

Family and Community Development Committee

Parliament House

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Submission to the Victorian Government Inquiry into the Handling of Child Abuse by Religious and Other Organisations

Rationalist Society of Australia Inc.

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The Rationalist Society (RSA) is Australia's oldest free thought organisation, established in 1906. Over the past 100 years or so, the RSA has promoted reason and evidence-based decision making in public policy, independent of theological creeds and dogma. Amongst the aims of the Society is the promotion of a secular and ethical system of education.

The principal author of this submission is Diane Preston, General Counsel for the Rationalist Society, with reviews by RSA President Dr Meredith Doig and RSA President Emeritus Ian Robinson.

Scope

This submission addresses Part 2 of the submission guide:

“Suggestions for reform, to help prevent abuse and ensure that allegations of abuse are properly dealt with. This includes both reforms to Victorian laws and reforms to the policies, procedures and practices within religious and non-government organisations”

The submission is relevant to the terms of reference noted in 4.3 of the guide with respect to religious organisations:

“Whether changes to law or to practices, policies and protocols in such organisations are required to help prevent criminal abuse of children by personnel in such organisations and to deal with allegations of such abuse”

This submission focuses on what can be done under existing Victorian legislation, namely the *Occupational Health and Safety Act 2004*, to assist in the management and control of the potential risks religious organisations pose to the children of Victoria. The submission also addresses the introduction of legislation providing for the mandatory reporting of suspected child abuse by priests, churches and other religious organisations.

Introduction

The global reporting of the Catholic Church sex abuse cases involves multiple series of convictions, trials and investigations into allegations of sex crimes committed by Catholic priests and members of Roman Catholic orders against children as young as 3 years old with the majority between the ages of 11 and 14¹. The cases came to global media attention as early as 2004. Such reports were followed by widespread public outcries when it became clear that members of the clergy had knowingly ‘shuffled’ offenders to remove them from suspecting communities and unwanted media attention².

Cases in the United States, Ireland, England, France, Germany and Australia all share similar circumstances and themes: that of the clergy’s failure to disclose its awareness of abuse and in some cases, actively aiding the offenders evade authorities and detection. In many cases, such assistance allowed the offenders to continue to abuse children in their new localities. This has led to a number of fraud cases where the Church has been accused of misleading victims by deliberately relocating priests accused of abuse instead of removing them from their positions³. In defending their actions, some bishops and psychiatrists contended that the prevailing psychology decades ago suggested that people could be cured of such behavior through counseling⁴.

The Church hierarchy is still criticized for not acting quickly and decisively to remove, defrock or report priests accused of sexual misconduct. In response to such criticism, many bishops assert that the hierarchy was unaware until recent years of the danger in shuffling priests from one parish to another and in concealing the priests' problems from those they served. For example, Cardinal Roger Mahony of the Archdiocese of Los Angeles, said:

‘We have said repeatedly that ... our understanding of this problem and the way it's dealt with today evolved, and that in those years ago, decades ago, people didn't realize how serious this was, and so, rather than pulling people out of ministry directly and fully, they were moved.’⁵

Cases continue to surface throughout the world and follow similar trajectories of denial, outcry and the repetition of accusations of cover-ups and so on.

According to Broken Rites, a support and advocacy group for church-related sex abuse victims, as of 2011 there have been in Australia over one hundred sex abuse cases brought against Catholic priests⁶.

¹ Reports go back as early as 2004 and increased with alarming regularity to the present day. See this report by the *USA Today* newspaper, 19/06/2004 - http://www.usatoday.com/news/religion/2004-06-19-church-abuse_x.htm. One such excerpt is as follows:

“In one case, the Rev. Frank Klep, a convicted child molester who has admitted abusing one boy and is wanted on more charges in Australia, was placed in Apia, Samoa, in the South Pacific. Australia has no extradition treaty with Samoa. Klep told the newspaper that neither he nor the church feels an obligation to tell anyone about his past. Few, if any, locals are aware of his history.”

² Laurie Goodstein, ‘Early Alarm for Church on Abusers in the Clergy’, *The New York Times*, April 2, 2009 at http://www.nytimes.com/2009/04/03/us/03church.html?_r=2&hpw

³ See [Sex abuse victim accuses Catholic church of fraud](#). *USAToday*. June 29, 2010 for an example.

⁴ As above n 2.

