claims as a significant barrier in the Victorian context, noting that:
- i. particularly in cases where there has been a substantial gap between the alleged abuse and the time claimants first raise their experiences with others, its members report that it is not uncommon for documents to be lost, and witnesses to have either passed away or have imperfect memories. Considering the onus of proof is on the claimant in a civil claim, this can often represent a significant obstacle to redress for legitimate claims.

- 
- ii. documentary evidence made available by defendants through the discovery process can go some way towards remedying these deficits. Victorian civil procedure rules and the law in relation to discovery require that records be preserved where litigation is anticipated.
  - iii. Accordingly, institutions with responsibility for the care of children are under a legal obligation (at least in Victoria) to preserve records of allegations, complaints or findings of fact against employees and members relating to child sexual abuse, given it would be difficult to maintain an argument that litigation was not contemplated or anticipated.
  - iv. however, it is dependent on the quality of record-keeping and observations made at the time the abuse allegedly took place. According to LIV members, here again, the corporate structure of the religious entity is a factor: the lack of any centralised record keeping or reporting, or policies as to documenting complaints and preservation of records means that such decisions appear to have been largely ad hoc, and vary greatly between organisations, as well as within a given organisation.
96. Given these concerns, in its submission to the Victorian Inquiry, the LIV recommended that consideration be given to specific strategies for case-management of historical child sex abuse claims, including in regard to discovery and the availability of evidence. In doing so, it:
- i. clarified that ‘existing laws and court rules and practices appear to provide adequate scope for the court to introduce appropriate management of cases involving historical abuse of children;’<sup>73</sup>
  - ii. suggested the creation of a specialised list that would be case managed by a specialist judge. The LIV noted that case management is an independent judicial function, but urged the Committee to recommend that the government consult closely with the judiciary in overcoming barriers to civil litigations systems; and
  - iii. noted that in addition to the courts procedural powers to regulate case management under the *Civil Procedure Act 2010* (Vic), the court also has power to define the scope and disclosure of documents that are to be discovered in relation to a claim.<sup>74</sup>
97. The Victorian Report made no recommendations over access to records. However, the Law Council suggests that the Royal Commission consider the concerns expressed by the LIV regarding evidence and access to records, and its recommendations in this regard.

#### *Process of giving evidence*

98. The Issues Paper identifies the process of giving evidence and being subject to examination and cross-examination.

---

<sup>73</sup> Law Institute of Victoria, *Inquiry into the processes by which religious and other non-government organisations respond to the criminal abuse of children by personnel within their organisations – supplementary submission*, 28 February 2013, p 7, available at: <http://www.parliament.vic.gov.au/fcdc/article/1789>.

<sup>74</sup> *Ibid*, p 29.

---

99. Another of the Law Council's constituent bodies, the Law Society of the Northern Territory (LSNT), identified that likely or possible re-traumatisation is also a barrier to pursuing a civil litigation claim, particularly where this involves cross-examination – for example, in the process of establishing causation. The Law Council recognises the entitlement of organisations and institutions to test allegations in court, but acknowledges the risk of re-traumatisation.

100. While the Law Council has not had the opportunity to consider this issue in-depth, the Royal Commission may wish to conduct a review of how jurisdictions currently offer protections to vulnerable witnesses, including in civil proceedings. In this respect, it notes that the Australian Law Reform Commission considered the issue of cross-examination of witnesses, including vulnerable witnesses, in its 2006 Uniform Evidence Law Report.<sup>75</sup> This report may provide a starting point for further review and analysis.

#### Other elements of civil litigation systems that raise issues for victims of child sex abuse

##### *The relationship between internal complaints processes and the rights of victims to access the civil justice system*

101. The Law Council's Towards Healing Submission discussed the relationship between participation in the internal complaints process such as Towards Healing, and the rights of victims to access the civil and criminal justice systems in Australia. It noted that participation in the internal complaints process may affect the rights or ability of victims to access the civil (and criminal) justice system. Given their interaction, some of the issues which were identified in that context are worth repeating for the purposes of this submission.

102. For example, with respect to limitation periods, the Law Council noted that:

- (a) many survivors of abuse may not report their experiences of abuse for lengthy periods of time after they have taken place, due to the trauma involved and the discomfort associated with recounting such incidents publicly. However, statutory limitation periods may operate to bar a person from pursuing a civil claim because of such delays (see further discussion below);
- (b) where a victim makes a complaint through an internal complaints process such as Towards Healing, the time taken for this process to be completed may operate to further decrease the likelihood of falling within statutory limitation periods for a civil claim; and
- (c) this may occur even where the Towards Healing process has not been resolved to the satisfaction of the complainant, with the result that neither the civil justice system nor Towards Healing offer any redress.

