Ellis: a post Royal Commission analysis

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Overview

This article is a study of the "Ellis defence". It is also the story of John Ellis' struggle against the Catholic Church. As a child, John Ellis was the victim of a priest's sexual abuse. As will be seen, the difficulty John Ellis encountered in *Ellis*[1] in suing any person or body apart from the offending priest (who died), arose from the application of orthodox legal principles to the particular structure of the Catholic Church. The legal issue in *Ellis* arose because the Catholic Church, like other Christian denominations, is an unincorporated association with a fluctuating membership. John Ellis could not establish tort liability against an unincorporated association. He also could not engage the rules for the appointment of a representative to be sued on behalf of that unincorporated association. The applicable property trust that held the assets of the Catholic Church had no liability because it had not held management responsibility for the offending priest. The Archbishop of the Sydney Catholic Archdiocese had no responsibility for any negligence of his predecessors.

Despite its legal orthodoxy, *Ellis* had profound implications. A key theoretical implication of this essay is that the Ellis defence may disincentivise churches from prohibiting paedophilia. The defence may also lead to tacit toleration of children's abuse. The doctrine therefore has great significance for law and religion in Australia.

The article highlights the implications of *Ellis* for victims of child sexual abuse from three viewpoints. First, the perspective of the victim, John Ellis, who sought to engage with the Sydney Catholic Archdiocese under the *Towards Healing* protocol before he commenced pretrial litigation. Secondly, the findings of the *Royal Commission into Institutional Responses to Child Sexual Abuse* ("Royal Commission"), which carried out a Case Study into Ellis' experiences, including his litigation with the Sydney Catholic Archdiocese. The Royal Commission's

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In keeping with a recent change in St Mark's Review *editorial policy to respect those who have experienced trauma and their stories, John Ellis and Stephen Blacker (JCB) have given permission to the author for their stories to be published here.*

findings and conclusions provide sharp historic insights into the background to *Ellis* that only came to light as a result of its careful and detailed work. Thirdly, the role of George Cardinal Pell in the administration of *Towards Healing* in the Sydney Catholic Archdiocese and his involvement in the Archdiocese's decision making during the Ellis litigation. The article analyses a recent decision of the Supreme Court of Victoria (VSC)—*JCB v Bird*[2]—concerning a victim's claim for damages arising from paedophilia in the Catholic Diocese of Ballarat. In *JCB v Bird*, the VSC analysed legislation enacted by the Victorian legislature in response to the recommendations of the Royal Commission arising from *Ellis*. In the concluding section, the author offers some opinions about the political response to *Ellis*; the implications of *Ellis* for victims of church sexual abuse; and the prospects for victims of historic child sexual abuse in the light of legislative reforms.

There are four other introductory points to make, briefly, about this essay. First, the "author voice" in this article is not neutral: I cannot write entirely dispassionately about injustice for a victim of child sexual abuse. The second point is related to the first. From to time, I am critical of Pell, the man in charge of the Sydney Catholic Archdiocese at the time Ellis lodged his *Towards Healing* claim and during the entirety of the *Ellis* litigation. Thirdly, I hope that my high respect for John Ellis is evident from the article. His ordeal with the Sydney Catholic Archdiocese became a blueprint for how institutions responsible for caring for children should not engage with them as sexual assault victims. Without Ellis' tenacity, there would be no such negative blueprint. Fourthly, the article uses some graphic terms and the content may distress some readers.

The background to the Ellis *Towards Healing* claim

In 2002, John Ellis, a then 41-year-old law firm partner at Baker & McKenzie, made a complaint to the Catholic Church in Sydney ("Sydney Catholic Archdiocese") under its *Towards Healing* protocol for grievances about sexual abuse. Ellis' submission related to sexual assaults committed upon him by an Assistant Priest, Father Aidan Duggan. Duggan's abuse of Ellis began in the 1970s when Ellis was a teenage altar boy at Christ the King Catholic Church, Bass Hill (part of the Sydney Catholic Archdiocese). The assaults perpetrated against Ellis included masturbation, oral sex, and anal penetration.[3]

A Benedictine priest ordained in Sydney in 1950, Duggan spent four years at New Norcia in Western Australia; in Catholic terminology, New Norcia was an *Abbey Nullius*, ungoverned.[4] The Sydney Catholic Archdiocese could

later produce no records of Duggan's time at New Norcia.[5] After four years at New Norcia, Duggan travelled to Scotland where he lived for 20 years. There, he serially abused boys at Fort Augustus Abbey School as well as at its feeder school Carlekemp Priory School.[6] His brother, Father Fabian Duggan, was also at Carlekemp and, like his brother Aidan, was involved in sexual abuse.[7] Fabian Duggan died on the same day that *BBC Scotland* raised allegations of sexual assault against him in relation to his time at Carlekemp.[8]

Duggan initially returned to Australia to the Hobart Catholic Archdiocese before he arrived six months later, in late 1974, at Christ the King, on secondment from Fort Augustus.[9] At Bass Hill, Duggan, then in his 50s, set about grooming the 13-year-old altar boy John Ellis, who would later recall the sensation of the soreness of his face from Duggan's beard stubble after Duggan kissed him.[10] Ellis was a teenager with a bright future. He had been dux of his primary school. He would come first in the State in Geology in his Higher School Certificate and, later, after initially considering the priesthood, he would achieve first in the state in the Nurses Registration Board examination. In law, he would come in the top ten in his year at the University of Sydney, achieving First Class Honours.[11]

The initial assaults began when Ellis was 14 and continued until he was 17. They occurred in the Bass Hill presbytery and at a holiday house. As Duggan later moved ghostlike between parishes (he held six appointments in Sydney between 1974 and 1995),[12] he maintained contact with Ellis. Duggan continued to have sexual contact with Ellis: in a presbytery at Gymea; and, several times, in Duggan's upstairs bedroom in the presbytery at St Mary's Cathedral. Later, Duggan had sexual relations with Ellis in a presbytery at Camperdown next to the University of Sydney where Ellis was, by then, studying law and could visit between his lectures. The two men had sex in 1987 after Ellis visited Duggan to arrange for Duggan to baptise Ellis' first child. Duggan had officiated at Ellis' wedding and later conducted the girl's baptism. Ellis' last recollection of having any sexual contact with Duggan was when Ellis was 26[13] and Duggan was in his late 60s. It was not, then, until 1996 or 1997, after the breakdown of his first marriage, that Ellis (then in his mid-30s), when preparing to facilitate a session for divorcees, appreciated that what had occurred with Duggan was abuse.[14]

The Ellis litigation

George Pell become Archbishop of the Sydney Catholic Archdiocese in 2001. He would be made a Cardinal in 2003. Before taking his seat in Sydney, Pell had served as Archbishop of the Melbourne Catholic Archdiocese. He was

the architect of the *Melbourne Response*, a program for dealing with allegations of sexual abuse in the Melbourne Catholic Archdiocese, a program that Pell describes as a "world first".[15] Pell claims to have managed 300 complainants under the *Melbourne Response*.[16] Pell launched the *Melbourne Response* in October 1996, a month before the Catholic Bishops Conference approved *Towards Healing*.[17] This timing meant that the *Melbourne Response* gazumped *Towards Healing* in Melbourne. As Pell acknowledged to the Royal Commission, the effect of his introducing the *Melbourne Response* when he did, meant that *Towards Healing* (which came into effect in March 1997), and which, unlike the *Melbourne Response*, allowed victims to receive uncapped damages, was not a national response.[18] Behind the impressive administrative visage of the *Melbourne Response* there was a miserly compensation scheme. Between 1996 and 2014, the average compensation payment to a victim of sexual abuse under the *Melbourne Response* was a mere $32,000.[19]

