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Where to From Here for the Catholic Church- Recommendations 94 and 95 of the  
Redress and Civil Litigation Report

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# WHERE TO FROM HERE FOR THE CATHOLIC CHURCH: RECOMMENDATIONS 94 AND 95 OF THE *REDRESS AND CIVIL LITIGATION REPORT*

JANE POWER \*

## I INTRODUCTION

The Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) was called by then Prime Minister the Hon. Julia Gillard, MP, on 12 November 2012.<sup>1</sup> The breadth of the abuse in society's institutions was disturbingly wide:

The sexual abuse of children has occurred in almost every type of institution where children reside or attend for educational, recreational, sporting, religious or cultural activities. Some institutions have had multiple abusers who sexually abused multiple children. It is not a case of a few 'rotten apples'. Society's major institutions have seriously failed.<sup>2</sup>

The Recommendations made by the Commission both in its Final Report submitted on 15 December 2017<sup>3</sup> and the final recommendations in its interim Redress and Civil Litigation Report published in 2015,<sup>4</sup> relate to all institutions against

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<sup>1</sup> Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015).

<sup>2</sup> Ibid 5.

<sup>3</sup> Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017).

<sup>4</sup> McClellan AM, above n 1, Although the report was an interim one the Commission made

whom allegations of abuse were made.<sup>5</sup> This paper only considers two recommendations, namely Recommendations 94 and 95 that relate to the legal structure of the Church in Australia and only in relation to law reform for the Catholic Church (the Church). Recommendations 94 and 95 in the Redress and Civil Litigation Report arose as a consequence of survivors of child sexual abuse being unable to either properly identify a relevant legal entity to sue, or being unsuccessful on legal technicalities when they did commence an action. These issues do not just arise for plaintiffs wishing to commence legal action for compensation relating to child sexual abuse. They affected all would be plaintiffs wishing to commence any legal action against the Church in Australia except those relating to property.

Recommendation 16.7 of the Final Report states:

The Australian Catholic Bishops Conference should conduct a national review of the governance and management structures of dioceses and parishes, including in relation to issues of transparency, accountability, consultation and the participation of lay men and women. This review should draw from the approaches to governance of Catholic health, community services and education agencies.

Therefore, in discussing the efficacy of Recommendations 94 and 95, this paper examines the current legal status and structure of the Church to determine those ‘governance and management structures’.

## II RECOMMENDATION 94

Recommendation 94 addresses the need for a victim of institutional child sexual abuse to be able to sue a legally recognised body for damages relating to the abuse, the recommendations within it final recommendations.

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<sup>5</sup>The percentage of survivors reporting abuse in religious institutions to the Royal Commission were: Catholic - 61.4; Anglican - 14.8; Salvation Army - 7.2; Protestant - 4.4; Presbyterian and Reformed - 2.8; Uniting Church - 2.3; Other Christian - 1.9; Jehovah’s Witness - 1.8; Baptist - 1.2; Pentecostal - 1.0; Judaism - 0.6; other religious organisations - 3.9: Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Information Update* (2017) 1.

even if that body only relates to issues concerning property. Recommendation 94 states:

94. State and territory governments should introduce legislation to provide that, where a survivor wishes to commence proceedings for damages in respect of institutional child sexual abuse where the institution is alleged to be an institution with which a property trust is associated, then unless the institution nominates a proper defendant to sue that has sufficient assets to meet any liability arising from the proceedings:

- a. the property trust is a proper defendant to the litigation
- b. any liability of the institution with which the property trust is associated that arises from the proceedings can be met from the assets of the trust.

### III THE LEGAL STRUCTURE OF THE CATHOLIC CHURCH

Recommendation 94 invites the question ‘is the alleged perpetrator not the most relevant party to sue?’ Suing the alleged perpetrator is unhelpful as s/he are unlikely to have any financial means to satisfy any court order for damages, as they have usually taken a vow of poverty or are bound to pass their property to ownership by the Church. If the Church holds the property then why is the Church not the most suitable party for a litigant to sue? The simple answer is that the Church has no legal identity within Australian law and therefore cannot be sued directly. Why then not sue the local bishop as representative of the Church? Pursuing an action against the Church in vicarious liability is fraught with difficulties, not least of which is its lack of legal capacity.<sup>6</sup>

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<sup>6</sup>The difficulties of suing the Church or the Archbishop in vicarious liability are discussed in McClellan AM, above n 1, 464.

## A *What is the Church if it has no legal structure?*

‘In the Christian context, “the church” means a grouping of people who have a common religious belief, founded on the person of Jesus Christ. The Church then is not so much a physical “thing” as it is a community of “people”’.<sup>7</sup> The ‘Church’ in canon law has no separate juridical personality, or identity as a ‘being’; therefore, in canonical terms the Church is not an entity. The juridical entity of the diocese or parish has direct relevance to canonical issues, but not common law issues. When discussing legal issues<sup>8</sup> the diocese or parish is the object of such discussion. In common law the Church is also not an entity; it is an unincorporated association, as are the diocese and parish:

[w]ithin the Catholic Church in WA<sup>9</sup> there is one archdiocese<sup>10</sup> in Perth and three dioceses in Bunbury, Broome and Geraldton, each with an archbishop<sup>11</sup> or bishop<sup>12</sup> at its governance head. The dioceses of Perth, Bunbury, Geraldton and Broome together constitute the ecclesiastical province of Perth. The Archbishop of Perth is the Metropolitan of the Province.<sup>13</sup> ‘The spirit of the law is to minimise the involvement of the metropolitan in the affairs of the suffragan dioceses’.<sup>14</sup>

The dioceses are part of the Church hierarchy; the dioceses represent the Church. In Western Australia (WA) each diocesan bishop is a separate statutory corporation sole in relation to property and each has exclusive governance of his diocese.

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<sup>7</sup>Brian Lucas, Peter Slack and William d’Apice, *Church Administration Handbook* (St Pauls, 2008) 24. Juridical persons are ‘an aggregate of persons or things’ (canon 113 §2) and in canon law are ‘subjects of obligations and rights which accord with their nature’ (canon 113 §1). Canon 1254 refers specifically to the Universal Church as being able to acquire property but in the local Australian context, the ‘Church’ does not have juridical personality. The Australian Catholic Bishops’ Conference, dioceses and parishes do have separate juridical personalities.

<sup>8</sup>This paper only considers the common law issues, not canon law issues, relevant to Recommendations 94 and 95.

<sup>9</sup>Dioceses are often created to coincide with geographical boundaries to easily interact with the civil government of the region: Lucas, Slack and d’Apice, above n 8, 130.

<sup>10</sup>*Code of Canon Law 1983* canon 431.

<sup>11</sup>*Code of Canon Law 1983* canon 435 and 436.

<sup>12</sup>*Ibid* canons 481, 391 and 393.

<sup>13</sup>*Ibid* canons 431 and 432. The powers of the position are set out in canon 436.

<sup>14</sup>Lucas, Slack and d’Apice, above n 8, 133.