103. Further, with respect to deeds of release and legal advice, the Law Council commented that:

- (a) Towards Healing refers to victims signing deeds of release as one of the possible outcomes of the process. Such deeds may prevent the person from pursuing further civil action against the Church; and

---

<sup>75</sup> Australian Law Reform Commission, *Uniform Evidence Law Report (ALRC Report 102)*, February 2006, see Chapter 18

- 
- (b) While the Law Council considered that it was appropriate to prevent 'double dipping', it was concerned that there is no specific provision in Towards Healing for victims to access independent legal advice until the deed of release is contemplated, rather than earlier in the process (see discussion below). This may have the effect that the victim decides to sign a deed of release rather than pursue more advantageous civil pathways, due to a lack of advice provided earlier in the process about their legal options.

104. Although, as discussed above, the Law Council acknowledges the importance of internal complaints processes and their potential to settle claims without the need for civil litigation, it considers that such processes should not inhibit a victim's ability to access the civil litigation system.

#### *The victim's personal barriers*

105. An additional barrier that was outlined in the Law Council's Towards Healing Submission, and was raised by the LIV, is that victims of child sexual abuse may feel shame in engaging in civil litigation systems or the criminal justice system, or may mistrust the system.
106. More generally, the LIV in its submission to the Victorian Inquiry identified additional barriers that are specific to cases of child sexual abuse by personnel in religious organisations. For example, the LIV identified that victims may be reluctant to engage in civil litigation because of their own faith, or that of their family. This could be because they are fearful of repercussions or alienation from the broader church community if they instigate an action against the church.
107. The Law Council therefore stresses the importance of creating an environment in which victims can access and engage with civil litigation systems (and the criminal justice system) in a way that does not risk the re-traumatisation of the victim. In this respect, it notes the suggestions recorded below that courts and the judiciary are not always well aware of, or appropriately sensitive to, the experiences of victims of child sexual abuse within institutions.

#### *Lack of understanding of child sexual abuse matters within the court system*

108. As mentioned above, in its submission on the Terms of Reference for the Royal Commission, it was noted that a member of the Law Council's ILS had suggested that the Terms of Reference should allow the Royal Commission to consider the shortcomings of State and Territory courts in dealing with civil and criminal child sexual abuse matters.
109. More specifically, the member noted that the success rate of both criminal and civil cases for victims of child sexual abuse was very low. In both instances, she emphasises the distress to children (or adults who were victims as children) involved. She recommends that the Royal Commission specifically consider how the court system responds to these cases, emphasising that the court system, and judges, have often failed to understand the nature of child sexual abuse.
110. As an example of the problems that arise in civil cases, the member refers to the appeal decision of *Cranbrook School v Stanley* [2002] NSWCA 290. In that case the respondent alleged that he was sexually assaulted in 1988 by a staff member at Cranbrook School, where he was a student. Stanley had awoken to the assault that occurred in his dormitory, but at the time he could not identify the perpetrator. Stanley alleged that up until 1997, he was under the impression that he was assaulted by a fellow student, Dudley. It was only in 1997, when he

---

bumped into another fellow student who informed him that Dudley had given evidence against a Cranbrook teacher in criminal proceedings concerning that teacher's abuse of Dudley; that Stanley came to the realisation that the school knowingly allowed him to incorrectly accuse Dudley of abuse.