Pell knew about managing Church victims' claims. Pell was also well equipped, as a researcher of the history of the early Roman Church, to understand the susceptibilities of the relatively powerless to forms of control by men with divine authority. During his doctoral candidacy at the University of Oxford in the late 1960s, Pell had researched the concept of a monarchical episcopate, in which a bishop dominates presbyters in teaching and matters of judgment.[20] Monarchs are difficult to move from office. Pell concluded from these studies that, emboldened by confidence in apostolic succession, it was a small step for the Roman bishops of the early church to move from a view of superiority over presbyters, to actual belief in inheritance of Peter's position (i.e., the Peter to whom Christ had given a special position).[21] In short, Bishops could be susceptible to the allure of monarch-like clerical power. It was, and is, a small step to conceive of some priests, by reason of their ordained position, having a mindset of superiority over the laity, particularly the young. This research in the formative stages of his clerical career provided Pell with original insights into power relations in the church and specifically to understanding the skewed power between the most impressionable of its members—children—and priests, with ordained, immutable, authority.

There was, however, little apparent sympathy in Pell's correspondence with Ellis, or during the litigation that followed. Ellis' *Towards Healing* claim was a plea for help. He wanted the Church to assist him with the spiritual and emotional dilemmas he was facing and to appoint someone to help him.[22] There was a reflexive hostility in the Archdiocese's responses. The Sydney Catholic

Archdiocese responded to Ellis by telling him that Duggan had no capacity to understand the allegations against him and that Duggan could not respond to them[23] because he had dementia.[24] The subtext to this limbic response was that the problems were Duggan's, not those of the Church. Pell himself told Ellis on Christmas Eve in 2002 that, in the "circumstances I do not see that there is anything the Archdiocese can do" to reach resolution.[25] The implication of this correspondence was that Pell viewed the notion that the Sydney Catholic Archdiocese would facilitate any kind of reconciliation with Ellis as pointless. The correspondence demonstrated Archbishop Pell's direct involvement in the Ellis matter from an early stage.

There were historic hints that Ellis may find it difficult to engage with the Sydney Catholic Archdiocese under Archbishop Pell's administration. Pell's show of support for Father Gerald Ridsdale in the 1990s might have, if Ellis had known about it, caused Ellis to wonder how strongly the recently appointed Sydney Catholic Archbishop would support a 1970s' victim of Catholic Church paedophilia. In 1993, Pell walked beside the soon-to-be convicted paedophile priest, Gerald Ridsdale, when Ridsdale appeared before the Melbourne Magistrates Court to plead guilty to 30 charges of sexual offences.[26] In 1973, Pell had lived with Gerald Ridsdale for ten months in East Ballarat, without, according to Pell, the two men forming a close friendship.[27] The Royal Commission concluded that, in 1973 (the year he lived with Ridsdale), Pell had considered whether it was prudent for Ridsdale to take boys on overnight camping trips, due to the possibility of Ridsdale sexually abusing them.[28] In 1993, Pell accompanied that same man to the Melbourne Magistrates Court in an act that Pell described as "priestly solidarity."[29] Pell, then an Auxiliary Bishop, said at the time of the sentencing that Ridsdale had made "terrible mistakes."[30] This phrase, which would be replayed to Pell,[31] reflected a priest's perspective. A victim of rape, child or adult, is not the victim of a "mistake". Pell later acknowledged to a Parliamentary Inquiry that he had not understood at the time that his public demonstration of support for Ridsdale at the Melbourne Magistrates Court would translate to a perceived hostility by him towards victims.[32] His failure to understand this hostility, was, Pell said, because he had "always been on the side of victims."[33] Yet, in 2016, Pell told the Royal Commission that he took little interest in what Catholic clergy in Ballarat knew about the paedophile activities of Ridsdale in Ballarat in 1975. Specifically, Pell told the Royal Commission in 2016, to gasps from the live-broadcast audience listening to his testimony, that Pell didn't know whether Ridsdale's offending in Inglewood in the Ballarat Diocese in 1975 was

common knowledge at the time, and that the matter was "a sad story, *of not much interest*" to him.[34] In a striking contrast, Ridsdale described *himself* to the Royal Commission as being "out of control" during his time at Inglewood.[35] Ridsdale lived alone in a presbytery and had a pool table that he described as a trap for young boys.[36] The review of *JCB v Bird* discussed later in this article includes a more detailed analysis of Ridsdale's crimes and the practices of Ballarat Diocese's Bishops in relation to him.

Pell claims to have "loyally implemented" *Towards Healing* in the Sydney Archdiocese,[37] but in Ellis' case, as Pell acknowledged, the Catholic Church's management of *Towards Healing* was "flawed".[38] Ellis, as a result, engaged with *Towards Healing*, powered by his own tenacity. Through Ellis' persistence, and despite numerous failings in the Sydney Catholic Archdiocese's management of its processes for reviewing complaints under *Towards Healing*, Ellis progressed the matter to assessment. He sought compensation of $100,000. In May 2004, the Church offered Ellis a settlement figure of $25,000, which, in June 2004, was increased to $30,000.[39] Ellis rejected these compensation offers and, with his customary determination, in July 2004,[40] he sought a review of the handling of his *Towards Healing* complaint. The respected former New South Wales Ombudsman, Mr David Landa, investigated the Church's handling of the matter.[41] The results of Landa's findings were clear: the Church, Landa reported, "fail[ed] to observe the required process."[42] Echoing Landa's findings, the Royal Commission concluded that the Sydney Catholic Archdiocese "fundamentally failed"[43] in its conduct of the *Towards Healing* process Ellis and it noted "an absence of justice for Mr Ellis through the extensive delays in undertaking the required process."[44]

On 30 August 2004, with Ellis by then having exhausted all avenues under *Towards Healing* and with the statutory limitation period for commencing legal proceedings having long since expired, Ellis filed a Statement of Claim in the Supreme Court of New South Wales ('NSWSC'). Patten AJ would hear the matter. Ellis named as defendants to the NSWSC proceedings, Cardinal Pell, the Trustees of the Roman Catholic Church for the Archdiocese of Sydney ("Trustees"), and Reverend Aidan Duggan (the parties named in the settlement deed earlier presented to Ellis). Ellis brought the claims against the defendants in tort and sought equitable relief for breach of fiduciary duty.[45]

Due to the long delay since Duggan's abuse of Ellis, Patten AJ had to determine whether Ellis could *commence* the proceedings. Ellis had to persuade Patten AJ that there were reasonable grounds for his Honour to believe that,

despite the delay since the damage Ellis alleged that he had suffered, the defendants could have a fair trial.[46] Additionally, Patten AJ had to adjudge whether Ellis had sued the correct defendants. The latter point was a critical one. Patten AJ would have allowed Ellis to sue the Trustees[47] and to extend the limitation period for commencing the claims.[48] Yet, the Court of Appeal of the Supreme Court of NSW ("Court of Appeal") overturned Patten AJ's decision to allow Ellis to extend the limitation period against the Trustees;[49] the High Court of Australia ("High Court of Australia") then rejected Ellis' special leave application appeal the decision.[50] In the end, Ellis could sue no one.

