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Institutional Processes for Dealing with Allegations of Child Sexual Abuse

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Abstract

Institutional processes for dealing with allegations of child sexual abuse, such as the Catholic Church's Towards Healing statement, fail to recognize that the public has a legitimate interest in ensuring that the processes used to investigate complaints and offer assistance to victims are transparent, rigorous and accountable. These institutional processes inadequately balance the public interest with the private interests belonging to the stakeholders in these claims. The need for confidentiality that is invoked in seeking to protect private interests directly undermines public confidence in the process. Greater recognition needs to be given by institutions to the legitimacy of the public interest, and this legitimacy needs to be reflected in the processes used. The role of such processes in educating the public and thus having a preventative function needs also to be recognized. At the same time the public needs to recognize the legitimacy of claims by stakeholders to use confidential processes until clear findings have been made in relation to allegations. The paper will suggest a new model for dealing with claims within institutions arising out of allegations of sexual abuse, that moves closer to finding that elusive balance between the public and private interests.

Introduction

I fear that 2003 will be another big year for claims arising out of allegations of sexual abuse, particularly in institutional contexts, and that this will throw more public attention on the processes used to deal with these claims. In fact 2003 may turn out to be the worst year yet for these claims, even making the Hollingworth and Pell sagas look rather innocuous. I will discuss the reasons for holding this belief in the next section.

The biggest concerns I have about existing institutional processes for dealing with allegations of sexual abuse is that they seek to address the interests of certain stakeholders, but do not sufficiently recognize that the Australian public is a stakeholder. Specifically, the biggest problems arising out of this include lack of transparency, inadequate accountability, and an insufficient preventative/educative focus. Sometimes, I believe, there are ethical issues that are not recognized, let alone addressed.

I will use the December 2000 Australian Catholic Bishops Conference *Towards Healing* document (http://www.catholic.org.au/statements/sexual_abuse_th_2.htm) as an example

of an institutional process that fails to adequately take into account the public interest. However, I wish to make it very clear from the outset that, subject to a few considerations, I come principally to praise *Towards Healing*, and not to bury it. It is an excellent model with far more strengths than weaknesses. Many secular and religious institutions, including governmental bodies, face serious problems with allegations arising out of sexual abuse alleged to have been perpetrated by their employees, members and/or their adherents for whom they are responsible. I believe that most institutions who have problems with allegations of sexual abuse are firmly committed to dealing with these difficult issues constructively, and I hope that my comments may provide some food for thought in their quest to make their processes even better.

A Problem That Will Not Go Away

I stated before that I fear that we face another big year for claims arising out of allegations of sexual abuse in institutional settings. I hope I am wrong, but the reasons for my concerns in this regard include the following:-

- (a) I sense a deep feeling of cynicism, skepticism and disappointment in the Australian public about the internal processes and policies used by institutions to deal with allegations of sexual abuse. In short, there is a reluctance to trust institutions that deal with these matters internally because they have been perceived in the past, certainly overseas but also in Australia, to only act when they are made accountable in a legal sense. This cynicism is apparent, and perhaps justified, every time there is a new revelation of sexual abuse that has been covered up by the institution. There is a perception amongst some that institutional interests are more focussed on the public relations and legal liability aspects of these claims rather than in seeking to achieve healing, restoration, reconciliation and just settlements with the survivors. As one vocal critic has stated “ Managing the media has taken precedence over open disclosure of the truth to the people whose lives have been most effected by...misconduct” (Rev Marie M Fortune, *Dallas Morning News*, March 9, 2002. Reprinted in *Working Together* Spring 2002, Vol 22, Number 2. See <http://www.cpsdv.org/Newsletter/index.htm>). The Boston Globe describes the “ugly truth” in the following terms: “Most of the claims have been settled in private, with no public record. It was an agreeable arrangement: the Church got to keep the ugly truth under wraps: shame filled victims, having no clue that there were so many others, were able to protect their privacy..” (Foreword to *Betrayal : The Crisis in the Catholic Church* available at www.boston.com/globe/spotlight/abuse/betrayal/print_friendly.htm). This deep cynicism will ensure that when sexual abuse allegations arise, public attention will be aroused. Moreover, when that public interest is aroused the response is also one of subdued anger and fear, partly caused because so many of us are parents and/or work with children. When children are violated by abuse, most parents and children’s workers feel violated themselves.