⁵ See Tom Robert, ‘Bishops were warned of abusive priests,’ *National Catholic Reporter*, 30/03/2009 – at <http://ncronline.org/news/accountability/bishops-were-warned-abusive-priests>

⁶ The website of Broken Rites is listed here: <http://brokenrites.alphalink.com.au/>

Their website also details current cases before Australian courts. In Victoria alone, a 2012 police report detailed 40 suicide deaths directly related to abuse by Catholic clergy⁷.

Regime of the Occupational Health & Safety Act

One of the objects of the *Occupational Health and Safety Act 2004* (the Act) in section 3(1)(c) is “to ensure that the health and safety of members of the public is not placed at risk by the conduct of undertakings by employers and self-employed persons”. This object is to be understood against the principles of health and safety protection in section 4(1), namely, “the importance of health and safety requires that employees, other persons at work and members of the public be given the highest level of protection against risks to their health and safety that is reasonably practicable in the circumstances”.

Pursuant to section 23(1) of the Act, “An employer must ensure, so far as is reasonably practicable, that persons other than employees of the employer are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer.” A breach of this section is an indictable offence, triable by jury and carrying a maximum penalty of approximately one million dollars. The appendix details the sections of the legislation referred to.

The term “undertaking” is broader than the term “workplace” and refers to the business or enterprise of the employer. The word “conduct” refers to the activity or what is done in the course of carrying on and the business or enterprise. Thus wherever an employer conducts business, the duties under the Act follow the employer⁸.

Application of the Act to the Abuse of Children in Religious Organisations

It is well established at law that the major denominational Churches and other religious organisations can be considered employers in Victoria. As employers, religious organisations, in carrying out their business, have duties to their employees and the public under the Act. In the case of the Catholic Church that business includes the operation of schools, welfare agencies, orphanages and so on. For example, parish priests are the employers of primary school principals. In all other states, the Bishop of the Diocese or a Diocesan education body with delegated authority from the Bishop is the employer in most cases.

It is indeed the case that the Catholic Church has a complex legal structure that involves relationships between different legal entities. However, the identity of employers can be ascertained from an analysis of those legal entities.

⁷ See *The Age's* Nick McKenzie, Richard Baker and Jane Lee, ‘Church’s suicide victims’, 13/04/2012, at <http://www.canberratimes.com.au/victoria/churchs-suicide-victims-20120412-1wwox.html>

⁸ The term ‘undertaking’ is not defined in the Act. In a recent case of *VWA v Horsham City Rural Council* 2008 VSC 404, the Supreme Court in considering the meaning of s23 referred to the case of *Whittaker v Delmina Pty Ltd*[12]. [1998] VSC 175. In that case Justice Hansen said “the expression is broad in its meaning and that such a broad expression has been used deliberately to ensure that the section is effective to impose the duty it states..... Although such a place may, and often will be, a workplace as defined it seems to me that the legislature has chosen not to use that word and, rather, to use an expression of breadth and possibly of wider application.... The word “undertaking” should not be read as synonymous with “workplace”. It is neither helpful nor necessary to do so.... In my view it means the business or enterprise of the employer ... and the word “conduct refers to the activity or what is done in the course of carrying on and the business or enterprise”.

The relationship between a religious organisation and a priest or minister or other holder of religious office may not be that of employer and employee. That relationship may be governed in the case of a priest by canon law and not civil law. However when a priest is involved in carrying out the undertaking of a given employer and that involvement does harm to the public, it does not matter that the priest is not an employee of the employer. For example, where a priest is invited to provide special religious education or religious instruction in a primary school as part of the undertaking of the employer (viz, as part of running the business of the school) the employer is responsible for ensuring under the Act that the priest does not pose any risks to the public in carrying out that education or instruction.

The undertaking or business of a religious organisation involves interaction with the public which includes the parishioners or other followers of the organisation. **In so far as the conduct of the business or undertaking of religious organisations creates risks to the health and safety of the public then religious organisations as employers are responsible under the Act to minimise that risk.** They are required under the Act to either eliminate the risk or minimise the risk insofar as it is practicable to do so.

In the case of the Catholic Church it is clear from the introduction above that it has known for decades the possible risk of abuse posed by some priests to children. It could be said that the sexual offending of individual priests was wholly extraneous to the undertaking of the Church to provide religious education and instruction just as bullying and corruption by individual officers is extraneous to the undertaking of enforcement agencies to provide public safety. However in utilising priests to carry out the said undertaking, the risk of abuse arises from how the Church has chosen to carry out its undertaking. The Act imposes a duty on an employer to either eliminate or minimise known risks that arise from the conduct of its undertaking. **The Catholic Church as an employer (however legally identified) under the Act has an obligation to either eliminate or minimise the known risk of abuse to children that arises from the conduct of its business or undertaking.**

In so far as the Catholic Church can be said to have put a risk management process in place with respect to the abuse of children, the way the Catholic Church minimised risk was to remove the priest from the community where the abuse occurred. It is of course clear that such a method did not minimise the risk but simply relocated the risk and exposed further children to potential harm.