In relation to the initial NSWSC proceedings, the *Limitation Act 1961* (NSW) ("Limitation Act") presumptively limited Ellis' causes of action in tort against the defendants (Pell, the Trustees and Duggan) to six years from the date the cause of action first accrued to Ellis: section 14(1)(b). The Limitation Act also prevented the NSWSC from hearing the claims unless it could be satisfied that Ellis commenced proceedings *within three years* of Ellis first becoming aware of the connection between the personal injury he suffered and the defendants' acts: section 60G and section 60I of the Limitation Act. Patten AJ decided that, based on the evidence presented to the NSWSC, the limitation period ended on 14 March 1985 (six years from 1979).[51] Ellis filed his claims in 2004, 19 years after the expiry of the limitation period. It followed that, unless the NSWSC could be satisfied that there were good legal grounds to extend the limitation period by a *very* lengthy time, *and* that the defendants could have a fair trial, the NSWSC could not hear the claims. There also remained a significant legal hurdle to Ellis being able to bring the action against the Trustees, who appeared to have neither any decision-making authority for the Church nor any oversight of any priests in the Sydney Catholic Archdiocese.

The pretrial litigation was a barrister-guided excursion into the past abuses of Ellis, who later said that he found cross examination about the truth of his allegations particularly distressing because he had understood until that time that Catholic Church officials had believed his account.[52] At no time did the Sydney Catholic Archdiocese in the litigation concede that Duggan committed the assaults on Ellis; it disputed elements of Ellis' story, and asked him questions that may have caused him embarrassment. For example, Ellis was asked in cross examination about how Duggan came to officiate at Ellis' wedding if Duggan's advances were actually unwelcome, and whether, as a teenage boy, Ellis had any homosexual relationships before meeting Duggan.[53]

A subtlety lost in the searing witness interrogation of Ellis, is that it took decades for Ellis to apprehend that Duggan's paedophile acts *amounted* to abuse. Ellis had a delayed realisation. According to Patten AJ, as Ellis' appreciation of the effects of the abuse on him dawned and then deepened, Ellis' condition—his interpersonal skills; his mental health—worsened. Ellis would tell the NSWSC that it was in 2001 (when he was 40) during professional counselling, that he became aware of the extent that Duggan's assaults on him affected Ellis' relationship with his second wife.

The evidence before the NSWSC showed that Ellis came to know of the effects of Duggan's assaults on him in early August 2001,[54] a little more than three years before he filed the claims before the NSWSC, but more than 25 years after Duggan's first assaults. There was unchallenged evidence before the NSWSC that, by the age of 40, Ellis could not bring himself to utter Duggan's name, convulsing at the prospect. His psychotherapist reported the following in relation to counselling sessions he held with Ellis during August and September 2001:

> In my 4th session with John, something turned up that was a complete surprise. After being able to talk quite freely about himself and what had happened to him up until then, he was unable to talk about something that the very thought of brought about the most significant physical change in John. He was able to speak of the fact of sexual abuse by a priest when he was a teenager, but unable to talk about or speak the priest's name.[55]

Ellis was, however, the subject of gruelling interrogation about when he should have brought proceedings based on when he became aware of the significance to himself of Duggan's assaults. Ellis, it was claimed, should have known of the damage he had suffered in August 2001 at the very latest;[56] the technical legal dilemma was that Ellis appeared to have failed to make a claim within three years of that time (the implied professional insult was that, as a lawyer, he should have known better than to wait). The jibe overlooked the fact that Ellis was sexually assaulted as a boy. In what became an abstracted adversarial inquiry into the truth of Ellis' account, there was no recorded challenge to Ellis' testimony that he first became aware of Duggan's sexual assaults in 1996 or 1997 when Ellis was in his mid-30s. To appreciate the significance of this point, it is worth pausing to dwell on it. It was not until 20 years after Duggan's assaults that Ellis first apprehended that, when he was a teenage boy, he experienced sexual abuse.

As noted, the Sydney Catholic Archdiocese's lawyers proposed in cross examination of Ellis, that Ellis should have known, as a "well-qualified lawyer",[57] to bring the claims at the latest by early August 2004. There was little acknowledgement that, before he proceeded with his legal claims, Ellis spent two years trying to resolve his concerns privately through the Sydney Catholic Archdiocese's program, *Towards Healing*. Nor was it conceded in cross examination that Ellis was by that time a well-qualified *former* lawyer, with his career with Baker & McKenzie finished. Ellis had resigned from Baker & McKenzie on 31 May 2004 after he realised that he could not at that stage continue full time work. He understandably attributed his departure from the firm to the effects of Duggan's abuse.[58]

Patten AJ in the NSWSC concluded that Ellis did file the claims within three years of Ellis becoming aware of the nature and extent of the personal injury to himself resulting from Duggan's assaults. His Honour held that Ellis did not become aware of the nature and extent of that injury until September 2001.[59] The judge also held that it was arguable that Ellis could sue the Trustees.[60] His Honour ordered an extension of time until 30 August 2004[61] (the same day Ellis filed the claims) for Ellis to bring the claims against the Trustees. Patten AJ also concluded that, despite the delay since the assaults, there could be a fair trial, albeit not a perfect one.[62] Patten AJ dismissed Ellis' application to grant the extension of time against Cardinal Pell and awarded costs against Ellis. He did not, however, specifically rule on whether Ellis had incorrectly joined Cardinal Pell as a defendant. The third defendant, Aidan Duggan, was dead and died destitute and Ellis did not press a claim against his estate. His Honour dismissed Ellis' separate claim for equitable relief. Ellis could therefore, for now, have his case heard against the Trustees.

The Sydney Catholic Archdiocese appealed Patten AJ's decision to extend the limitation period against the Trustees to the Court of Appeal. Ellis cross-appealed the dismissal of Cardinal Pell's liability. Before the Court of Appeal, the lawyers for Pell and the Trustees neither admitted nor denied the allegations of sexual abuse by Duggan. Instead, for the purpose of the ongoing interlocutory proceedings, Pell and the Trustees were only prepared to accept that there was an *arguable case* that Duggan had done what Ellis alleged he had done.[63] There was no admission of liability in relation to Duggan's predation; there was only an assumption made of there being an arguable case against him, conceded to the minimum possible extent.

If the Sydney Catholic Archdiocese did admit to Duggan's abuse, then Ellis could have taken some comfort that the Church (and the public) believed his account. The Church gave him no solace. There was no concession. There were at least three considerations suggesting that the Sydney Catholic Archdiocese could have conceded before the Court of Appeal (or before Patten AJ) that Duggan abused Ellis. Further, the Archdiocese could arguably have admitted to Duggan's abuse without weakening its legal position in relation to the claims against Pell and the Trustees. Admitting to Duggan's assaults did not *per se* make Cardinal Pell or the Trustees vicariously liable for Duggan's actions or for damages. The issues of Duggan's culpability, and the liability of Pell, the Trustees, and the Church were legally separable matters.