(b) There is a growing realisation that the treatment of the survivors of abuse is or becomes a public responsibility or, perhaps worst, the responsibility of the survivor, unless the cost of treatment is sheeted home to those responsible for the injury. The emotional, physical and psychological damage caused by sexual abuse is well known and will be taken as axiomatic in this paper. The hard question that needs to be asked in this context is why the public or the survivor should have to bear the costs and other consequences of this? Both governments and the public will start asking this hard question, if they have not already done so. This concern is starkly stated during the discussion of a recent Californian Bill dealing with the limitations period for child sexual abuse claims:

“Proponents assert that the emotional and psychological damage that results from childhood sexual abuse affects the public at large. Many victims will require state-funded therapy or other medical care. They contend that untreated victims often have problems with alcohol and drug abuse and low achievement and will require state-funded treatment programs and/or public assistance. Some victims will become perpetrators themselves. In short, it is the victims themselves, their families, and the public that now bear the financial and other burdens of this abuse while the responsible entities, which can prevent the harms, are free from potential liability.”
(http://info.sen.ca.gov/pub/01-02/bill/sen/sb_1751-1800/sb_1779_cfa_20020625_115414_sen_floor.html)

(c) Society seems to have a tendency to put behind it the more unpleasant aspects of its history. There is a temptation to do this as regards the occurrence of sexual abuse in institutions. But in the present context, I discern little tendency to leave past events where they are. The past will not leave us alone, as unpalatable as it is. This has been clearly stated by Steinfels (Commonweal-A Review of Religion, Politics and Culture April 19,2002. See <http://commonwealmagazine.org/12002/april192002/41902ar.htm>).

“...what is past cannot be ignored or dismissed. Revelations of atrocities committed by American troops in Vietnam or Central America ought to make headlines today, although these U.S. military interventions are long over. Unethical or criminal instances of medical experimentation or drug testing should be uncovered and publicized even when they occurred years ago. We not only hold individuals responsible for such past acts; by exposing them, we learn important, lasting lessons about our institutions, ideologies, politics, and economics, and sometimes about human nature itself. “

(d) I sense a desire among some institutions to willingly and constructively confront their past and deal with the issues of sexual abuse. For example, Harry J Flynn, a retired Catholic Archbishop in the USA recently stated in the context of the sexual abuse crisis confronting the Catholic Church in the USA (*Can the Church be Healed?* Communications April 25, 2002. See <http://www.usccb.org/comm/flynn.htm>):-

“It is clear that the church is facing an opportunity to renew its relationship with its people, to restore trust and to strengthen its commitment to the faithful. We are confronting a wonderful opportunity for ultimate healing and for the beginning of a new era in the church, an era of unshakable faith and the emergence of a church stronger and more full of love and hope than we humanly could ever have imagined.”

Another example is found in the Preamble to the US Conference of Catholic Bishops Charter for the Protection of Children and Young People Revised Edition 2002 (<http://www.usccb.org/bishops/charter.htm>) which states:-

“The Church in the United States is experiencing a crisis without precedent in our times. The sexual abuse of children and young people by some priests and bishops, and the ways in which we bishops addressed these crimes and sins, have caused enormous pain, anger, and confusion. Innocent victims and their families have suffered terribly. In the past, secrecy has created an atmosphere that has inhibited the healing process and, in some cases, enabled sexually abusive behavior to be repeated. As bishops, we acknowledge our mistakes and our role in that suffering, and we apologize and take responsibility for too often failing victims and our people in the past. We also take responsibility for dealing with this problem strongly, consistently, and effectively in the future. From the depths of our hearts, we bishops express great sorrow and profound regret for what the Catholic people are enduring.”

There may thus be evidence within institutions of a move away from problem *avoidance* towards problem *solving* and towards meeting the needs of survivors even at the expense of bad publicity and law suits. This will, if this is correct, mean a much greater openness in terms of dealing with these issues.

(e) Another basis of my concern is the disturbingly high levels of new allegations and claims all over the world (Hong Kong, Ireland, France, England) and also the increasing reports of litigation in the USA arising out of these claims. There is the tendency for Australia to follow suit with other nations after a brief time-lag, particularly the USA, in so many ways.