All four positions of the Bishops are ‘equal’. ‘Within the diocese the bishop has the responsibility for teaching and pastoral government’.<sup>15</sup> The dioceses<sup>16</sup> are separate juridical persons (canonical entities) and the diocesan bishops are the representative of the dioceses<sup>17</sup> and may be the relevant legal entity in any legal proceeding, but in their personal capacity not their office,<sup>18</sup> and they will rarely if ever hold any property in their personal capacity. The common law status of the diocesan bishops in non-property matters is uncertain. They could be:

- a corporation sole at common law —this seems unlikely in light of *Archbishop of Perth v AA to JC Inclusive* (1995) 18 ACSR 333 (the Archbishop of Perth case), which leaves open the possibility that the Church could be a corporation sole at common law, but dicta in the case suggests it is unlikely a court would decide this;
- personally liable —as in *Barry James Hickey Archbishop of Perth v Independent Schools Salaried Officers Association* [2003] WAIR Com 10127 in which the archbishop was recognised as the employer; or
- an agent for an unincorporated association, that is, the bishops representing the Church as the heads of the dioceses.

Confusion in legal proceedings arises as the alleged perpetrator and the local bishop are unlikely to have the personal capacity to fulfil any award of damages. The

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<sup>15</sup>Ibid 39.

<sup>16</sup>The diocese is defined in canon 369, it can only be created by the Pope and obtains juridical personality by law (canon 373). It is, by virtue of canon 372 §1, usually a defined territory and that is the case in WA. A diocese is divided into parishes (canon 374 §1), which are separate canonical entities (canon 515 §3) although in common law are recognised as an unincorporated association with no common law identity.

<sup>17</sup>See also, Vatican Council II, *Lumen Gentium* (21 November 1964), [21-23] <[http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_const\\_19641121\\_lumen-gentium\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19641121_lumen-gentium_en.html)>.

<sup>18</sup>This is because the office does not have any separate common law identity other than as an unincorporated association. The diocese and parish have a clearly identifiable canon law identity as juridical persons.

Church has no common law status as an unincorporated association, which is not recognised as a legal entity with rights and obligations. Determining the correct parties to proceedings involving the Catholic Church is a difficult and frustrating concept and led to the Royal Commission making Recommendation 94.<sup>19</sup>

#### IV LEGAL STRUCTURES IN THE DIOCESES

Although the Church has no legal identity, it needs some form of legal structure to hold its property interests; the only legal entities relating to the Church are in relation to property. In most states the dioceses are the focus of legal status but that status varies between the states. In WA the diocesan bishops as statutory corporations sole separately hold the property of all four Roman Catholic dioceses. In other states, the Catholic Church adopted other legal entities, including property trusts.

##### A *Statutory Property Trusts*

In NSW, the Trustees for the Roman Catholic Church for the Archdiocese of Sydney ('Sydney Trustees'), a statutory body corporate with perpetual succession, was established under the *Roman Catholic Church Trust Property Act 1936* (NSW) (the NSW Act).<sup>20</sup> In Victoria, the Roman Catholic Trusts Corporation in-

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<sup>19</sup>See McClellan AM, above n 1, 509-511; *Trustees for the Roman Catholic Church for the Archdiocese of Sydney v Ellis* [2007] NSWCA 117; Truth Justice and Healing Council, Submission No 21 to Royal Commission into Institutional Responses to Child Sexual Abuse, Commonwealth, *Issues Paper No 5 Civil Litigation*.

<sup>20</sup>Broadly, a trust is 'a device by which one person holds property for the benefit of another person. A trust imposes a personal equitable obligation upon a person ('trustee') to deal with property for the benefit of another person or class of persons ('beneficiary') or for the advancement of certain purposes, private or charitable': Peter Butt (ed), *Butterworths Concise Australian Legal Dictionary* (Lexis Nexis Butterworths, 3<sup>rd</sup> ed, 2004) 433-3. See below for a discussion of the *Ellis* case in which Mr Ellis instigated proceedings against the Sydney Trustees.

corporated pursuant to the *Roman Catholic Trusts Act 1907* (Vic) (the Victorian Act). The relevant statutes in NSW and Victoria restrict the purpose of the relevant body to proprietary interests and rights. Under the NSW Act s 9 '[a] body corporate created by this Act has all the powers of a natural person, including (without limiting the scope of those powers) the power...' that relates to allowing it to purchase, lease, sell, bequest, mortgage and otherwise deal with the property. Likewise, the preamble to the Victorian Act states the purpose of it as being solely concerned with property:

WHEREAS the property of the Roman Catholic Church in Victoria is held by many different bodies of trustees: AND WHEREAS owing to death and other causes the necessity for the appointment of new trustees is continually arising: AND WHEREAS it is expedient that corporate bodies of trustees should be created for the purpose of holding managing and dealing with the property of the said Church and that for the better management thereof certain properties of the said Church should be vested in such corporate bodies and that the conveyance and transfer of such properties should be facilitated and rendered less expensive...

Section 3 of the Victorian Act then permits the corporate body that is the property trust to hold manage and deal with property, including leasing, charging, mortgaging, and otherwise encumbering a title of property.<sup>21</sup> The property trust is a separate legal entity to the Church. The relevant statutes limit trust status to legal issues relating to property only. In all other matters, unrelated to property, common law recognises that the Roman Catholic Church, including its dioceses and parishes, is an unincorporated association.<sup>22</sup> A plaintiff seeking compensation for child sexual abuse cannot sue the property trust as the cause of action does not relate to the property.<sup>23</sup> Any litigant seeking compensation from the Church for a cause of action in anything other than property, has no defendant to sue.

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<sup>21</sup> *Roman Catholic Trusts Act 1907* (Vic) s 15.

<sup>22</sup> *Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2005] NSWSC 381.

<sup>23</sup> *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* (2007) 70 NSWLR 565.

## B *The Corporation Sole*

Recommendation 94 only refers to ‘property trusts’. In WA the legal entity used to manage Catholic Church property is the corporation sole. It is unlikely that the Royal Commission intended to exclude WA from this recommendation, but to encompass all legal entities used to hold the Catholic Church’s property.

A corporation is an artificial person in law.<sup>24</sup> Corporations developed through common law for centuries, with Sir William Blackstone describing the need for them:

As all personal rights die with the person; and as the necessary forms of investing a series of individuals, one after another, with the same individual rights, would be very inconvenient if not impracticable; it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality. These artificial persons are called bodies politic, bodies corporate (corpora corporate) or corporations.<sup>25</sup>

In WA the Catholic Church holds its property through the historical, and relatively unused, corporation sole. Corporations sole are created by statute or recognised in common law. It is a body corporate but has no members or shareholders. It consists of an individual who holds a particular office (eg a bishop) and each holder of that office constitutes the corporation sole whilst ever in that office’.<sup>26</sup>

The corporation sole consists therefore of only one person and that person’s successors to a particular position, where that person constitutes an artificial legal person in which title to property could be vested ... A corporation sole is meant to give those individuals who hold an office or station some legal capacities and advantages, particularly that of perpetuity, which they could not have in their capacity as natural persons.<sup>27</sup>

The corporation sole therefore has a separate legal identity to the person who holds

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<sup>24</sup>Butt (ed), above n 20, 98.

<sup>25</sup>Sir William Blackstone, *Commentaries on the Laws of England* (, 1765) vol 1, 455.

<sup>26</sup>Lucas, above n 7, 240.