Prosecution

The failure of the Catholic Church to put in place systems to eliminate or minimise risks to children when the risks were known to the Catholic Church means that the Catholic Church is in breach of its duties as Employer under the Act and subject to prosecution under the Act.

It is not a defence to a prosecution for the Catholic Church to claim that the particular priest was acting criminally, on his own and not carrying out the business of the Church. The reason for this is that the Act makes employers responsible for failing to control known risks in their organisation, the known risk being the existence of priests abusing children. It matters not that the Catholic Church did not know or condone the individual cases of unlawful conduct of any given priest. The risk was still known and not acted upon.

Prosecution under the Act may also be directed to individual office holders of the Catholic Church responsible for moving a priest from one community to another. Those office holders, in so moving

subject priests, were carrying out the business of the Catholic Church as an employer. The evidence presently available is that office holders who did move priests did so in the knowledge that children in other communities may be placed at serious risk. The liability of individual office holders is to be found in sections 143 and 144 of the Act, as detailed in the appendix to this paper.

Whilst it is open under present legislation for a religious organisation and or its office holders to be prosecuted for the harm caused to children in Victoria it is important that the entity concerned is properly identified for the purposes of a prosecution. The undertaking of the employer of a given religious organisation may be considered to be restricted to a particular parish or region as opposed to being identified by the name of the religion it practices. The Catholic Church for example has a complex legal structure and it cannot be presumed in a given case that a prosecution brought against 'the Catholic Church' properly identifies the responsible legal entity.

Under the Act, prosecution may be brought only by the Victorian WorkCover Authority (VWA) or the Victorian Director of Public Prosecutions (section 130). Notwithstanding the evidence of abuse by priests and the evidence about spreading the risk to children by the movement of priests, no prosecution has been brought in Victoria against religious organisations or their office holders.

There is provision in section 131 for a person who considers that an offence has been committed against the Act to bring the matter to the attention of the Authority. The Authority is required to investigate the matter. If on investigation the Authority does not prosecute, the person may refer the matter to the DPP pursuant to the same section. The DPP is required to consider the matter and advise the Authority whether or not a prosecution be brought. The DPP is further required to make a report of the requests made and the advice provided. Sections 130 and 131 are found in the appendix to this paper.

We submit that the Victorian WorkCover Authority should actively initiate investigations of those matters and prosecute appropriate cases found in all religious organisations, not restricted to the Catholic Church. It is not the case that the Authority must wait for a notification from a person to trigger an investigation or prosecution. **Further we submit that the Victorian WorkCover Authority should as part of its operating policy, practice and procedure actively engage the community in encouraging and promoting the rights of citizens** preserved by section 131 of the Act.

Utilising the Act to Oversee the Compliance of Religious Organisations

The Act sets out the functions of the Authority under section 7 and provides ample scope for the Authority to initiate and enforce the operational environment in which religious organisations are obliged to conduct their business and comply with the Act. Section 7 is found in the appendix to this paper. The functions under section 7 can provide for (i) the approval of compliance codes which are religious organisation specific, (ii) developing policy and procedure specific to the monitoring of religious organisations, (iii) creating occupational health and safety standards specific to religious organisations, (iv) enforcing compliance with such standards, (v) engaging with relevant stakeholders including religious organisations for the development of codes and standards specific to religious organisations, (vi) create a communication and information pathway such that the Victorian community are aware of those codes and standards.

We submit that the VWA immediately adopt those functions as a policy priority. Whilst the Office of Public Prosecutions can prosecute a given case of abuse, the OPP has no legislative power to create a compliance regime in which religious organisations must conduct their business for the safety of our children. The VWA does have that power.

Mandatory Reporting

We support the recommendation of extending the mandatory reporting of abuse under the *Victorian Children Youth and Families Act 2005* to religious personnel. We support the call recently made by Katherine McMillan SC, now her Honour Justice McMillan, before the present Queensland enquiry into child abuse to extend the mandatory reporting of suspected child abuse to include priests, churches and other religious organisations. We understand the Catholic Archbishop of Brisbane Mark Coleridge agrees with this.