(f) There is evidence that existing processes are just not working. A reflection on the media activity during and after the Hollingworth and Pell stories demonstrates that no one was satisfied with the outcomes. For example, in Pell the inquiry cleared Archbishop Pell of any misconduct but it also found that the accuser was speaking honestly from an actual recollection when giving evidence. After the enquiry, the *accused* claimed to have been vindicated even though Pell was exonerated. To me this suggests a system that is not working as well as it should. The outcomes were simply not clear. As for Archbishop Pell he was reported to have sought a review of the processes used to deal with these cases. One gets the impression that he was hardly satisfied about the process or the outcome. There were several reported calls for a Royal Commission, or other such enquiry, into allegations of sexual abuse in the churches. As for the Australian public, it

could hardly have confidence that an institutional process that produces these results is in fact working.

(f) All of the above factors, either in isolation or interacting with each other, will ensure that media attention remains focussed on this issue in 2003, and thus that the Australian public is made aware of the allegations and claims and how they are handled.

The Public Interest in Institutional Processes

Sexual abuse is both a private *and* a public problem. For the survivors, alleged perpetrators, and the institutions involved, there are quite obvious and legitimate private interests in ensuring that the processes used are private and confidential. I regard these factors as self-evident. The case for confidentiality has been clearly articulated and is well argued. Processes such as *Towards Healing* provide for confidentiality eg Para 40.15. However, these private interests in confidentiality need to be balanced with the public interest in transparency and accountability. This case has been less well argued and articulated.

The public has a legitimate interest in each and every allegation of sexual abuse that is made.

Firstly, this is because as a matter of public policy the protection of children from harm has long been regarded as a public matter and not just a private family or organisational matter. Why institutional processes for dealing with these allegations have lost sight of this I am unsure, and I am even more unsure about why commentators such as academics and practitioners have allowed this serious incursion to take place. Basically, society has an interest in the welfare of its children, carrying forward to when they become adults.

The other factors flow on from this public policy consideration.

Secondly, and as stated above, the public bears the social, economic and other costs of treating the consequences of abuse. It necessarily follows that the public does have an interest in the amounts of compensation awarded, even in private settlements.

Thirdly, there is a close link between transparency, accountability and education directed towards prevention. Each allegation of abuse is yet another opportunity to educate a sometimes unbelieving and reluctant public about the extent and consequences of abuse and how it may be avoided or minimized. An insidious public problem is effectively hidden when allegations are dealt with internally and privately. It's like family violence towards women and children all over again.

Fourthly, many allegations involve abuse not just of the particular survivor who has invoked the institutional process, but can lead to information about other past victims. Professor Patrick Parkinson in *Child Sexual Abuse and the Churches* (Hodder and Stoughton London 1997) makes the chilling observation that sex offending is habitual

behaviour and that some research shows that many sex offenders commit a large number of offences. (See the research of Abel G, Becker J et al cited at p 31 of Parkinson) . Parkinson concludes (at p31) that this may well mean that the number of offences coming to light are a small fraction of the number actually committed by each perpetrator. Thus, an institutional process that focuses on the needs of the one survivor/complainant may well address the interests of some stakeholders, but not of the public which must also be concerned about other survivors. One of the most disappointing aspects of *Towards Healing* is its lack of explicit recognition of this factor. It is almost as if all allegations of abuse are treated as if there is only one victim when the reality may well be otherwise. In para 12 of *Towards Healing* there is a “firm commitment” to strive for “assistance to other persons affected”. But when this commitment is actually articulated in paras 20-25 it refers to the family, parish, school or other community surrounding both survivor and offender, with no explicit recognition to the existence of other victims. In para 38.4, however, there is reference to “immediate action that needs to be taken in relation to the protection of vulnerable children and adults” thus tacitly recognizing that there might be other victims or vulnerable people.

Perhaps the most poignant example of this is in the Pell inquiry itself. The report of the Inquiry is found at www.catholic.org.au under Statements and Submissions. The inquiry exonerated Pell, but accepted that the accused was speaking honestly from an actual recollection of events. I presume this means that the Commissioner accepted that the accuser had in fact been abused. If this is the case then who was the perpetrator and what steps will be taken to pursue that person? Moreover, the accused gave evidence that another child, A, was molested. I presume that this evidence was also accepted by the Commissioner, but he stated that “ This inquiry is not, of course, investigating the question whether A was molested.” Where does that leave these allegation? Was someone else molested? Is there another perpetrator who has not yet been identified? Whilst these questions might be highly relevant from the public perspective, they were not within the terms of reference of the inquiry.