<sup>27</sup>Butt (ed), above n 20 98.

the office or title. The bishop holds the property as the office of the corporation sole, not in his personal capacity. The corporation sole does not require the formal transfer of the powers, duties and ownership of property that is normally required when a person leaves an office or dies.<sup>28</sup>

The corporation sole is an historical entity created to accommodate situations where the main office holder of the corporation was an ‘office’ rather than an individual; it is ‘the incorporation of an office’,<sup>29</sup> its origins in ecclesiastical law. Historically, the corporation sole was particularly useful for ecclesiastical bodies where the bishop held the office, usually until their death. Before the corporation sole, the church had to transfer the ownership of diocesan temporal goods into the name of the person succeeding the deceased officeholder, an expensive and time-consuming procedure which often left the church unable to deal with their property for a considerable time until the transfers were completed.<sup>30</sup> The corporation sole was adopted as the common way to incorporate church bodies in several common law countries.<sup>31</sup>

A corporation sole may be statutory – created by a specific statute, or a common law corporation sole – arising from common law without statutory recognition. From the 17th century in England, the Church of England was the established church, with the monarch as the Head of the Church. On the colonisation of Australia, ecclesiastical law was not received with other common law as there was no established church as in England. Consequently, the common law corporation

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<sup>28</sup> *Crouch v Commissioner for Railways (Qld)* (1985) 159 CLR 22.

<sup>29</sup> James B O’Hara, ‘The Modern Corporation Sole’ (1988-1989) 93 *Dickinson Law Review* 23, 25.

<sup>30</sup> Although it was initially a legal entity adopted and developed to accommodate property transfer within the church, in the 17th century the Crown was also recognised as a corporation sole: R.P Austin and I.M Ramsay, *Ford’s Principles of Corporations Law* (LexisNexis Butterworths, 15<sup>th</sup> ed, 2013) 35.

<sup>31</sup> Including England, the United States of America and parts of Australia. The first American provision for a corporation sole was in Maryland in 1833 Francis J Weber, ‘Corporation Sole in California’ (1965) *The Jurist* 330.

sole is not the legal entity of any church in Australia, though several cases argued that in recent years.<sup>32</sup> Only statutory corporations sole are currently recognised in Australia.<sup>33</sup> Commentators have suggested that the corporation sole is not a corporation at all but an anomaly.<sup>34</sup> Admittedly, it is not a corporation pursuant to s 57A of the *Corporations Act 2001* (Cth), nonetheless, the corporation sole has the main features of a corporation:

- it has perpetual succession;
- it can hold property;
- it can sue and be sued; and
- both the property and the powers of the corporation sole are transferable on the death of the office holder to their successors in the particular office (not to their heirs, executors or administrators),

but there is no board of directors or shareholders —only the present, serving office holder.<sup>35</sup>

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<sup>32</sup>*Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* (2007) 70 NSWLR 565; *Archbishop of Perth v AA* (1995) 18 ACSR 333; *Hubbard Association of Scientologists International v Attorney General for the State of Victoria* [1976] VR 119; For a discussion on whether the Church of England was ever the ‘established’ church of Australia see Renae Barker, *The Changing Relationship Between the State and Religion in Australia: 1788 to Modern Australia. What has Changed? What is the Same? And what does that Tell Us?* (PhD Thesis, UWA, 2014) 31.

<sup>33</sup>For example (in addition to the corporations sole of the Catholic bishops in WA) the Public Trustee in Queensland and NSW are statutory corporations sole: s 8 *Public Trustee Act 1978* (Qld) s 8 and *Public Trustee Act 1913* (NSW) s 7.

<sup>34</sup>See Robert L Raymond, ‘The Genesis of the Corporation’ (1905-1906) *Harvard Law Review* 350, 361.

<sup>35</sup>O’Hara, above n 29, 25-6; Austin, above n 30 35.

## C *The Corporation Sole in WA*

The bishop's' *offices* in WA are statutory corporations sole acting independently of each other. The Roman Catholic Bishop of Perth was originally established as a statutory corporation sole.<sup>36</sup> Subsequently, the term 'archbishop' was substituted for 'bishop' in 1916.<sup>37</sup> The bishops of Geraldton, Bunbury and Broome are also individual statutory corporations sole<sup>38</sup> which hold any diocesan property in their name. Section 4 of the *Roman Catholic Church Property Acts Amendment Act 1916* (WA), specifically states the powers of the archbishop in relation to selling, leasing and mortgaging church property.<sup>39</sup> Those powers include the ability to purchase, sell, exchange, lease or 'dispose of [property] in any other manner'. The bishop may 'mortgage whether legally or equitably' (including equitable charges),<sup>40</sup> enter into a guarantee<sup>41</sup> or partnership,<sup>42</sup> or become a member of a company.<sup>43</sup> He may 'compound, release or settle claims by or against him in his corporate name, whether in contract or tort...'<sup>44</sup> Section 4(2)(g) of the *Roman Catholic Church*

<sup>36</sup>*Roman Catholic Church Property Act 1911* (WA) s 4(1).

<sup>37</sup>*Roman Catholic Church Property Acts Amendment Act 1916* (WA) s 3; The corporation sole is known as 'The Roman Catholic Archbishop of Perth'. Due to the growth of the Diocese of Perth, it became an Archdiocese hence the need for the change in the name of the corporation sole.

<sup>38</sup>*Roman Catholic Geraldton Church Property Act 1925* (WA) s 4; the corporation sole is known as 'The Roman Catholic Bishop of Geraldton'. *Roman Catholic Bunbury Church Property Act 1955* (WA) s 4; the corporation sole is known as 'The Roman Catholic Bishop of Bunbury'. *Roman Catholic Vicariate of the Kimberleys Property Act 1957* (WA) s 4; the name of the Act changed pursuant to section 9 of the; *Roman Catholic Vicariate of the Kimberleys Property Act Amendment Act 1970* (WA); The corporation sole is known as 'The Roman Catholic Bishop of Broome'. The Abbot of New Norcia (a Benedictine Monk Community) was also a corporation sole and known as 'The Abbot Nullius of New Norcia' pursuant to s 4 of the *Roman Catholic New Norcia Church Property Act 1929* (WA); 'The Abbey Nullius of New Norcia was suppressed and incorporated within the Archdiocese of Perth on 12 March 1982' Lucas, above n 7, 267.

<sup>39</sup>The other relevant statutes referred to above provide identical or very similar powers.

<sup>40</sup>*Roman Catholic Church Property Acts Amendment Act 1916* (WA) s 4(2)(c).

<sup>41</sup>Ibid s 4(2)(d).

<sup>42</sup>Ibid s 4(2)(e).

<sup>43</sup>Ibid s 4(2)(f).

<sup>44</sup>Ibid s 4(2)(g). However, s 4(4) restricts these powers so that they do not apply to 'lands which have been granted by the Crown to or for the use of the Roman Catholic Church and which are vested in the Archbishop, except with the prior approval of the Governor'.