First, there was the compelling testimony by Ellis himself, and that of the independent experts who gave evidence about their professional observations of Ellis, describing the visceral effects of Duggan's abuse on Ellis. The expert witnesses had little to gain from their professional testimony other than the value of having the NSWSC believe them to be credible about their observations of Ellis. Secondly, Monsignor Brian Rayner—appointed in 2003 as Vicar General and Chancellor of the Catholic Archdiocese of Sydney, and Moderator of the Curia—did not ever doubt the truth of Ellis' account and he communicated this to Cardinal Pell.[64] Vicar General is a position of high standing in the Catholic Church and Rayner was the 1996 recipient of the Medal of the Order of Australia. He was a man of credibility in the Catholic Church, whose opinion, it might be thought, warranted more respect. Thirdly, during the proceedings before Patten AJ, another complainant—SA—came forward claiming that Duggan had sexually abused SA from April 1980 until the end of 1982 in the presbytery at St Mary's Cathedral and at a holiday house.[65] Pell later told the Royal Commission that he, and others he spoke with, believed that the evidence of SA significantly strengthened Ellis' legal case, but neither he, nor anyone else in the Archdiocese, reconsidered their position on whether Duggan abused Ellis.[66]

As will be seen, Pell was of the view that the Church had to ensure that there could be no liability for the Trustees. Before the Court of Appeal, Cardinal Pell and the Trustees had a jarringly simple proposition: Ellis had sued the wrong defendants. The Court of Appeal agreed with the Church; its ruling was as unambiguous as it was unanimous. In Mason P's leading Court of Appeal judgment, his Honour held that the proceedings were " . . . doomed to fail and ought . . . to be dismissed as against the first and second defendants both as regards the claims in tort and the claim of breach of fiduciary duty."[67] According to Mason

P, the Church did not exist as a corporate body in law and the Trustees were not responsible for Duggan's abuse. Cardinal Pell was not liable in perpetual succession for the actions and/or inactions of his predecessors. Mason P held that it was unnecessary for the Court of Appeal to even consider the question of the application of the extension of time to sue the Trustees. In his Honour's words, such an exercise was " . . . pointless, [as] there is no viable cause of action".[68] Ipp JA and McColl JA each concurred with Mason P, without either judge writing a judgment. There was no clear guidance from the Court of Appeal about who the *right* defendant might be. Yet, Mason P observed that there was no allegation against the Trustees as owners or occupiers of the Church buildings or presbytery.[69] With this, Mason P hinted at a claim in occupier's liability. Ellis' lawyers had not raised a claim directly on the pleadings.

For John Ellis, the Court of Appeal's decision meant that the evidence he had given before Patten AJ about his abuse at the hands of Duggan was legally irrelevant; it was, in Mason P's words, "pointless". Unless overturned by the High Court, the Court of Appeal's decision created a precedent that could spell great difficulty not only for Ellis but for other victims of church abuse. Namely, a victim could not successfully bring an action against a church property trust even if the trust were the only defendant capable of financing a claim in damages for a priest's paedophilia. Additionally, an Archbishop would not be vicariously liable for the past actions of a paedophile priest in their Archdiocese merely because the Archbishop took charge of the administration of the Archdiocese. What is more, the Church itself could not be liable for the actions of a paedophile priest. If the Church was not responsible for the actions of priests, then, logically, it would be less accountable for the actions of Church laity. The Church ought to have been concerned about the reverse implication of this finding. In what sense, could the Church take any credit for any charitable works of the laity? Finally, even with a weight of evidence pointing to a priest's guilt and the priest himself being dead, the Church would admit nothing.

The Sydney Catholic Archdiocese was wary of the prospect of a successful High Court challenge. The Church offered Ellis an immunity from the costs orders of the Court of Appeal (which the Church assessed as being in excess of $500,000) if Ellis did not apply to the High Court for special leave to appeal the decision led by Mason P.[70] It later emerged that the Sydney Catholic Archdiocese incurred $755,940 in legal costs in the Ellis matter.[71] The implications of the Church's $500,000 immunity offer were twofold. First, the Archdiocese's minimum legal costs in respect of the Ellis litigation exceeded

Ellis's compensation request by at least five times. Secondly, if Ellis' application to the High Court did not succeed, then Ellis would be liable for at least $500,000 in legal costs, not including his own. These expenses would be even greater if the Church's immunity offer did not reveal the full extent of its costs. Ellis nevertheless lodged an appeal to the High Court, believing that the Court of Appeal's decision as it concerned the Trustees was wrong in law, and that other victims would be disadvantaged if the decision were not challenged.[72] Yet, Ellis failed in his attempt to have the High Court grant his leave application. On 16 November 2007, the High Court refused to grant Ellis leave to appeal.[73] The High Court did not even hear verbal submissions from the Church's lawyers. Ellis' final avenue of legal appeal faltered without the case even going to a full hearing of the High Court. There was now no higher legal authority in Australian law than Mason P's judgment in *Ellis*.

Unless addressed by legislation, the Court of Appeal's decision would send several harsh messages to victims of child sexual abuse and their advisers. First, the victim would be responsible for explaining how much time had elapsed until they realised that they had suffered sexual abuse, and then understood its effects and consequences. The expectations on the claimant would be even higher if they were well educated. The obvious paradox was that, as a result of *Ellis*, there was no defendant against whom that same plaintiff could bring an effective claim. Secondly, and more prosaically, any victim, even a law firm partner, would struggle to win a court case against a well-resourced church. This was precisely the message that Pell intended to convey to victims. As the Royal Commission noted, "Cardinal Pell decided to accept the advice of the Church's solicitors to vigorously defend the claim brought by Mr Ellis . . . to encourage other prospective plaintiffs not to litigate claims of child sexual abuse against the Church."[74]

Thirdly, the Catholic Church would fight litigation. Fighting Ellis in Court was consistent with Pell's intent. Cardinal Pell told the Royal Commission that he agreed with the advice of the Church's lawyers that they, the lawyers, should not help Mr Ellis identify a suitable defendant;[75] Pell also accepted the advice of the Church's lawyers to refuse an offer by Ellis to mediate after Patten AJ's decision in February 2006.[76] Strikingly, Pell testified to the Royal Commission that "the principle that the Trustees were not liable had to be maintained 'whatever we did'".[77] Pell saw *Ellis* as a high-stakes legal battle. The Archdiocese may have feared a "floodgates effect" if Ellis succeeded. Perhaps, too, there was a whiff of Pell's personal ambition in the Ellis litigation. Pell had established himself

as the guard in chief of the Melbourne Catholic Archdiocese's assets under the *Melbourne Response*. In 2014, he would be appointed as the first prefect of the *Secretariat for the Economy* in Rome, to be responsible for the budget of the Holy See and the Vatican. It is possible that Pell's "whatever we did" approach in relation to the *Ellis* litigation was part of the Cardinal's own groundwork for his role as Church financial protector. As the man who dispensed low compensation claims in the Melbourne Archdiocese and who, in Sydney, sought to save the Church from a potential breaking dam of victims' claims, Pell could be a fitting candidate for managing the finances of the Catholic Church in Rome.