111. *Stanley* involved a complex set of proceedings, which highlight the difficulties which may be faced by complainants in bringing a case:
- i. Stanley filed a Notice of Application to Commence Proceedings against Cranbrook School on 11 August 1999, seeking an extension of the limitation period. An extension of time was granted, and the order was made on 27 October 1999;
  - ii. Cranbrook School subsequently filed a defence, in which it did not plead any defence under the Limitation Act. It also arranged a medical appointment for Stanley to meet with a psychiatrist. The application was stood over several times following this, as Cranbrook School was not ready to participate in the proceedings. On 24 April 2001, Cranbrook School's insurer changed. The school subsequently brought an application to vacate the extension of time granted on 27 October 1999.
  - iii. On 19 July 2001 DCJ Phegan vacated the extension of time. The Court of Appeal noted that the papers do not show the evidence relied on before that judge or the reasons why the judge vacated the order. There was no appeal against this order. Consequently, the court was required to rehear Stanley's original Notice of Application to Commence Proceedings (filed 11 August 1999 and granted 27 October 1999).
  - iv. Stanley's Notice of Application was reheard by DCJ Christie on 22 November 2001. The order was handed down on 14 December 2001, extending the time that Stanley could commence proceedings up until the date of the order, that is, until 14 December 2001. In that case DCJ Christie found that the limitation period ended on 16 December 1998, and therefore, in order to be granted an extension of time to bring his claim, Stanley was required to establish that at the end of the limitation period, he was unaware of the nature and extent of his injury, including the identity of the perpetrator. DCJ Christie accepted Stanley's submission that, until Stanley saw a doctor in April 1999, he had no insight into or understanding of the nature and extent of the abuse, and the connection between the abuse and the perpetrator. As stated, the time in which Stanley could bring proceedings was extended to 14 December 2001.
  - v. On appeal, the Court of Appeal found in favour of Cranbrook School, dismissing Stanley's Notice of Application to Commence Proceedings, dated 10 August 1999 (and reheard on 22 November 2001), and the extension of time granted for him to commence the proceedings, dated 14 December 2001. In agreeing with Heydon JA, Hodgson JA stated:

*Having regard to the likely problems in ascertaining the truth about a complicated and highly contentious fact situation occurring in 1988, and in evaluating alternative psychological outcomes for [Stanley] arising out of different scenarios occurring at that time, in my opinion the presumptive*

---

*prejudice to the claimant from the delay is high in this case. I am not satisfied that the delay has not made the chance of a fair trial unlikely.*<sup>76</sup>

112. Commenting on the appeal judgment in *Stanley*, the ILS member suggests that it is noteworthy for two reasons:
- i. first, that the ground upon which the appeal was allowed, namely that the cause of action was hopeless, was not raised before the judge hearing the application;
  - ii. secondly, that the appeal judgment highlights the reluctance of the courts to accept the failure of schools to put in place adequate procedures for the protection of children exposed to abuse. In this case, she notes that *Stanley* included allegations that the school involved had covered up the abuse by the teacher by dishonestly blaming another student who was in fact a victim of the teacher involved.
113. With this in mind, the member suggests that the Royal Commission should not only consider adequacy of, and improvements to, current court procedures – such as in the taking of evidence; but further, that it should consider more significant reforms, such as the use of specialist courts and specially trained judges. She notes that such courts have been adopted in New York State in the United States of America.
114. The member notes that there is opposition to the proposal to split courts into specialist sex crimes/ child sex assault courts, for reasons including that this may lead to the lessening of the court's status and authority, as well as its size. She counters this argument by emphasising that such a serious issue as widespread child sex abuse calls for an objective review of how it has been dealt with by courts, using statistics and results as a first port of call.
115. The above suggestions were made on the basis of the member's experience in the area of child sexual abuse, including the member's participation in a study trip taken for the National Child Sexual Assault Committee (National Committee)'s Report on Alternative Models for Prosecuting Child Sex Offences in Australia (2010).<sup>77</sup>
116. The National Committee was established in response to a *Four Corners* program 'Double Jeopardy', screened in July 1999; that revealed the 'abusive cross-examination' of an 8-year old victim of child sexual abuse. The task of the National Committee was to document the best practice standards for the conduct of child sexual assault trials across Australia; to document the outcomes of prosecuting child sex offences in terms of reporting, attrition and conviction rates; and to research and consider alternative models for prosecuting child sex offences.<sup>78</sup> Although the Report addressed criminal trials, the ILS member recommended that consideration of the shortcomings of the court system should occur in regards to both criminal and civil redress.
117. The relevant recommendation of that Report for this Issues Paper is that a Child Sex Offences Court be established in each jurisdiction with specific features

---

<sup>76</sup> *Cranbrook School v Stanley* [2002] NSWCA 290, [89].

<sup>77</sup> Dr Anne Cossins, 'Alternative Models for Prosecuting Child Sex Offences in Australia', *Report of the National Child Sexual Assault Reform Committee*, 1 March 2010, available at: <http://www.law.unsw.edu.au/sites/law.unsw.edu.au/files/docs/nationalcsareformcommitteereport2010.pdf>.

<sup>78</sup> *Ibid*, p 7.

---

to support victims of child sex abuse, including the exemption of children from giving evidence at committal and pre-trial hearings and *voir dire*s to reduce the number of times a child gives evidence.<sup>79</sup> The reasoning behind this recommendation is that courts may not adequately recognise and understand child sexual abuse, and may lack the requisite training and legal tools or procedural rules to deal with child sexual abuse cases.