*Property Acts Amendment Act 1916* (WA) allows a bishop to ‘...compound, release or settle claims by or against him in his corporate name, whether in contract or tort,...’ but it does not confer a statutory ability to sue the bishop in tort for matters unrelated to property. This was affirmed in the Archbishop of Perth case:

That statute created such a body corporate only for the limited purposes provided by the statute, they being purposes related to the holding of and dealing with property and matters associated therewith, and do not permit or contemplate the body corporate being responsible for an action in tort unrelated to property.<sup>45</sup>

Contractual and tortious claims are limited to actions relating to the property. These statutory corporations sole cannot be sued for actions other than those relating to the property of the Church. In all other matters, unrelated to property, common law recognises that the Roman Catholic Church, including its individual dioceses and parishes, is an unincorporated association<sup>46</sup> and not a corporation sole.<sup>47</sup> A Plaintiff seeking compensation for child sexual abuse cannot sue the corporation sole as the cause of action does not relate to the property. Any litigant seeking compensation from the church for a cause of action in anything other than property, had no defendant to sue, hence the need for Recommendation 94.

## V RECOMMENDATION 95

Recommendation 95 addresses a need for victims to have access to financial compensation from unincorporated associations, through insurance, and connects the Governments’ financial support of these institutions to the insurance requirement. Although not specifically stated, the implication is that funding is dependent on

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<sup>45</sup> *Archbishop of Perth v AA* (1995) 18 ACSR 333, per Cole JA at 348 referring to the 1911 Act, Kirby, J at 336 and Meagher, JA at 341.

<sup>46</sup> *Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2005] NSWSC 381.

<sup>47</sup> *Archbishop of Perth v AA* (1995) 18 ACSR 333, The office of the diocesan bishops in canon law is the representative of the juridical person that is the diocese. Canonically, the dioceses constitute separate public juridical persons, ie separate entities in canon law.

institutions having the insurance:

95. The Australian Government and state and territory governments should consider whether there are any unincorporated bodies that they fund directly or indirectly to provide children’s services. If there are, they should consider requiring them to maintain insurance that covers their liability in respect of institutional child sexual abuse claims.

### A *The Church as an Unincorporated Association*

The unincorporated association is a business structure typically found in not-for-profit organisations, social and sporting clubs, and voluntary associations.<sup>48</sup> Dioceses and parishes in Australia are unincorporated associations.<sup>49</sup> *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* (2007) 70 NSWLR 565 (*‘Ellis’*)<sup>50</sup> recognised parishes as unincorporated associations and the parties, and judges, acknowledged that the Catholic Archdiocese of Sydney was an unincorporated association (and therefore dioceses in general). The unincorporated association has long been a problematic legal concept due to its lack of legal status, though its definition has been relatively clear for some time.<sup>51</sup> There are no statutory requirements relating to the formation or administration of an unincorporated body; it is only governed by case law. *Cameron v Hogan*, the leading Australian case on unincorporated associations, defines them as follows:

They are for the most part bodies of persons who have combined to further some common end or interest, which is social, sporting, political, scientific, religious, artistic or humanitarian in character, or otherwise stands apart from private gain and material advantage. Such associations are established

<sup>48</sup> *Cameron v Hogan* (1934) 51 CLR 358, 370-371 (Rich, Dixon, Evatt, and McTiernan JJ)..

<sup>49</sup> The Church has no common law identity nor is it a public juridical person. Dioceses however, are separate public juridical persons (with the diocesan bishops as the representative of their respective dioceses) and are unincorporated associations in common law: *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* (2007) 70 NSWLR 565.

<sup>50</sup> Commonwealth, *Case Study 08: Mr John Ellis, Towards Healing and Civil litigation 10 –26 March 2014* <<https://www.childabuseroyalcommission.gov.au/case-studies/case-study-08-mr-john-ellis-towards-healing-and-civil-litigation>>.

<sup>51</sup> Many of the cases considering unincorporated associations demonstrate their problematic nature arising from the lack of legal status.

upon a consensual basis, but, unless there were some clear positive indication that the members contemplated the creation of legal relations inter se, the rules adopted for their governance would not be treated as amounting to an enforceable contract.<sup>52</sup>

This very wide common law definition contains no provision for any formal requirements relating to the establishment of an unincorporated association. Nor is there provision for its administration, such as a constitution, contractual liability between members, property ownership or management of the unincorporated association.<sup>53</sup> The only common factor appears to be the not-for-profit status of these bodies. Establishing an unincorporated association is, therefore, very simple: a group of people (members) with a common not-for-profit interest voluntarily establish a group and name it. They may or may not draft and adopt rules or a constitution, they will generally choose a committee from the members, but are not required to, and they may or may not own property held on trust. Today the *Cameron v Hogan* definition remains the current law and it is accepted that

[v]oluntary non-profit associations are associations, clubs, societies or other groups of persons that are formed or carried on for any lawful purpose which does not result in the association's members making any profit from its activities or dividing its property among themselves while the association remains in existence.<sup>54</sup>

Characteristics of the unincorporated association include that it:<sup>55</sup>

- is formed for a common purpose;
- is a not-for-profit group;

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<sup>52</sup>*Cameron v Hogan* (1934) 51 CLR 358, 370-371 (Rich, Dixon, Evatt, and McTiernan JJ)..

<sup>53</sup>Myles McGregor-Lowndes and Frances Hannah, 'Unincorporated Associations as Entities: A Matter of Balance between Regulation and Facilitation?' (2010) 28 *Company and Securities Law Journal* 197, 205.

<sup>54</sup>A.S Sievers, *Associations and Club Law in Australia and New Zealand* (Federation Press, 3<sup>rd</sup> ed, 2010) 1.

<sup>55</sup>These are common characteristics identified from relevant cases and commentary. See generally *Cameron v Hogan* (1934) 51 CLR 358; *Trustees for the Roman Catholic Church for the Archdiocese of Sydney v Ellis* [2007] NSWCA 117; Sievers, above n 54.

- is not regulated by statute and is therefore subject to common law principles;
- does not necessarily have a fixed or finite membership;<sup>56</sup>
- may or may not hold property (but only pursuant to a trust or other relevant legal entity);
- cannot sue or be sued; and
- may or may not have rules or a constitution (though it is now rare that they do not).

It is arguable that the dioceses are unincorporated associations without any written rules<sup>57</sup> and a large membership that is difficult to determine at any point in time. The unincorporated association's lack of legal status causes problems for its members and those dealing with it, including the relationship between its members, the ability to sue and be sued, to enter into contracts, to be held liable for tortious acts, and to own and insure property.

### 1 *Identity in Legal Proceedings*

As the unincorporated association is not a legal entity it follows that it cannot sue or be sued, and therefore has no legal standing to commence, or join other parties to, court actions. This raises various issues and difficulties in relation to legal rights and liabilities in both contract and tort, as experienced by many victims of institutional child sexual abuse.<sup>58</sup>

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<sup>56</sup>*Trustees for the Roman Catholic Church for the Archdiocese of Sydney v Ellis* [2007] NSWCA 117, 576 [47] (Mason P with whom Ipp and McColl JJA concurred).

<sup>57</sup>Although not tested, it is unlikely that canon law would be accepted as the unincorporated association's 'Rules'.

<sup>58</sup>The victims of institutional child sexual abuse need to be able to sue in tort.