Fourthly, filing a complaint under *Towards Healing* would be a difficult, cumbersome, process without a guarantee of any satisfactory assistance for a victim (or compensation: capped or otherwise), and it would be adversarial.[78] Fifthly, the prospect that many victims of abuse may fear from litigation—a public and humiliating airing of the intimate details of their abuse—could not only occur, but even if it did occur, it may be "pointless".[79] Sixthly, the Sydney Catholic Archdiocese (and other churches or other institutions with children in their care) would have few financial incentives to expose or expunge abusers: so long as they structured their financial affairs in property trusts and ensured that those trusts were *not* involved in decision-making, the Church could not be financially liable to victims for abuse by priests. Conversely, other churches could *alter* their finance portfolios, and insulate their liability, by placing assets in property trusts. If the Church trusts were not involved in supervising priests or in diocesan management, then the trusts could not be a suitable defendant in relation to a victim's legal claim of damages for paedophilia.

A seventh, more subtle, message was that those in charge of an Archdiocese had limited responsibility to scrutinise the antecedents of priests or to *listen* to information about them. By not admitting to Duggan's abuse, the Sydney Catholic Archdiocese possibly avoided, in the short term, some public opprobrium. It was not obvious that the Sydney Catholic Archdiocese carried out rudimentary inquiries into Duggan's background before entrusting him with caring for a bright teenage altar boy at Bass Hill. It is conceivable that no Catholic leader in Sydney (including Pell), knew of Aidan Duggan's alleged predation at Fort Augustus before his return. Yet, the Sydney Catholic Archdiocese could seemingly produce no adequate records about Duggan. In 2004, the Archdiocese was incapable of disgorging any documentation about the priests at the Bass Hill parish between 1976 and 1978 (three years in which Duggan sexually abused Ellis).[80] It could not produce any records relating to Duggan's time at *New Norcia*.[81] The information

it held about Duggan's 20 years at Fort Augustus before welcoming him back to Sydney consisted entirely of Duggan's correspondence.[82]

Legislative recommendations

Only legislative reform could reverse *Ellis* and its implications. Yet, it was not until five years after the High Court dismissed Ellis' special leave application that Prime Minister Julia Gillard announced the Royal Commission. Prime Minister Gillard announced the establishment of the *Royal Commission into institutional Responses to Child Sexual Abuse* on 12 November 2012. This announcement followed years of advocacy by, and for, survivors of child sexual abuse.[83] It was fitting that Australia's first female Prime Minister should announce the Royal Commission given that it can be argued that institutional abuse is predominantly an issue about male power.[84] The Royal Commission received evidence about *Ellis* including from John Ellis and Cardinal Pell. After nearly five years, the Royal Commission released its final findings on 15 December 2017 in a 17-volume Final Report it supplied to the Governor General. It published a Case Study (No 8) devoted to Ellis and his experiences with the Sydney Catholic Archdiocese.

The Royal Commission considered the importance of a redress scheme for victims of sexual abuse so pressing that in September 2015 (more than two years before the Royal Commission's inquiry concluded) it released a *Redress and Litigation Report*. The Royal Commission recognised the importance of the government creating avenues for victims of sexual misconduct to obtain appropriate redress.[85] It also highlighted the advantages of a national scheme as compared to individual state and territory schemes (or programs run by non-government institutions) while apprehending the difficulties, and the time required, for negotiations to take place in the Australian federation. On 31 May 2018, the Catholic Church became the first major non-government institution to announce its intention to join the scheme. [86]

The Royal Commission made two recommendations to address the anomalies arising from *Ellis*. First, the Royal Commission advised that state and territory governments should introduce legislation to ensure that, in cases of child sexual abuse, institutions must nominate a proper defendant with sufficient assets to meet a claim in damages or face the prospect of the property trust being the proper defendant and funding a claim in damages.[87] Secondly, it recommended that state and territory governments remove limitation periods in the case of child sexual abuse in an institutional context, with retrospective effect.[88]

JCB v Bird

The 2019 decision of *JCB v Bird*[89] before the Supreme Court of Victoria is the first case the author is aware of where a Court interpreted legislation enacted in response to the Royal Commission's recommendations about *Ellis*. McDonald J's decision in *JCB v Bird* deals with the specific question of whether the *Legal Identity of Defendants (Organisational Child Abuse) Act* 2018 (Vic) ("Child Abuse Act") allows a plaintiff to add defendants to a claim if the plaintiff began the legal proceedings before the commencement of the Child Abuse Act.

JCB v Bird involves sexual abuse in the Ballarat Diocese by the previously mentioned Gerald Ridsdale. He sexually abused at least 50 victims in the Diocese between the late 1950s and the early 1990s.[90] His convictions included sexual assaults in the Ballarat East, Swan Hill, Warrnambool, Apollo Bay, Inglewood, Edenhope, and Mortlake parishes.[91] The majority of Ridsdale's victims were under the age of 13; most were boys, there were also girls.[92] Faced with allegations about his predations, the Ballarat Catholic Diocese typically moved Ridsdale to a different parish. Ridsdale, as a result, held 16 different appointments over a period of 29 years as a priest, with each appointment being on average less than two years.[93]

The case raises some similar issues to *Ellis*. First, JCB commenced proceedings long after the abuse took place (in JCB's case, 36 years) Secondly, JCB sought to identify a Church defendant who could fund a successful claim in damages and the Church's lawyers challenged whether JCB could sue such a defendant. Thirdly, while *Ellis* involved a legal question about the applicability of a statutory time limit, in *JCB v Bird*, similarly, the Church's lawyers argued that the Child Abuse Act did not have any retrospective effect in relation to an already-commenced claim. Fourthly, in *JCB v Bird*, McDonald J considered a claim of occupier's liability, which Mason P alluded to in his Honour's Court of Appeal judgment in *Ellis*. However, a key difference in the cases was that, in *Ellis*, the Sydney Catholic Archdiocese did not admit to Duggan's abuse of Ellis and it denied all liability in relation to Cardinal Pell and the Trustees. By contrast, in *JCB v Bird*, the Church's lawyers admitted that Ridsdale sexually abused the plaintiff but the Church denied *liability* for the abuse. The victim's lawyers noted that this was the first occasion in Australia that a Catholic Diocese had admitted liability for child sexual abuse and it was the first time in Victoria that the Catholic Church had made such an admission in a legal proceeding.[94]

JCB commenced the proceedings in the VSC on 20 February 2018, before the Child Abuse Act commenced; it came into effect on 1 July 2018. JCB alleged

that Ridsdale anally raped JCB in April 1982, when JCB was nine years old.[95] At the time of the assault on JCB, Ridsdale was the priest at St Colman's Parish, Mortlake in the Ballarat Diocese. In March 2019, JCB sought to amend his statement of claim to include material to address the question of the defendants' liability, as well as adding the Catholic Diocese of Ballarat as the third defendant, and the Roman Catholic Trust Corporation for the Diocese of Ballarat as the fourth defendant. The defendants' lawyers admitted that Ridsdale sexually abused the plaintiff but they denied liability for Ridsdale's abuse of JCB.[96] They also challenged whether JCB could add the third and fourth defendants.[97]