*The cost of accessing the civil justice system*

118. On 13 November 2013 the Law Council made a submission to the Productivity Commission's Inquiry into Access to Justice Arrangements (Productivity Commission Inquiry).<sup>80</sup> This submission drew on contributions from the Law Council's constituent bodies, as well as the expertise of members of its expert Advisory Committees, Sections and Divisions. The draft Productivity Commission report is due to be released in April 2014, and the Final Report is due to be released in September 2014.

119. In its submission, the Law Council recognised that legal cost was one barrier to the delivery of justice and access to the civil justice system. This barrier could be overcome if there is investment in the courts, legal assistance services, new technology, community legal education and referral services, and if measures are taken to slow the attrition of lawyers in regional and remote areas.<sup>81</sup>

120. The Law Council's submission also referred to the findings of the 2012 Legal Australia-Wide (LAW) Survey that examined the significant legal need in the community, which particularly affects disadvantaged people. It examined the barriers faced in, obtaining legal assistance; participating effectively in the legal system; obtaining assistance from non-legal advocacy and support services; and participating effectively in the law reform process.<sup>82</sup>

121. Research demonstrates that people who are victims of child sexual abuse are more likely to experience adverse mental health, which in turn causes adverse behavioural outcomes resulting from mental health issues, interpersonal health issues and physical health issues.<sup>83</sup> For example, there has been a large amount of research indicating that survivors of child sex abuse are at a greater risk of substance dependency, including alcohol and nicotine dependency.<sup>84</sup> Furthermore, studies have indicated that sexual victimisation trauma may be a risk factor for homelessness, as well as being a result of homelessness.<sup>85</sup> It is therefore arguable that victims of child sexual abuse can often be counted as part of the most disadvantaged groups in society.

---

<sup>79</sup> Ibid, p 37-8.

<sup>80</sup> Law Council of Australia, *Inquiry into Access to Justice Arrangements*, 13 November 2013, available at: [http://www.pc.gov.au/data/assets/pdf\\_file/0015/130173/sub096-access-justice.pdf](http://www.pc.gov.au/data/assets/pdf_file/0015/130173/sub096-access-justice.pdf).

<sup>81</sup> Ibid, summary of submission at p 8.

<sup>82</sup> Christine Coumarelos, Deborah Macourt, Julie People, Hugh M McDonald, Zhigang Wei, Reiny Iriana & Stephanie Ramsey, 'Legal Australia-Wide Survey: Legal need in Australia' 2012, NSW Law and Justice Foundation, available at: <http://www.lawfoundation.net.au/ljf/app/6DDF12F188975AC9CA257A910006089D.html>.

<sup>83</sup> Judy Cashmore and Rita Shackel, 'The long-term effects of child sexual abuse', (2013) 11 *Australian Institute of Family Studies* 1.

<sup>84</sup> Ibid, p 13, citing Nelson et al., (2002).

<sup>85</sup> Liz Wall and Antonia Quadara, 'Acknowledging complexity in the impacts of sexual victimisation trauma', (2014) 16, *Australian Institute of Family Studies*, 1, p 14 citing Morrison (2009).

- 
122. In order for such victims to successfully pursue redress through civil litigation, it is necessary to consider the effect of the abuse that they suffered as children on their ability to take further action, including seeking legal advice.
123. As the Law Council outlined in its submission to the Productivity Commission Inquiry, it is important that those services that traditionally represent disadvantaged groups in Australia, such as community legal centres (CLCs), are adequately funded and easily accessible.<sup>86</sup> Indeed, its submission noted that the 2008 Review of the Commonwealth Community Legal Services Program conducted by the Attorney-General's Department confirmed that CLCs are a vital resource for the financially and socially disadvantaged.<sup>87</sup> Furthermore, the Law Council's submission recognised that:
- ...there is a growing body of evidence that many disadvantaged members of the community often face a 'cluster' of problems that, if left unresolved, increase their social exclusion with long term implications for their health, employment capacity and general well-being.*<sup>88</sup>
124. The Law Council therefore stresses the importance of the Royal Commission considering the 'cluster' issues which affect victims of child sexual abuse, with regard to their capacity to take action.
125. Class actions may be a useful mechanism for certain classes of claims – for example, in matters involving a small number of claimants against specific institutions or entities, rather than as mass tort litigation.
126. The Law Council notes that there are some policy questions around how this would work in practice, including the way in which such proceedings would be funded and whether the usual commercial funding mechanisms would be appropriate or well-suited to such litigation.
127. However, the particular risks which have been identified in relation to such cases will often remain – for example, owing to their historical nature, and the fact that evidence and witnesses may not be readily accessible. This may make such cases less attractive to plaintiff lawyers.
128. Currently, legal aid for civil claims is virtually unavailable Australia. Without effective legal representation, victims are unlikely to benefit from other changes to the civil litigation system. Therefore, there is value in considering how victims can be supported to access legal advice and representation in the longer term, beyond the Royal Commission.
129. Consideration should be given to, for example, an ongoing specialist legal service such as Knowmore. Knowmore, an organisation which was set up to provide legal advice to victims of child sexual abuse who wish to engage with the Royal Commission, is a service that may be well placed to provide free, specialised assistance to victims on an ongoing basis. A key difference between Knowmore and the ongoing proposed service, however, would be that it would need to provide some form of funding for the legal representation of victims of child sexual abuse so that they may take matters forward. A specialist legal aid fund for victims of institutional child sexual abuse is also worth considering.