The public interest is clearly in helping other victims as well as the survivor who has come forward and invoked the institutional process.

Fifthly, and flowing on from the above, the public has an interest in protecting potential future victims as well. The case of father John J Geoghan in Boston is a slamming indictment of an institutional process that failed to protect future victims. (See Chapter 1 of *Betrayal : The Crisis in the Catholic Church* available at www.boston.com/globe/spotlight/abuse/betrayal/print_friendly.htm). One could readily understand concerns about the adequacy of steps taken to protect against future abuse by certain institutions with a poor track record.

Sixthly, the public has an interest in ensuring that the internal processes used by institutions are sufficiently rigorous, appropriate and fair. This goes to both transparency and accountability. Every day in Australia, far less serious matters go before courts and tribunals, and these proceedings and processes are open to the public. The officers involved are publicly appointed following rigorous selection procedures, and largely

accountable for their actions. Outcomes of proceedings are generally matters of public record. Review procedures are in place. The *perception* of transparency and accountability is treated as being as important as the *reality* of transparency and accountability. Careful checks are in place to prevent the inappropriate use of processes. For example, in the public court and tribunal system, the use of mediation and other alternative dispute resolution processes is generally circumscribed by a test of appropriateness eg Order 25A Family Law rules in relation to the use of mediation in family law matters. Very few of these features are adequately addressed in institutional processes for dealing with sexual abuse allegations.

Thus, eg, in *Towards Healing*, as previously indicated, proceedings are in private and are confidential. A Director of Professional Standards is appointed (para 35.3) as well as a Resource Group (para 35.2). The latter group's function is primarily to advise the Church in all matters concerning professional standards (para 35.2.2). However, the Director has quite substantive powers including the power to manage the process in relation to specific complaints, to appoint assessors, facilitators and reviewers when required, and the Director shall be responsible for the safe-keeping of all documentation connected with the procedures (para 35.3.1). All of this is relatively unremarkable, even allowing for the fact that the institution is establishing a process to investigate the actions of itself and its own officers. The only remarkable feature of this is the fact that the Church appoints the Director itself (para 35.3-specifically, the bishops and religious leaders). Some Australians might wryly comment that it's like having a Royal Commission into the building industry, but letting the building industry decide who will be the Commissioner. Remember that this is as much about perception, as it is reality. It is not suggested that the Director does not, in fact, act objectively and independently. Rather, my focus is on the *perception* of lack of independence, and thereby the lack of transparency, which is created. The Director determines whether a complaint concerns conduct amounting to abuse (38.3) and makes consequential recommendations (38.4, 38.8). The Director has extensive powers in relation to selecting the appropriate process (39). The Director can appoint an assessor or assessors (40.1). The Director can be involved in the assessment process eg he must be consulted by the assessors about who should be interviewed as part of an investigation (40.7). The Director receives the assessors written report (40.11). The Director keeps a confidential record of all findings (40.15). Curiously, however, there is no review process as regards the Director's decisions.

I find particularly disconcerting the provisions of para 38.4.1. When read in conjunction with para 38.4 it states, inter alia, that when the complaint of abuse is received against a bishop or leader of a religious institute the Director should consult with the Chairpersons of the National Committee for Professional Standards about how to deal with a complaint. The context indicates that the Director should first consult with the Chairpersons and that a different procedure might apply as regards senior church officials. But this completely undermines what little perception of independence rested in the office of the Director because the Director is required to consult someone else. I note with interest that one of the current Chairpersons, who would otherwise need to be consulted in this type of case, is an Archbishop. Why might there be a special process put in place because the alleged offender was a senior church official? Lady Justice is blind, and the Law is dispensed without fear or favour to all and sundry. Regrettably,

institutional processes such as *Towards Healing* ignore the perils of not considering the public perception of how their processes operate. The US Bishop Sean O'Malley, speaking at the November 2002 meeting of US Catholic Bishops in Washington demonstrated a deep insight into this issue when he said:

“We all share the concerns of the Holy See and our priests against vigilantism. But certainly a secular review board is necessary to have a credible way to judge merits of an allegation. If I were falsely accused, I would want to be exonerated by a civil investigation, or by an independent board. Without such an exoneration, a priest's reputation and the credibility of a bishop's decision will remain seriously compromised”

(Quoted in USCCB Report by John Bookser Feister *Debate on Accountability* found at www.americancatholic.org/news/clergyabuse/USCCB-WashingtonWednesday.asp)

All of these problems arise because the institutions fail to adequately consider the legitimate interest of the public when designing and implementing their processes to deal with these complaints.

Reconciling Clashing Interests

Of course this situation is a clear example of when, at some point in time, public and private interests clash with each other.

Parkinson at pp239-254 sets out some Principles for Disciplinary Procedures and there seems little doubt that these principles influenced the drafting of *Towards Healing*. These are essential reading for anyone working in this field. Parkinson identifies three main interests that need to be satisfied through the process- the complainant's, the respondent's and the churches. This is an insightful but broad characterisation of the people having interests. It identifies the stakeholders in the process. When specific interests are sought to be identified common ones might be privacy and confidentiality, fairness, healing and restoration, and vindication. All of these are legitimate in their own right- except to the extent that they clash with the public interests identified above. One can readily understand that some survivors of abuse are not interested in “going public” – indeed, they probably would not come forward at all if they were not confident that the process did ensure privacy and confidentiality. Moreover, persons against whom accusations are made are also entitled to confidentiality, at least until a fair and thorough investigation and hearing leads to a finding against them. Perhaps even institutions have the right to “do things their way”, at least up until that point when the public interest outweighs their private interest.

Some public and private interests in this context are in fact similar. Thus, eg, if a survivor does not come forward due to concerns about lack of confidentiality, not only is the survivor's interests not met, but neither are some of the public interests identified above. There is a missed opportunity to protect welfare, to provide assistance, to protect and assist others, to shift cost and to educate for prevention. If an environment is created whereby false and malicious claims are allowed to be made and dealt with publicly

without due process and protection for the accused, then the public interest in having committed persons working for the welfare of children (often at private not public cost) is also undermined as no one will go into this type of ministry or profession. Finally, if there were absolutely no institutional processes for dealing with these types of allegations, and if all of them had to be determined by the formal legal system, this would not be in the public interest as the legal system is already unmanageable.

Thus it is clear that the public and private interests must be reconciled.

Changing Institutional Processes to Meet the Public Interest

The changes to institutional processes that I put forward here for consideration can be divided into two categories: internal changes to existing procedures, and more significant structural external changes.

Internal changes. Again, I use as my model *Towards Healing* as it is a relatively sophisticated institutional process. I would urge consideration of the following internal changes. I recognize and acknowledge that some of my suggestions may seem confronting to any institution which believes that it is entitled to design and implement its own internal procedures. However, my fundamental thesis is that existing procedures do not adequately take into account the public interest in these issues. An institution that is committed to considering the public interest must acknowledge that it can only achieve this by surrendering some of its control and involving persons external to the organisation.

- The Professional Standards Resource Group is an important feature of *Towards Healing* (para 35.2). It is appointed by the Church and acts as adviser to all Church bodies in all matters concerning professional standards. Its composition is appropriately mixed having regard to background and relevant expertise. However, as all of the group is appointed by the Church, there may be the potential for the public to perceive that the independence of this group is undermined by this. This would easily be resolved by finding a mechanism whereby half of the Resource Group is appointed externally, whilst maintaining the relevant expertise and background mix. The external appointments could be facilitated through government, NGOs or community organisations, and the protection of the public interest, as articulated in this paper, could be an expressly stated criteria of appointment.
- Probably the most significant player within the institutional process is the Director of the process. In *Towards Healing*, the Director is appointed by the Church (para 35.3), and again there is the risk of the public perceiving that an institutional appointment lacks independence. One option is for a Resource Group, reconstituted as suggested above, to appoint or have a meaningful role in the appointment of the Director.
- One simple principle of institutional system design is that of arm's-length outsourcing. This simple measure has the potential to enhance transparency and public confidence in the system.