Recommendations

1. That the Victorian WorkCover Authority actively initiates investigations and prosecutes appropriate cases against religious organisations and their officers.
2. That the Victorian WorkCover Authority as part of its operating policy, practice and procedure actively engage the community in encouraging and promoting the rights of citizens preserved by section 131 of the Act.
3. That the Victorian WorkCover Authority immediately adopt the functions in section 7 to create an occupational health and safety compliance regime for religious organisations.
4. That mandatory reporting be extended to religious personnel.

Excerpts from *Occupational Health and Safety Act 2004*

Section 2: Objects

- (1) The objects of this Act are —
 - (a) to secure the health, safety and welfare of employees and other persons at work; and
 - (b) to eliminate, at the source, risks to the health, safety or welfare of employees and other persons at work; and
 - (c) to ensure that the health and safety of members of the public is not placed at risk by the conduct of undertakings by employers and self-employed persons; and
 - (d) to provide for the involvement of employees, employers, and organisations representing those persons, in the formulation and implementation of health, safety and welfare standards—

having regard to the principles of health and safety protection set out in section 4.

- (2) It is the intention of the Parliament that in the administration of this Act regard should be had to the principles of health and safety protection set out in section 4.

Section 4: The principles of health and safety protection

- (1) The importance of health and safety requires that employees, other persons at work and members of the public be given the highest level of protection against risks to their health and safety that is reasonably practicable in the circumstances.
- (2) Persons who control or manage matters that give rise or may give rise to risks to health or safety are responsible for eliminating or reducing those risks so far as is reasonably practicable.
- (3) Employers and self-employed persons should be proactive, and take all reasonably practicable measures, to ensure health and safety at workplaces and in the conduct of undertakings.
- (4) Employers and employees should exchange information and ideas about risks to health and safety and measures that can be taken to eliminate or reduce those risks.
- (5) Employees are entitled, and should be encouraged, to be represented in relation to health and safety issues.

Section 5: Definitions

workplace : means a place, whether or not in a building or structure, where employees or self-employed persons work

employer: means a person who employs one or more other persons under contracts of employment or contracts of training

Section 20: The concept of ensuring health and safety

(1) To avoid doubt, a duty imposed on a person by this Part or the regulations to ensure, so far as is reasonably practicable, health and safety requires the person—

- (a) to eliminate risks to health and safety so far as is reasonably practicable; and
- (b) if it is not reasonably practicable to eliminate risks to health and safety, to reduce those risks so far as is reasonably practicable.

(2) To avoid doubt, for the purposes of this Part and the regulations, regard must be had to the following matters in determining what is (or was at a particular time) reasonably practicable in relation to ensuring health and safety—

- (a) the likelihood of the hazard or risk concerned eventuating;
- (b) the degree of harm that would result if the hazard or risk eventuated;
- (c) what the person concerned knows, or ought reasonably to know, about the hazard or risk and any ways of eliminating or reducing the hazard or risk;
- (d) the availability and suitability of ways to eliminate or reduce the hazard or risk;

Section 23: Duties of employers to other persons

(1) An employer must ensure, so far as is reasonably practicable, that persons other than employees of the employer are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer.

Penalty: 1800 penalty units for a natural person; 9000 penalty units for a body corporate.

(2) An offence against subsection (1) is an indictable offence.

PART 11 – LEGAL PROCEEDINGS

Division 4—Offences by bodies corporate

Section 143: Imputing conduct to bodies corporate

For the purposes of this Act and the regulations, any conduct engaged in on behalf of a body corporate by an employee, agent or officer (within the meaning given by section 9 of the Corporations Act) of the body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, is conduct also engaged in by the body corporate.

Section 144: Liability of officers of bodies corporate

(1) If a body corporate (including a body corporate representing the Crown) contravenes a provision of this Act or the regulations and the contravention is attributable to an officer of the body corporate failing to take reasonable care, the officer is guilty of an offence and liable to a fine not exceeding the maximum fine for an offence constituted by a contravention by a natural person of the provision contravened by the body corporate.

(2) An offence against subsection (1) is summary or indictable in nature according to whether the offence constituted by the contravention by the body corporate is summary or indictable.

(3) In determining whether an officer of a body corporate is guilty of an offence, regard must be had to—

- (a) what the officer knew about the matter concerned; and
- (b) the extent of the officer's ability to make, or participate in the making of, decisions that affect the body corporate in relation to the matter concerned; and
- (c) whether the contravention by the body corporate is also attributable to an act or omission of any other person; and
- (d) any other relevant matter.