## 2 *Who to Sue?*

Ellis demonstrates the difficulty of identifying the correct parties to join in legal proceedings involving an unincorporated association. The plaintiff originally commenced proceedings<sup>59</sup> in relation to alleged sexual abuse perpetrated by a Catholic priest in the 1970s. In addition to the priest, the plaintiff eventually sued His Eminence George Cardinal Pell Archbishop of Sydney for and on behalf of the Roman Catholic Church in the archdiocese of Sydney; and the Sydney Trustees.

It was never the plaintiff's contention that Cardinal Pell was personally responsible; Cardinal Pell was not a Cardinal<sup>60</sup> nor even in the relevant diocese at the time of the alleged offences. The plaintiff joined him in the proceedings as representing the Church at the time of commencing the action. The NSW Act allowed for the establishment of the Sydney Trustees (a statutory corporation) to administer the property of the Church. The court needed to determine whether either, or both, of those defendants were capable of being party to the particular proceedings, which related to torts and fiduciary duty. The parties, and judges, acknowledged that the Catholic Archdiocese of Sydney was an unincorporated association and as such could not be sued. The difficulty the plaintiff had in determining the correct defendants was that 'the Catholic Church' had no clear legal identity and the 'membership' of the Church changed constantly. Unchallenged canon law expert evidence at the trial explained the division of each diocese into distinct parishes.<sup>61</sup> Mason P, referring to these parishes stated that '[t]he body fluctuates as members depart through death or other reasons and are added through birth (or baptism),

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<sup>59</sup> *Ellis v Pell* [2006] NSWSC 109.

<sup>60</sup> Which may have been relevant to whether he was the appropriate 'officer' in the Church to join in the action.

<sup>61</sup> *Code of Canon Law 1917* canon 216 §1 and §3; as the allegations of abuse related to a period prior to the 1983 amendments to the Code the 1917 Code is cited. The corresponding canon in the *Code of Canon Law 1983* is canon 374 §1. The expert was Dr Rodger Austin.

arrival within the ecclesiastical jurisdiction or other reasons'.<sup>62</sup> He acknowledged that Cardinal Pell was not a member of the unincorporated association at the time of the alleged offences and that it was difficult to identify 'how membership of that body was to be determined'.<sup>63</sup> The court recognised that the membership was difficult to establish but that this uncertainty did not preclude the church being an unincorporated association. None of the parties joined were capable of being liable in tort or fiduciary duty. The plaintiff in *Ellis* joined the Sydney Trustees to the litigation and alleged liability on the basis that the Sydney Trustees had the care, control and management of the parish and therefore of the priest. Where the unincorporated association holds property on trust on behalf of its members, the trustees may be sued in relation to actions relating to the property;<sup>64</sup> identification of the legal entity holding the property (the trustees) is clear. However, the Sydney Trustees was created pursuant to the *Roman Catholic Church Property Act 1936* (NSW), which strictly limited its scope to property matters (fulfilling the same role as the corporations sole of the diocesan bishops in WA). The court accepted that the diocese was an unincorporated association and the Sydney Trustees was a legal entity that could sue and be sued. The court, however, rejected the notion that Sydney Trustees was liable for all the business of the unincorporated association or that it could be sued for issues beyond its own scope and powers, which were limited to property. The unincorporated association had no legal status and the Sydney Trustees could not be liable in tort, or owe a fiduciary duty for the acts of the priest.<sup>65</sup> The scope and powers of the corporations sole of the Western Australian dioceses are similarly limited to property issues as confirmed in *Archbishop of*

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<sup>62</sup> *Trustees for the Roman Catholic Church for the Archdiocese of Sydney v Ellis* [2007] NSWCA 117, 575-576 (Mason P).

<sup>63</sup> *Ibid.*

<sup>64</sup> *Wise v Perpetual Trustee Co Ltd* [1903] AC 139.

<sup>65</sup> Sydney Trustees were the correct party in another case relating to a lease as the dispute related to property rights: *Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2005] NSWSC 381.

*Perth*.<sup>66</sup> Comparable issues of identifying parties for the purposes of legal action also arose in *Carlton Cricket & Football Social Club v Joseph*<sup>67</sup> (*Carlton Cricket & Football*). A lease, to which the plaintiff club was a party, covered a period of 21 years. Membership of the club, including the committee members, was difficult to determine for the purposes of legal action due to the length of time and the changing memberships within the 21-year period. In both *Ellis* and *Carlton Cricket & Football* the courts concluded that difficulty in determining membership did not preclude the organisations from being unincorporated associations, but acknowledged that the changing membership made it very difficult to attribute liability to individuals.

(i) *Statutory 'loopholes'?*

Some Australian courts have considered the lack of legal status of the unincorporated association as merely a 'detail' in court proceedings, particularly where there was statutory support for doing so. *Bailey v Victorian Soccer Federation* [1976] VR 13 considered a workers' compensation claim by the widow and son of an 'employee' of a Soccer Federation that was an unincorporated association. Gillard J said:

It is my opinion that in order to overcome the difficulties ... raised by the common law, the extensive definition of "employer" was adopted in the Workers Compensation Act for the purposes of arbitration proceedings ... It was the legislative intention that by the use of the enlarged definition, any person employed by an unincorporated body, like a club, or an association, or a society under its collective name, could make a claim for workers compensation from such unincorporated body in its collective name, even though the constituent membership of the "employer" might alter from period to period: at 22.

Gillard J specifically accepted the common law doctrine that an unincorporated

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<sup>66</sup> *Archbishop of Perth v AA* (1995) 18 ACSR 333.

<sup>67</sup> *Carlton Cricket & Football Social Club v Joseph* [1970] VR 489.

body cannot be sued but applied the overriding statutory provision contained in the *Workers Compensation Act 1958* (Vic) under which the action was brought.

WA has a similar definition of worker in s 5 of the *Workers' Compensation and Injury Management Act 1981* (WA) where a 'worker'

... means any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise and whether the contract is expressed or implied, is oral or in writing ...

The same definitional section specifies that an employer 'includes any body of persons, corporate or unincorporate'. Owing to the similarity in legislation, it is highly likely that a WA court would follow the same reasoning as Gillard J in Victoria in relation to workers' compensation matters and any other legal action where a statute has provided such a wide and encompassing definition. Mr Ellis had no relevant legislation in NSW upon which he could rely to join a relevant party.

In *Re Independent Schools' Staff Association (ACT) Ex parte Hubert and Others* (1986) 65 ALR 673, Gibbs CJ, Mason and Dawson JJ held that unincorporated bodies (other than clubs) may not be employers for the purposes of the Conciliation and Arbitration Act 1904 (Cth). The distinction was made between the board as an unincorporated association not being capable of being an employer, and the 'members of the Board for the time being' who were capable of being an employer.<sup>68</sup> Therefore, a diocese as an unincorporated association cannot be an employer in diocesan schools; in WA the diocesan bishop is the employer, but in his personal capacity.<sup>69</sup> As the diocesan bishop usually holds little or no personal

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<sup>68</sup>*Re Independent Schools' Staff Association (ACT) Ex parte Hubert and Others* (1986) 65 ALR 673, 675.