The Ballarat Diocese's lawyers had a simple proposition in opposing JCB's addition of the third and fourth defendants: they asserted that there was no clear indication in the Child Abuse Act that it was intended to operate retrospectively.[98] The primary issue for McDonald to determine was, therefore, whether the Child Abuse Act allowed JCB to add the two new defendants to JCB's original claim. After a careful review of the Child Abuse Act, McDonald J rejected the defendants' submissions that his Honour had no power to amend the proceeding to join the Diocese as a defendant in reliance upon the provisions of the Act because the proceeding against the defendants was commenced prior to 1 July 2018.[99] JCB could therefore add the two defendants. His Honour noted that, under the Child Abuse Act, the defendants had 120 days from the commencement of the claim against the Diocese (a non-government organisation ("NGO") under the legislation) to nominate a proper defendant or, failing that, the plaintiff's claim could proceed against the trustees of an associated trust of the defendant.[100] His Honour held, for completeness, that under the Child Abuse Act, the 120 day period was enlivened by the bringing of the claim against the NGO and not the commencement of the proceedings in which a claim is made against the NGO.[101] This meant that the trial could not proceed for at least 120 days.

JCB sued Bishop Paul Bird, as Catholic Archbishop of the Diocese of Ballarat, on behalf of the estates of two deceased Ballarat Diocese Bishops each of whom had led the Ballarat Diocese at the time of Ridsdale's assaults. The first Bishop was James O'Collins, Bishop of Ballarat between 1941 and 1971, who died in 1983. The second Bishop was Ronald Mulkearns who was coadjutor for the Ballarat Diocese between 1968 and 1971 and Bishop for the Diocese between 1971 and 1997, and died in 2016. There was little doubt that the Bishops were negligent in their management of Ridsdale. The Royal Commission concluded that Mulkearns should not have appointed Ridsdale parish priest of Mortlake (where Ridsdale raped JCB) given what he already knew of Ridsdale's history.[102]

The Truth Justice Healing Council (TJHC) conceded that Mulkearns' actions were "inexcusably wrong".[103] Pell acknowledged before the Victoria Parliamentary Inquiry (in 2013) that Mulkearns placed paedophile clergy above the law.[104] The Royal Commission noted that, after being made aware of a complaint of abuse by Ridsdale at North Ballarat in 1962, O'Collins moved Ridsdale to Mildura.[105] The Royal Commission accepted the evidence of Gerald Ridsdale that O'Collins placed no condition, restriction, or any supervision on Ridsdale's move from North Ballarat to Mildura.[106] Ridsdale proceeded to abuse children at Mildura.[107]

The Royal Commission concluded more broadly that there was an "extraordinary failure within the [Ballarat] Diocese at the time to respond adequately to allegations and complaints about the sexual abuse of children by clergy over the course of at least three decades."[108] Similarly, the TJHC recognised that "such failures of leadership and communication . . . were and are unacceptable, and [that the failures] contributed to further abuse . . . after enough was known or suspected for that to have been prevented."[109] The TJHC observed that authority to take any action in response to allegations of child sexual abuse lay solely with the bishop.[110]

What followed McDonald's careful analysis of the legislation, was a razor-edged review by his Honour of the defendants' nonacceptance or denials of JCB's allegations in relation to Ridsdale and the Ballarat Bishops. In their submissions to the VSC, JCB's lawyers particularised details of O'Collins having been informed in 1963 of an allegation that Ridsdale engaged in inappropriate behaviour of a sexual nature with a minor while he was a priest at the Ballarat North Parish.[111] The Church's defence included a denial of this allegation.[112] Similarly, JCB's lawyers' statements of claim described Mulkearns as having been aware, or having been made aware, prior to Ridsdale's placement at St Colmans (Mortlake), of Ridsdale's predilection or propensity to engage in inappropriate sexual conduct with minors.[113] The defendants accepted that Mulkearns was informed of a complaint at Inglewood but it otherwise denied the allegation.[114]

The difficulty for the defendants was that their denials were inconsistent with TJHC submissions to the Royal Commission. For completeness, counsel for the plaintiffs confirmed from the bar table, without objection, that the TJHC submissions included the Diocese of Ballarat.[115] McDonald J noted—tellingly—that he drew no conclusion from the inconsistencies other than to observe that the TJHC submission appeared to go beyond the defendants' limited admissions and denials.[116] His Honour was satisfied that O'Collins knew between 1962 and 1964 of Ridsdale molesting a minor and that Mulkearns knew, prior

to Ridsdale's appointment at Mortlake in 1981–82, that Ridsdale was engaging in inappropriate sexual behaviour with minors.[117]

McDonald J pressed even further with his Honour's careful review of the defendants' other nonacceptances or denials. The lawyers for the defendants did not admit that Ridsdale was engaged in priestly duties and responsibilities between July 1961 and November 1993 and they did not admit that, by reason of his position and status as a priest, Ridsdale was imbued with special authority, power, control, and influence over members of the community.[118] On these points, his Honour referred the defendants to section 42(1A) of the *Civil Procedure Act 2010* (Vic) ("Civil Procedure Act").[119] This section provides that, in a civil proceeding, a legal practitioner making a proper basis certification must ensure that there is a proper basis for each denial and non-admission in a defence. His Honour queried by reference to this section of the Civil Procedure Act, whether there was any proper basis for these denials.[120]

Concerning the non-admissions and denials, McDonald J adjudged that he would allow the parties time to address whether there had been a breach of the defendants' obligations and/or that of their lawyers, under the relevant provisions of the Civil Procedures Act.[121] The defendants could, to put the matter differently, reconsider the inconsistencies between the non-admissions in the defence materials with the TJHC submissions and reflect on whether it was plausible for them to deny that Ridsdale at the time was engaged in priestly duties, and imbued with special authority and influence over members of the community. McDonald J noted—ominously—that, if his Honour *were* satisfied that there was a breach of the defendants' obligations under the Civil Procedures Act, then it would be necessary for his Honour to consider the making of orders against the defendants and/or their legal representatives.[122] It is not surprising that the matter settled.[123]

McDonald J, however, had not finished with his Honour's analysis of elements of the plaintiff's claim. JCB raised a claim of breach of occupier's liability in relation to the fourth defendant. Specifically, JCB's lawyers alleged that the fourth defendant failed to take reasonable care to ensure that JCB was not injured on the Church's premises by reason of the state of the premises or of things done or omitted to be done in relation to the state of the premises.[124] JCB's plea drew on the language of section 14B(3) of the *Wrongs Act 1958* (Vic), which provides that "an occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that any person on the

premises will not be injured or damaged by reason of the state of the premises or things done or omitted to be done in relation to the state of the premises".[125]

JCB's lawyers contended that the "state of the premises" referred not only to the physical condition of the premises but to the condition of the premises while Ridsdale was present. While McDonald J considered JCB's argument a novel one, his Honour *was* satisfied that there was an arguable case that the "state of the premises" could be interpreted this way.[126] His Honour cited a decision of the Australian Capital Territory ("ACT") Supreme Court in *Hartigan v Commissioner for Social Housing in the Australian Capital Territory*,[127] where Penfold J, in reviewing similar legislation in the ACT, noted that "state of the premises" might refer to a property with dangerous guard dogs in it. McDonald J concluded, dryly, that Ridsdale's presence on Church property might be considered analogous to the presence of a dangerous dog.[128]

Conclusion

The powerful work of the Royal Commission, and the legislative change that followed it, should not be allowed to mask more than a decade of legislative stasis after *Ellis*. The *Ellis* decision confirmed that victims of Church sexual abuse had no access to adequate compensation through the Courts. These were, and are, crimes involving gross power imbalances, with men using spiritual authority and community standing for their own sexual gratification with children. While the decision may be legally impeccable, *Ellis* was a harsh decision for the victims of paedophilia who might otherwise be inclined to seek damages from the Catholic Church in the Australian courts.