(4) An officer of a body corporate may be convicted or found guilty of an offence in accordance with subsection (1) whether or not the body corporate has been convicted or found guilty of the offence committed by it.

(5) An officer of a body corporate (including a body corporate representing the Crown) who is a volunteer is not liable to be prosecuted under this section for anything done or not done by him or her as a volunteer.

Section 130: Proceedings may be brought by the Authority or inspectors

(1) Proceedings for an offence against this Act may be brought only by—

- (a) the Authority; or
- (b) an inspector with the written authorisation of the Authority (either generally or in a particular case).

- (2) An authorisation under subsection (1)(b) is sufficient authority to continue proceedings in any case where the court amends the charge-sheet, warrant or summons.
- (3) An inspector who brings proceedings may conduct the proceedings before the court.
- (4) The Authority must issue, and publish in the Government Gazette, general guidelines for or with respect to the prosecution of offences under this Act.
- (5) Nothing in this section affects the ability of the Director of Public Prosecutions to bring proceedings for an indictable offence against this Act.

Section 131: Procedure if prosecution is not brought

- (1) If—
 - (a) a person considers that the occurrence of an act, matter or thing constitutes an offence against this Act; and
 - (b) no prosecution has been brought in respect of the occurrence of the act, matter or thing within 6 months of that occurrence—

the person may request in writing that the Authority bring a prosecution.

- (2) Within 3 months after the Authority receives a request it must—
 - (a) investigate the matter; and
 - (b) following the investigation, advise (in writing) the person whether a prosecution has been or will be brought or give reasons why a prosecution will not be brought.
- (3) If the Authority advises the person that a prosecution will not be brought, the Authority must refer the matter to the Director of Public Prosecutions if the person requests (in writing) that the Authority do so.
- (4) The Director of Public Prosecutions must consider the matter and advise (in writing) the Authority whether or not the Director considers that a prosecution should be brought.
- (5) The Authority must ensure a copy of the advice is sent to the person who made the request and, if the Authority declines to follow advice from the Director of Public Prosecutions to bring proceedings, the Authority must give the person written reasons for its decision.
- (6) The Authority must include in its annual report, and publish on its website, a statement setting out—
 - (a) the number of requests received by the Authority under subsection (1); and
 - (b) the number of cases in which the Authority has advised under subsection (2)(b) that a prosecution has been or will be brought, or will not be brought; and
 - (c) the number of cases in which the Director of Public Prosecutions has advised under subsection (4) that a prosecution should be brought or should not be brought.

Section 7: Functions of the Authority

- (1) The Authority has the following functions—
- (a) to enquire into and report to the Minister on any matters referred to the Authority by the Minister (within the time specified by the Minister);
 - (b) to make recommendations to the Minister with respect to—
 - (i) the operation and administration of this Act and the regulations; and
 - (ii) regulations or compliance codes that the Minister or the Authority proposes should be made or approved under this Act; and
 - (iii) the establishment of public inquiries (if appropriate) into any matter relating to occupational health, safety and welfare;
 - (c) to monitor and enforce compliance with this Act and the regulations;
 - (d) to administer, examine, review and make recommendations concerning existing or proposed registration or licensing schemes relating to occupational health, safety and welfare;
 - (e) to co-operate with, and give advice and information to the following persons in relation to occupational health, safety and welfare—
 - (i) corresponding Authorities;
 - (ii) registered employee organisations (within the meaning of Part 8) and other organisations representing employers or employees;
 - (iii) other interested persons;
 - (f) to disseminate information about the duties, obligations and rights of persons under this Act or the regulations and to formulate standards, specifications or other forms of guidance for the purpose of assisting persons to comply with their duties and obligations;
 - (g) to promote education and training by—
 - (i) devising, in co-operation with educational and other bodies, courses in occupational health, safety and welfare; and
 - (ii) approving courses in occupational health, safety and welfare (whether or not devised in co-operation with another body); and
 - (iii) facilitating access to those courses; and
 - (iv) initiating or promoting events such as conferences and forums, and the publication of information, relating to occupational health, safety and welfare;
 - (h) to foster a co-operative, consultative relationship between employers and their employees in relation to the health, safety and welfare of those employees;
 - (i) to engage in, promote and co-ordinate the sharing of information to achieve the objects of this Act;