---

<sup>86</sup> Law Council of Australia, *Inquiry into Access to Justice Arrangements*, 13 November 2013, para [492], available at: [http://www.pc.gov.au/data/assets/pdf\\_file/0015/130173/sub096-access-justice.pdf](http://www.pc.gov.au/data/assets/pdf_file/0015/130173/sub096-access-justice.pdf).

<sup>87</sup> *Ibid*, [493].

<sup>88</sup> *Ibid*, [494].

- 
130. The Law Council recommends that the Royal Commission should emphasise the need for funding to support effective legal representation of victims of child sexual abuse in civil litigation cases.
131. The Law Council also suggests that the Royal Commission consider the findings of the Law Survey in forming recommendations about the civil litigation system.

#### Dispute resolution and mediation

132. As discussed above, the LSNT supports the establishment of processes that lessen the risk of re-traumatisation of the victim, and suggests that mediation and early dispute resolution processes may overcome this risk.
133. However, it should be noted that the Victorian Report recognised that:
- Victims can be at a disadvantage in private settlement negotiations, due to their lack of resources and the evidentiary, legal and practical barriers of challenging an organisation in court. The emotional impact of an adversarial battle also acts as a deterrent to litigation for already suffering victims of criminal child abuse.*<sup>89</sup>
134. It is important, therefore, to consider mechanisms which will assist victims to overcome this disadvantage during private settlement negotiations. This would include, for example, ensuring that they are provided with appropriate legal advice and representation, as suggested above.

#### Changes to civil litigation systems to accommodate for victims of child sex abuse

135. A number of possible areas in which the Law Council suggests that changes should be considered have been discussed above.
136. The Law Council notes that while there are key differences between Victoria and other jurisdictions, the recent Victorian experience provides a strong platform on which to consider civil litigation systems at the national level.
137. As set out above, the Law Council considers that the Royal Commission will also find it useful to refer to the findings and recommendations of other inquiries and studies in its consideration of reforms to the civil litigation system.

## Conclusion

138. The Law Council considers that there are several barriers facing victims of child sexual abuse who wish to engage in the civil litigation system. In particular, the Law Council has highlighted barriers such as:
- i. the lack of a defendant to sue;
  - ii. the lack of assets of the defendant;
  - iii. uncertainty surrounding the vicarious liability of institutions;

---

<sup>89</sup> Ibid.

- 
- iv. limitation periods;
  - v. a lack of evidence, including the existence of relevant records;
  - vi. the trauma associated with the process of giving evidence;
  - vii. barriers emerging from the interaction between internal complaints processes and the civil justice system;
  - viii. the victim's personal barriers;
  - ix. a lack of understanding of child sexual abuse matters within the court system; and
  - x. the cost of accessing the civil justice system, including access to legal advice and representation.

139. The Law Council considers that there are many useful resources available that can assist the Royal Commission in considering reforms to the civil litigation system. These resources include recommendations regarding how many of these barriers may be addressed. These include:

- i. the Report of the Victorian Inquiry;
- ii. the findings of the LAW Survey; and
- iii. the Law Council's submission to the Productivity Inquiry, and the interim and final reports of the Productivity Commission, upon release.

140. The Law Council looks forward to further engagement with the Royal Commission as it continues to examine justice for victims of child sexual abuse within institutional contexts.

---

## **Attachment A: Profile of the Law Council of Australia**

---

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel, President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.