It is difficult to estimate how many child victims of institutional abuse may have decided to *not* pursue compensation through the Courts as a result of *Ellis*. Similarly, it is impossible to know how many victims' lawyers advised their clients that it would be too hard for their clients to pursue claims against the Catholic Church (or other institutions) due to *Ellis*. The political reaction to *Ellis* should have been immediate, decisive, and comprehensive, but there was, despite the lobbying of victims' advocates and the painstaking work of the Royal Commission, an aching legislative silence.

The Australian states and territories enacted legislation to address *Ellis* after the conclusion of the five-year Royal Commission to make it impossible for a religious institution to rely on their structure through invocation of *Ellis* to escape liability for sexual or physical abuse of children.[129] Even that legislation was slow to negotiate and to implement, as might be expected in a

constitutional federation. Despite the legislative changes, not all victims will be able to establish that a religious institution or a school is liable for historical child sexual abuse that they suffered. The 2019 decision of the Court of Appeal of the Supreme Court of New South Wales in *The Council of Trinity Grammar School v Anderson*[130] illustrates this point. The victim in *Trinity* commenced legal proceedings in 2016 in relation to allegations of child sexual abuse in the 1970s. The school (Trinity) sought an order that the proceedings be stayed. In 2018, Rothman J in the Supreme Court of NSW dismissed the school's application. In 2019, the Court of Appeal allowed an appeal against Rothman J's decision and granted the school a permanent stay of proceedings. The Court of Appeal reasoned that, because of the passing of time, the unavailability of witnesses, and the absence of documentation concerning the attendance of pupils at camps, Trinity was unable to meaningfully deal with the question of whether it had placed the alleged perpetrator of abuse in a position of power and intimacy which gave the occasion for the wrongful acts.[131] The Court of Appeal noted—crucially—that the prejudice to Trinity from the delay was not due to the school's own neglect.[132] The reader might wish to consider *Ellis* through this lens.

It is instructive to reflect on how *Ellis* became binding and precedent in Australian law. The case became a precedent for two closely related reasons. First, the manifest failures in the Sydney Catholic Archdiocese's administration of *Towards Healing* in relation to John Ellis, that led to the pretrial litigation and to the Court of Appeal's decisive judgment. Ellis did not pursue resolution through the Courts except as a last resort. Ellis' *Towards Healing* claim was a plea for the Church's emotional and spiritual support. If the Sydney Catholic Archdiocese had a properly-administered healing program that provided victims with fair compensation, then *Ellis* need never have been decided. Secondly, the approach the Sydney Catholic Archdiocese took in relation to *Ellis*, namely, that it was more important to protect the Church's financial assets, than it was to allow John Ellis, or any other victim of Church abuse, to gain access to compensation through the Courts. Once the pretrial litigation began, the Sydney Catholic Archdiocese was exposed to the possibility of paying fair compensation. Cardinal Pell saw *Ellis* as "must win" for the Church, for reasons only he can know. And, legally, he won.

Endnotes

1 *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* (2007) 70 NSWLR 565. See also *Archbishop of Perth v "AA" to "JC"* (1995) 18 ACSR 333: application for special leave to appeal to the High Court of Australia refused on March 4, 1996.

2 *JCB v Bishop Paul Bird for the Diocese of Ballarat* (2019) 58 VR 426.

3 John Andrew Ellis, *Statement to the Royal Commission into Institutional Responses to Child Sexual Abuse*, March 5, 2014, 2–3.

4 Letter from the Catholic Archdiocese of Sydney to Mr Patrick Monahan, Mr John Ellis and Fr Aidan Duggan, September 2, 2004, 2.

5 Ibid, 3. The Royal Commission estimated that as many as one fifth of all priests at New Norcia were perpetrators of sexual abuse: Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report*, Volume 16, Religious Institutions, Book 1 (Canberra, Australian Government Publishing Service, 2017), 296.

6 Mark Daly, "Sins of Our Fathers," *BBC Scotland Investigates*, television documentary, 2013, https://www.bbc.co.uk/programmes/b037p6h2.

7 Mark Daly, "Third Australian monk implicated in Fort Augustus sex abuse scandal," *BBC News*, August 15, 2013, https://www.bbc.com/news/uk-scotland-23718573.

8 Ibid.

9 Letter from the Catholic Archdiocese of Sydney to Monahan, 4.

10 Ellis, *Statement to the Royal Commission*, 3.

11 Ibid, 5.

12 Letter from the Catholic Archdiocese of Sydney to Monahan, 1.

13 Ellis, *Statement to the Royal Commission*, 3

14 Ibid, 7.

15 Cardinal George Pell, interview by Andrew Bolt, *Sky News*, April 14, 2020, https://www.youtube.com/watch?v=3OX2aUvG51I.

16 Ibid.

17 Royal Commission into Institutional Responses to Child Sexual Abuse, "Report of Case Study No 16—the Melbourne Response," 2015, 6.

18 Ibid.

19 Ibid, 25.

20 George Pell, "The Exercise of Authority in Early Christianity from about 170 to about 270," (DPhil. diss., Oxford University, 1971), 447.

21 Ibid, 460, 461. See also Kieran Tapsell, "Civil and Canon Law on Reporting Child Sexual Abuse to the Civil Authorities," *Journal for the Academic Study of Religion*, 31 no.3 (2018): 145.

22 Ellis, *Statement to the Royal Commission*, 11.

23 Royal Commission into Institutional Responses to Child Sexual Abuse, "Report of Case Study No 8—Mr John Ellis's experience of the Towards Healing process and civil litigation," 2015, 5.

24 Ellis, *Statement to the Royal Commission*, 12.

25 Ellis, *Statement to the Royal Commission*, 5.

26 Family and Community Development Committee, *Inquiry into the handling of child abuse by religious and other organisations*, May 27, 2013, 5. Ridsdale was not sentenced to imprisonment: see Royal Commission into Institutional Responses to Child Sexual Abuse, "Report of Case Study No 28—Catholic Church authorities in Ballarat," 2017, 238 (unredacted).

27 Family and Community Development Committee, *Inquiry*, 5.

28 Royal Commission, "Report of Case Study No 28," 5.

29 Family and Community Development Committee, *Inquiry*, 4–5.

30 Ibid, 4.

31 Ibid.

32 Ibid.

33 Ibid.

34 "Cardinal Pell in his own words at the Royal Commission," *Sydney Morning Herald*, March 3, 2016, https://www.smh.com.au/national/cardinal-pell-in-his-own-words-at-the-royal-commission-20160229-gn6j3m.html (emphasis added). See also Royal Commission, *Report of Case Study 28*, 256.