<sup>69</sup>His other legal capacity is as a corporation sole but as seen above a corporation sole only relates to issues concerning property, not employment. In some Eastern States the parish priest is the employer for diocesan schools. Recommendation 16.1 of the Final Report states 'The bishop of each Catholic Church diocese in Australia should ensure that parish priests are not the employers of principals and teachers in Catholic schools.'

property, a judgment against him as a defendant is impractical. Cases departing from the common law rule that an unincorporated association cannot sue or be sued have been rare and usually involve trade unions or political parties, not religious institutions. In limited circumstances, however, a representative action may overcome the limitation of not being able to sue or be sued as an unincorporated association.

(ii) *The Representative Action*

Where all members of the unincorporated association have the same legal interest in the cause of action, a representative action may apply whereby one or more persons represent the group, pursuant to Order 18 Rule 12 of the Rules of the Supreme Court of Western Australia.<sup>70</sup> This would require plaintiffs suing together. Any judgment made in a representative action is made against all members of the association and therefore enforceable against them.<sup>71</sup> The requirement that all members have the same interest in the issue makes it unlikely that a representative action is useful for a matter in contract or tort;<sup>72</sup> in cases relating to unincorporated associations it has only been used in relation to trade unions. In *Ellis*, Mason P could find no causal connection between the Cardinal and the members of the Church that was sufficient to render them all liable for the alleged actions of the priest. He said that '[a] plaintiff cannot, by means of a procedural mechanism, such as a representative proceeding, sue defendants against whom he or she has no cause of action'.<sup>73</sup> It is arguable that a court would draw the same conclusion in relation to a representative action in which the members of a diocese were liable

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<sup>70</sup>There are similar provisions in other States and Territories.

<sup>71</sup>*Supreme Court Rules 1971* (WA) Order 18 Rule 12(3).

<sup>72</sup>*Trustees for the Roman Catholic Church for the Archdiocese of Sydney v Ellis* [2007] NSWCA 117, 580 (Mason P); *Carlton Cricket & Football Social Club v Joseph* [1970] VR 489.

<sup>73</sup>*Trustees for the Roman Catholic Church for the Archdiocese of Sydney v Ellis* [2007] NSWCA 117, 582 (Mason, P).

for the actions of someone acting in a diocesan school or parish. It would only be useful if a causal connection between the members and the legal action can be clearly determined, which is unlikely to occur for the same reasons determined in *Ellis*. Use of the representative action in cases concerning unincorporated associations is rare, and is likely to remain so in the future.<sup>74</sup>[The representative action was rejected in][where Campbell J held, following *Attorney General (Vic) v Brighton* [1964]VR 59, that parties in a representative action should have the same interest and only the same defence: at 391, severely restricting the application of the action. The existence of separate defences will generally defeat the common interest requirement of the representative action. The similarities in the statutory definitions of a representative action in these two jurisdictions and in WA make it likely that the Western Australian courts would follow these cases, rendering the representative action inapplicable to a plaintiff wishing to sue a diocese or a diocesan bishop.]Serbi1970

### 3 *Consequences for the plaintiff with a legal grievance against the Church*

The plaintiff in *Ellis* did not submit that all members of the Catholic Church at the relevant time were personally liable to him for the alleged acts of the priest, but that was the legal effect of the Church being an unincorporated association. The court ultimately held that the unincorporated association could not be sued, but that

persons or groups within an unincorporated association can be held in tort or contract as principals provided they assumed an active or managerial role in which they exercised palpable control over an activity at the relevant time. However, the liability of such persons is personal, not representative

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<sup>74</sup>The representative action was successfully used in a racial discrimination case in the Federal Court in *Executive Council of Australian Jewry and Another v Scully and Another* (1998) 160 ALR 137, but was interpreted there in relation to a particular section of the *Racial Discrimination Act 1975* (Cth).

in nature.<sup>75</sup>

An action can be brought personally against members of an unincorporated association if they are in ‘an active or managerial role’, which means they are ‘exercising palpable control over an activity’; it is not limited to committee members of the unincorporated association. It is therefore arguable that any members of the unincorporated association that is the Catholic Church who are in an active or managerial role and so exercising palpable control over an activity in the church, including a diocesan school or parish, may be held personally liable for tortious or contractual liability.<sup>76</sup> However, as previously noted, suing the diocesan bishop as the person ‘exercising palpable control’ in the diocese is unlikely to be useful in receiving an award of damages as it is improbable that a diocesan bishop will have the personal funds required to fill any award for damages.

Where a third party takes an action in tort against a member or members of an unincorporated association, that member or members, if liable, will be personally liable.<sup>77</sup> Ellis makes it unlikely that members of the Catholic Church, or even a diocese, are liable for tortious liability of an individual within the Church where there is no causal connection between the person and the tortious deed.<sup>78</sup> Because an unincorporated association is not a legal entity it cannot own, buy, sell or lease property, real or personal, in its own name.<sup>79</sup> The unincorporated dioceses hold property in a separate legal entity, in WA through the corporations sole. Ascertaining the legal responsibility of an unincorporated association remains one of

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<sup>75</sup>*Trustees for the Roman Catholic Church for the Archdiocese of Sydney v Ellis* [2007] NSWCA 117, 577 (Mason P) citing *Hrybnyuk v Mazur* [2004] NSWCA 374.

<sup>76</sup>The law relating to Agency and ostensible authority is also relevant to the ‘palpable control’ of the diocesan bishop but is outside the scope of this paper.

<sup>77</sup>*City of Gosnells v Roberts* (1994) 12 WAR 437.

<sup>78</sup>See also, *Uttinger v The Trustees of the Hospitaller Order of St John of God Brothers* [2008] NSWSC 1354; *PAO v Trustees of the Roman Catholic Church for the Archdiocese of Sydney and Ors* [2011] NSWSC 1216.

<sup>79</sup>Sievers, above n 54, 18; see also *Bacon v O’Dea* (1989) 88 ALR 486, 493 (per curiam). Where an individual is liable in a tortious action they are personally liable.

its greatest problems and creates severe limitations for those seeking legal recompense against, or for, an unincorporated association hence Recommendations 94 and 95. But why do the recommendations not go further and recommend that Commonwealth and State governments that provide substantial funding to the Church schools, only provide funding to bodies that have a corporate entity that can be sued? Despite these shortcomings in the legal structure of the Church, the legal issues for plaintiffs wanting to commence a child sexual abuse cause of action have been greatly eased in Western Australia.

### B *Recent Legislative Changes in Western Australia*

In response to the Redress and Civil Litigation Report (2015) the Western Australian Government introduced, on 22 November 2017, the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Bill 2017* (WA) (the Bill) which sought, inter alia, to address the Recommendations relating to the difficulties of identifying a defendant in order to commence proceedings by amending the *Civil Liability Act 2002* (WA) ('CLA') and to remove any limitation period for such actions by amending the *Limitation Act 2005* (WA). Part 1 of the Bill came into operation in April 2018 and the remainder in July 2018. Section 15B(2) of the CLA now allows a plaintiff to commence an action against the current office holder of an institution, in the name of the office, where at the time of the action the institution was an unincorporated association,<sup>80</sup> now remains unincorporated,<sup>81</sup> the officer holder at the time of the cause of action no longer holds the office<sup>82</sup> and the plaintiff can maintain a cause of action against the office holder.<sup>83</sup> To ensure that an award of damages could be pursued after any successful action taken un-

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<sup>80</sup> *Civil Liability Act 2002* (WA) s15B(1)(c).