- There must be greater scope to review decisions made by a Director. For example, in *Towards Healing* the Director decides whether conduct amounts to abuse (para 38.3), and determines significant aspects of the procedure (paras 40 and 41). The Director has extensive powers to make recommendations eg action to protect vulnerable children and adults (38.4), that accused stand aside from office (38.8). As will be noted below, the review mechanism contained in para 43 is limited. Public confidence, indeed the confidence of people using the process, would be enhanced by some simple mechanism for reviewing decisions of the Director.
- Everybody needs to be treated the same when an allegation is made, and in particular, there should be no more onerous obligation on a Director to consult or to do any other thing, merely because the allegation concerns a senior official within the institution (para. 38.4.1). Such provisions merely undermine the independence of the Director's office.
- Assessors who are appointed to investigate the facts of a case (para 40) should have access to all relevant information, and an institution should not be able to invoke obligations of confidentiality to the accused as a reason for not disclosing otherwise relevant documents (para 40.8).
- Institutions must be bound by the findings and report made by assessors, and should not have the option to reject the complaint after an adverse finding has been made. On my reading of para 40.12 of *Towards Healing*, this is currently a possible outcome. An institution cannot be permitted to resile from the results of the process it has put in place. This does not detract from the ability of the parties to the complaint to seek reviews of the process.
- The actual process of review must be even-handed affording all parties concerned equal opportunity to express concerns about perceived irregularities in the process. In para 43.3 of *Towards Healing*, however, it becomes clear that whilst the parties can request a review of procedures and processes, the Church itself may seek a review of outcomes. This is a curious feature of this institutional process. The institution is not even a formal party to the process, and yet it has greater substantive powers of review than the parties. Furthermore, the Director has the power to deny a request for review, subject only to the obligation to consult with the Resource Group (para 43.2). Greater transparency would be facilitated by clearly stating the grounds for review.
- Institutions should seriously consider adopting higher standards of reporting of allegations of abuse than is currently provided by law. Paragraph 37.3 of *Towards Healing* merely requires all church personnel to comply with the mandatory reporting requirements of state law, but those laws are category-based ie one must report only if one falls into a certain category of person. This has the potential to exclude many people who work with children. A serious commitment to dealing with abuse may well mean that institutions adopt standards that are more rigorous than those provided under law.
- Finally, there must be a greater emphasis in the institutional process on identifying, assisting and then protecting other victims and survivors of abuse. This may involve quite a degree of institutional courage, and sensitivity as well.

External Changes. Very few incursions into the confidentiality of the institutional process have been recommended above, despite the veil of secrecy being one of the most

significant under-miners of public confidence in these systems. This is because of the need for the public to recognize the legitimacy of reasonable confidentiality. As discussed above, and amongst other things, it is not in the public interest to discourage survivors from coming forward. I believe that the public interest in this regard can be protected through an external mechanism, namely an independently appointed ombudsperson, operating either nationally or on an industry basis. The ombudsperson would have the power to review on a random basis any institutional process. There would be complete and unfettered access to all documents and evidence. The ombudsperson assumes the defacto role of the protector of the public interest as articulated in this paper, ensuring that the processes used are transparent, rigorous, accountable and protect the interests of all stakeholders, but particularly other possible survivors. The ombudsperson's ultimate remedy is reporting to the public, thereby achieving that important goal of education directed towards prevention. The ombudsperson can ensure appropriate confidentiality in its reporting , and assist to coordinate the development of best practice in institutional processes dealing with allegations of abuse.

Conclusion

The problem of allegations of sexual abuse within institutions is not one that will go away in the immediate future. Existing institutional processes have much to offer survivors, alleged perpetrators, institutions and the public as well. These institutional processes will continue to remain in the public eye, and they will only achieve satisfactory levels of public confidence in their processes when they realise that the public has a legitimate interest in the problems they deal with and the processes they use. Adopting internal changes designed to enhance rigour, transparency, and accountability can enhance existing institutional processes. Society's treatment of the insidious problem of sexual abuse would be ameliorated by the use of an ombudsperson in the manner suggested in this paper. It is only by engaging in meaningful, searching and robust discussions about these sensitive and difficult issues that we will achieve satisfactory outcomes for our children and the survivors of abuse.

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