35 Royal Commission, "Report of Case Study No 28," 248.

36 Ibid.

37 Cardinal George Pell, *Sky News*.

38 Royal Commission, "Report of Case Study No 8," 5.

39 Ellis, *Statement to the Royal Commission*, 19.

40 Royal Commission, "Report of Case Study No 28," 65.

41 Ibid.

42 Ibid.

43 Ibid, 10.

44 Ibid, 67.

45 *Ellis v Pell* [2006] NSWSC 109.

46 Ibid, para 95.

47 Ibid, para 73.

48 Ibid, para 86.

49 *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis*.

50 *Ellis v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2007], HCA Transcript 697, Hayne J, Keifel J.

51 *Ellis v Pell*, para 3.

52 Ellis, *Statement to the Royal Commission*, 28.

53 Royal Commission, "Report of Case Study No 8," 85.

54 *Ellis v Pell*, para 28.

55 Ibid, para 38.

56 Ibid, para 26.

57 Ibid.

58 Ibid, para 20.

59 Ibid, para 80.

60 Ibid, para 73.

61 Ibid, para 99.

62 Ibid, para 95.

63 *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis*, 569.

64 Royal Commission, "Report of Case Study No 8," 6, 43.

65 Ibid, 88.

66 Ibid, 89.

67 *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis*, 569.

68 Ibid, 570.

69 Ibid, 587, 590.

70 Ellis, *Statement to the Royal Commission*, 30; Royal Commission, "Report of Case Study No 8," 97.

71 Ellis, *Statement to the Royal Commission*, 30. The Sydney Catholic Archdiocese eventually did not pursue costs against Ellis. Its legal costs were approximately $800,000. It paid approximately $568,000 to John and Nicola Ellis, including for an overseas trip and house renovations. The Royal Commission concluded that the Archdiocese took too long to communicate to Ellis that it was not pursuing legal costs against him and that this had a detrimental effect on his health. It did not advise Ellis in writing until August 2009 that it was not pursuing legal costs, which was nearly two years after the High Court decided to refuse Ellis' application for special leave to appeal: see Royal Commission, "Report of Case Study No 8,"101.

72 Ellis, *Statement to the Royal Commission*, 29.

73 *Ellis v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney*, HCA Transcript.

74 Royal Commission, "Report of Case Study No 8," 12.

75 Ibid, 14.

76 Ibid, 15.

77 Ibid, 73.

78 John Ellis and Nicola Ellis, "A New Model for Seeking Meaningful Redress for Victims of Church-related Sexual Assault," *Current Issues in Criminal Justice*, 26 no. 1 (2014): 32.

79 See *Matthew Rabl v Roman Catholic Trusts Corporation for the Diocese of Sale* [2020] VSC 71, para 12–13.

80 Letter from the Catholic Archdiocese of Sydney to Monahan, 1.

81 Ibid, 3.

82 Ibid.

83 Kathleen Daly and Juliet Davis, "Unravelling Redress for Institutional Abuse of Children in Australia," *UNSW Law Journal,* 42 no. 4 (2019): 1256.

84 Kathleen McPhillips, "Silence, Secrecy and Power: Understanding the Royal Commission Findings into the Failure of Religious Organisations to Protect Children," *Journal for the Academic Study of Religion*, 31 no. 3 (2018): 120.

85 Daly and Davis, "Unravelling Redress for Institutional Abuse of Children," 1257.

86 Ibid, 1262.

87 Royal Commission into Institutional Responses to Child Sexual Abuse, "Redress and Civil Litigation Report," 2015, 59.

88 Ibid, 53.

89 *JCB v Bird*.

90 Truth Justice Healing Council, "What we have done: an activity report from the Truth Justice and Healing Council 2013–2018," Vol 3, (2018): 72.

91 Royal Commission, "Report of Case Study No 28," 238.

92 Ibid, 459.

93 Ibid, 53.

94 Judy Courtin Legal, "Landmark Case Against the Catholic Church," 2019, https://www.judycourtinlegal.com/landmark-civil-claim

95 *JCB v Bird*, 428.

96 Ibid.

97 Ibid.

98 Ibid, 429.

99 Ibid, 433.

100 Ibid, 444.

101 Ibid, 432.

102 Royal Commission, "Report of Case Study No 28," 275.

103 Truth Justice Healing Council, "Submissions in Response to Submissions of Counsel Assisting—Case Study 28," 2016, 51.

104 Family and Community Development Committee, Inquiry, 13.

105 Royal Commission, "Report of Case Study No 28," 239.

106 Ibid.

107 Ibid.

108 Ibid, 420.

109 Truth Justice Healing Council, "Submissions in Response," 24.

110 Ibid, 23.

111 *JCB v Bird*, 434.

112 Ibid.

113 Ibid.

114 Ibid.

115 Ibid, 437.

116 Ibid.

117 Ibid.

118 Ibid, 438.

119 Ibid, 438–439.

120 Ibid, 445.

121 Ibid.

122 Ibid.

123 Judy Courtin Legal, "Landmark Case Against the Catholic Church".

124 *JCB v Bird*, 442.

125 Ibid.

126 Ibid, 443.

127 (2017) 319 FLR 158.

128 *JCB v Bird*, 444.

129 For example, the *Civil Liability Amendment (Organisational Child Abuse Liability) Act* 2018 (NSW) added Part 1B "Child abuse—liability of organisations" to the *Civil Liability Act 2002* (NSW). The amending legislation was enacted to '[level] the playing field to ensure that all survivors have access to a civil remedy through vicarious liability.': see *Civil Liability Amendment (Organisational Child Abuse Liability) Bill 2018* (NSW), Second Reading Speech, Mr Mark Speakman (Attorney-General), 26 September 2018, https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1323879322–103787'. In relation to the abolition of time bars for bringing proceedings for child sexual abuse (and in some cases, with the legislation extending the types of abuse for which limitation periods no longer apply), see *Limitation Act 1969* (NSW): s 6A; *Limitation Act 1985* (ACT): s 21C; *Limitation Act 1981* (NT): s 5A; *Limitation of Actions Act 1974* (Qld): s 11A*; Limitation of Actions Act 1936* (SA): s 3A*; Limitation Act 1974* (Tas): s 5B; *Limitation of Actions Act 1958* (Vic): s 27P; *Limitation Act 2005* (WA): s 6A.

130 [2019] NSWCA 292.

131 Ibid, 468–477 (Bathurst CJ); Payne JA and Simpson AJA concurring.

132 Ibid, 505 (Bathurst CJ). By contrast, in *Gorman v McKnight* [2020] NSWCA 20, a differently constituted Court of Appeal (Bell P; Payne JA and Emmett AJA) declined to grant a stay of proceedings brought against an estate (not an institution), for allegations of child abuse that were almost 40 years old. The Court of Appeal accepted the trial judge's observation that the estate's solicitor could have done more to investigate matters relating to the allegations before bringing the application to stay the proceedings: *Gorman v McKnight*, 55, (Bell P). Payne JA and Emmett AJA wrote brief judgments concurring with Bell P.