<sup>81</sup> *Ibid* s15B(1)(d).

<sup>82</sup> *Ibid* s15B(1)(e).

<sup>83</sup> *Ibid* s15B(1)(f).

der s15B of the *CLA*, s15C(2) allows any liability to be satisfied by ‘assets held by or for the office or institution, including assets of a trust (whether or not a charitable trust)’.<sup>84</sup> A plaintiff suing the Catholic Church pursuant to s15B(2) of the *CLA* may receive an award of damages from the property held in the relevant corporation sole. These legislative changes overcome the difficulties faced in both the Archbishop of Perth case and *Ellis*.<sup>85</sup>

## VI THE VICTORIAN APPROACH

Prior to the Federal Government announcing the Royal Commission into Institutional Responses to Child Sexual Abuse

[i]n April 2012, the Victorian Government initiated a landmark inquiry into the handling of child abuse allegations within religious and other non-government organisations. The inquiry’s final report, *Betrayal of Trust* was tabled in Parliament on 13 November 2013 and contained 15 recommendations. The Victorian Government tabled its response on 8 May 2014 giving support or in-principle support to all of the recommendations.<sup>86</sup>

The *Betrayal of Trust* Report,<sup>87</sup> made the following recommendations, inter alia, relating to civil litigation:

**Addressing the legal identity of non-government organisations**

**Rec** 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. (Recommendation 26.1, Part H)

**Rec** 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. (Recommendation 26.2, Part H).<sup>87</sup>

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<sup>84</sup>Ibid s15C(2).

<sup>85</sup>*Archbishop of Perth v AA* (1995) 18 ACSR 333; *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* (2007) 70 NSWLR 565.

<sup>86</sup>Victoria State Government, *Justice and Regulation, Betrayal of Trust Implementation* <<http://www.justice.vic.gov.au/home/safer+communities/protecting+children+and+families/betrayal+of+trust+implementation>>.

<sup>87</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 Organisa-*

Recommendation 95 does not recommend incorporation but only that institutions take insurance to cover liability for child sexual abuse claims. Acknowledging the Betrayal of Trust recommendations, the Redress and Civil Litigation Report recognises, before making Recommendation 95, that

[i]ncorporation will not necessarily overcome the difficulties that might arise from the passage of time or the absence of assets. However, insurance –if the insurance policy and the insurer can be found and the insurer is solvent –may help to overcome an absence of assets.

We are not satisfied that it is appropriate to recommend that any particular institutions should be incorporated and insured. In particular, if incorporation and insurance for small, temporary, informal unincorporated associations is required, people may be deterred from forming those associations and the various sporting, cultural and other activities they provide in the community would potentially be lost.<sup>88</sup>

The Redress and Civil Litigation Report considered the ‘big picture’ – the effect of their recommendations on the smaller institutions that may receive some funding, albeit only a small amount, from the State or Federal governments. It did not want to discourage the establishment or continuation of smaller clubs for whom incorporation and insurance may have proved financially intolerable. That scenario, however, does not relate to the Church and the Royal Commission acknowledged that, when quoting from a submission by the Australian Lawyers Alliance:

Given that the status of the Roman Catholic Church was created at its own request by acts of the state and territory legislatures, it should be recommended that the various acts be amended to make the trustees liable along the lines of the legislation currently before the NSW Legislative Council in The Roman Catholic Church Property Amendment (Justice for Victims) Bill 2012. Other churches and institutions do not generally appear to raise the same difficulties involved in the peculiar structure of the Roman Catholic Church and it is to that Church that specific amendments of state and territory legislation is required. Should any other significant institution lack an identifiable body to be sued, then the state or territory should similarly legislate protection. ... However the principal need for amendment is in respect of the Roman Catholic Church in all states and territories and the amendment is relatively simple, as has been indicated in the NSW Legis-

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*tions* (2013) xlv.

<sup>88</sup>McClellan AM, above n 1, 510-11.

lative Council discussion on the amendment bill.<sup>89</sup>

The *Roman Catholic Church Property Amendment (Justice for Victims) Bill* 2012 (the Bill) lapsed in March 2014 but its relevance to WA was extremely limited. WA did not adopt a property trust as in other States and the Bill aligned with Recommendation 94 in allowing relevant plaintiffs to sue the property trust as the only legal Catholic structure capable of being sued in NSW.

To effect some of the Victorian recommendations:

On 1 July 2017, the Wrongs Amendment (Organisational Child Abuse) Act 2017 will come into effect. The Act will create a new duty of care that will allow an organisation to be held liable in negligence for organisational child abuse, unless the organisation proves that it took reasonable precautions to prevent the abuse... The Limitation of Actions Amendment (Child Abuse) Act 2015 passed the Victorian Parliament in 2015, and became operative on 1 July 2015. The Act completely removed the limitation periods that apply to civil actions founded upon child abuse, with both retrospective and prospective effect. The reforms also removed the 12-year long-stop limitation period for wrongful death actions in relation to child abuse brought by dependants of a deceased victim.<sup>90</sup>

These implementations, although they should be commended, fall short of implementing Betrayal of Trust Recommendation 26.2. The Victorian Government acknowledges that it is still working to effect this recommendation, including ‘the incorporation and insurance arrangements of certain organisations’.<sup>91</sup> WA is also working towards reform, most notably the changes to the *CLA* and the *Limitation Act* which have removed any limitation period for actions arising from child sexual abuse, and provided a defendant that can be sued on behalf of the Church in actions arising from child sexual abuse.<sup>92</sup>

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<sup>89</sup>Ibid 511 referring to Australian Lawyers Alliance, *Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse*, Consultation Paper into Redress and Civil Litigation, 2015, 25-26.

<sup>90</sup>Victoria State Government, above n 86.

<sup>91</sup>Ibid.

<sup>92</sup>*Limitation Act 2005* (WA) s 1.

## VII THE MODEL LITIGANT

Compliance with recommendations 94 and 95, and the legislative changes in WA, provide plaintiffs with an opportunity to commence legal proceedings. Those proceedings must not be used to cause further trauma or disadvantage to plaintiffs. ‘Australian courts have long recognised that governments are expected to act as model litigants.’<sup>93</sup> This does not extend to non-government agencies and was not always evident in cases involving abuse victims. Recommendations 96 – 99 address the need for all parties, but particularly those defending claims, to act as model litigants:

96. Government and non-government institutions that receive, or expect to receive, civil claims for institutional child sexual abuse should adopt guidelines for responding to claims for compensation concerning allegations of child sexual abuse.

97. The guidelines should be designed to minimise potential re-traumatisation of claimants and to avoid unnecessarily adversarial responses to claims.

98. The guidelines should include an obligation on the institution to provide assistance to claimants and their legal representatives in identifying the proper defendant to a claim if the proper defendant is not identified or is incorrectly identified.

99. Government and non-government institutions should publish the guidelines they adopt or otherwise make them available to claimants and their legal representatives.

The Legal Services Directions 2017 require the Commonwealth and all Commonwealth agencies to act as model litigants. ‘In essence, being a model litigant requires that the Commonwealth and Commonwealth agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards’<sup>94</sup> but does not preclude them from acting firmly and properly

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<sup>93</sup>McClellan AM, above n 1, 512; *Melbourne Steamship Limited v Moorhead* (1912) 15 CLR 133, at 342; *Kenny v State of South Australia* (1987) 46 SASR 268, at 273; *Yong v The Minister for Immigration and Multicultural Affairs* (1997) 75 FCR 155.

<sup>94</sup>Legal Services Directions 2017, Appendix B, Note 2. The Legal Services directions are made under section 55ZF of the *Judiciary Act 1903* (Cth).

to protect their interests<sup>95</sup> or seek costs orders where appropriate.<sup>96</sup> The principal obligation rests with the Commonwealth or the Commonwealth agency but all lawyers engaged in the litigation, including in-house and private lawyers, must also uphold the requirement.<sup>97</sup>

Victoria,<sup>98</sup> NSW,<sup>99</sup> Queensland<sup>100</sup> and the Australian Capital Territory<sup>101</sup> have model litigation guidelines for their government agencies. It is the writer's contention that State and Territory governments ought to formally adopt Model Litigant Guidelines for all litigation to ensure that the spirit of Recommendations 94 and 95 are executed in all claims against the Church.

## VIII CONCLUSION

The Royal Commission's Recommendations 94 and 95 arise from the need for a plaintiff to be able to easily, and justly, identify a proper defendant for a claim arising from child sexual abuse. Current common law structures in the Church, discussed above, made it extremely difficult to sue the Church, and associated people, in any legal matters other than causes of action relating to the property

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<sup>95</sup>Ibid Note 4.

<sup>96</sup>Ibid Note 5.

<sup>97</sup>Ibid Note 6.

<sup>98</sup>Victoria State Government, above n 86; the Common Guiding Principles complement the Model Litigant Guidelines and are specifically directed to litigation involving child abuse: Victoria State Government, *Common Guiding Principles*, Chapter 1, and also incorporates Guidelines for claims involving child sexual abuse <<http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/common+guiding+principles+-+child+sexual+abuse+civil+claims>>.

<sup>99</sup>NSW Government, *Guiding Principles for Government Agencies Responding to Civil Claims for Child Abuse* <<https://arp.nsw.gov.au/sites/default/files/NS%5C%20Government%5C%20Guiding%5C%20Principles%5C%20for%5C%20Government%5C%20Agencies%5C%20Responding%5C%20to%5C%20Civil%5C%20Claims%5C%20for%5C%20Child%5C%20Abuse.pdf>>.

<sup>100</sup>Department of Justice and Attorney General (Qld), *Model Litigant Principles* (2010) <[www.justice.qld.gov.au](http://www.justice.qld.gov.au)>.

<sup>101</sup>*Law Officer (Model Litigant) Guidelines 2010* (No 1) (March 2010) [www.legislation.act.gov.au](http://www.legislation.act.gov.au) pursuant to *Law Officers Act* 2011, s 11.

of the Church. Recommendations 94 and 95 of the Redress and Civil Litigation Report, if adopted by the relevant state and territory governments, provide survivors with justice. The WA government has introduced legislation that provides the same outcome as that intended by Recommendations 94 and 95 – that plaintiffs have an entity to sue and access to assets for any damages award. Whilst it is likely that most survivors will seek recompense from the Commonwealth Redress Scheme should the Church agree to join it,<sup>102</sup> they should be able to sue the Church if that is how they choose to seek justice.

The legislative changes in WA now allow an action against the Catholic Church but these changes are limited to a child sexual abuse cause of action.<sup>103</sup> Recommendations 94 and 95 relate only to those plaintiffs seeking ‘to commence proceedings for damages in respect of institutional child sexual abuse where the institution is alleged to be an institution with which a property trust is associated’.<sup>104</sup> What of any other plaintiffs that have a legal grievance against the Church that does not involve property? They still face the challenges of pursuing legal action that the Redress and Civil Litigation Report identify, criticise and seek to rectify. Likewise, all litigants – not just those seeking damages in respect of institutional child sexual abuse – should have the ability to sue the Church where it is just to do so

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<sup>102</sup>The Scheme will commence on 1 July 2018 Australian Government, *Commonwealth redress scheme for survivors of institutional child sexual abuse* <<https://www.dss.gov.au/families-and-children/programs-services/children/commonwealth-redress-scheme-for-survivors-of-institutional-child-sexual-abuse>>; ‘The Catholic Church yesterday began historic negotiations to join the Turnbull government’s \$4 billion sex abuse redress scheme, a move that would place intense pressure on the remaining states and faiths yet to sign up. Social Services Minister Dan Tehan said Catholic Church officials had agreed to hold intensive talks in the next three weeks to iron out problems with the draft laws to enable the faith to lead the way among non-government institutions. If the church opts in before the July 1 start – as expected – it will transform the rollout of the scheme in Australia. Mr Tehan met Catholic officials in Canberra where the path was laid for the church to opt into the scheme, which would provide up to \$150,000 in redress to proven victims but with a lower burden of proof compared with the courts’ John Ferguson, ‘Catholic Deal Looms For Redress Payments to Sex Abuse Victims’, *The Australian* (Sydney), 15 March 2018.

<sup>103</sup>*Civil Liability Act 2002* (WA) s 15B(1).

<sup>104</sup>McClellan AM, above n 1, recommendation 94.

and not be stifled by legal technicalities.

Incorporation for the Church would not be detrimental in any sense other than its property will no longer be ‘protected’ by being inaccessible to litigants other than those with a cause of action in either property or child sexual abuse. Recommendation 94 seeks to alleviate the issue of finding an appropriate legal entity to sue by allowing the Plaintiff to sue the legal body that holds the Church’s property, which requires new legislation in the States and Territories to allow it to happen. The Truth, Justice and Healing Council accepted the need for the adoption of a corporate body when replying to the Consultation Paper 5, *Civil Liability*:

The identity and corporate structure of the body corporate should be left to the institutions to determine in accordance with their internal structures, provided that the body corporate has sufficient assets or is appropriately insured or indemnified. The legislation should apply equally to all institutions and not interfere with the right of religious institutions to arrange their affairs according to their norms or beliefs but instead should simply provide that there be an identifiable body corporate that is appropriately insured or indemnified. ...<sup>105</sup>

The Religious Institutions were, and remain, corporate bodies. These bodies vary between institutions including incorporated associations,<sup>106</sup> companies limited by guarantee<sup>107</sup> and statutory corporations<sup>108</sup> to name the most common. The Church too, needs to adopt a corporate structure, preferably for each diocese so the common law identity has some parallel to the juridical identity.<sup>109</sup>

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<sup>105</sup>Ibid 504 - 505.

<sup>106</sup>Eg, under the *Associations Incorporation Act 1987* (WA).

<sup>107</sup>*Corporations Act 2001* (Cth) s112.

<sup>108</sup>Eg, *Roman Catholic Church Trust Property Act 1936* (NSW); or the *Roman Catholic Trusts Act 1907* (Vic).

<sup>109</sup>Which corporate structure is appropriate, and why, is outside the scope of this paper.