



# Historical Sexual Abuse Claims

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# Corney & Lind Lawyers

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# TODAY'S PRESENTATION

- The National Redress Scheme
- An update on civil litigation (historical child abuse claims):
  - Stay Applications;
  - Secondary Liability (nervous shock) claims;
  - The expansion of vicarious liability
- 'Claims Farming' legislation



# The Royal Commission into Institutional Responses to Child Sexual Abuse

*“Tens of thousands of children have been sexually abused in many Australian institutions. We will never know the true number. Whatever the number, it is a national tragedy, perpetrated over generations within many of our most trusted institutions.”*

*The sexual abuse of children has occurred in almost every type of institution where children reside or attend for educational, recreational, sporting, religious or cultural activities. Some institutions have had multiple abusers who sexually abused multiple children. It is not a case of a few ‘rotten apples’. Society’s major institutions have seriously failed. In many cases those failings have been exacerbated by a manifestly inadequate response to the abused person. The problems have been so widespread, and the nature of the abuse so heinous, that it is difficult to comprehend.”*

Final Report, The Royal Commission into Institutional Responses to Child Sexual Abuse

# National Redress Scheme

- The *National Redress Scheme for Institutional Child Sexual Abuse Act 2017* – came into effect 1 July 2018 and is operational for a period of 10 years
- It allows for three elements of re-dress to eligible survivors:
  - monetary payment of **up to \$150,000**
  - access to counselling and psychological services
  - facilitation of a direct personal response
- The objectives of the scheme are to: recognise the wrong; alleviate the impact and provide justice for survivors;
- It relates to sexual abuse and any related non-sexual abuse
- The institution must have “*opted in*” to the scheme

# National Redress Scheme

## The Scheme acts as an alternative to civil litigation

- The Key differences
  - The standard of proof: ***balance of probabilities*** vs ***reasonable likelihood*** (contrast: beyond reasonable doubt);
  - The standard for liability: ***common law*** vs ***primarily/equally responsible***
  - The compensation: ***Compensatory Damages*** (including economic loss) vs ***redress payment***
  - Accessibility (e.g. legal costs implications)
- A discharge and release from civil liability (if offer is accepted)

# National Redress Scheme



## Institutions that fail to join

- From 1 January 2021 – Named institutions have 6 months from first engagement to join the Scheme
- If fail to join:
  - Named on the Redress Scheme Website
  - Can become ineligible for government funding
  - Can Risk losing charitable endorsements
- ACNC Governance Standard 6
- A charity must take reasonable steps to join the Redress Scheme if the charity is, or is likely to be, identified as being involved in the abuse of a person either: in an application for redress, or in information given in response to a request from the National Redress Scheme Operator.

# National Redress Scheme

## The Status of the Applications (as at 28 April 2023)

- **25,546** applications to the Scheme
- **12,007** finalised (determined as either eligible or ineligible, with offers of Redress either accepted or declined)
- **11,466** payments totalling \$1.014 billion dollars (average ~ \$88,435.37)
- 837 withdrawn by the applicant
- **12,702** remain on hand with the Scheme, of which
  - 735 are with applicants, awaiting a decision on offer;
  - 999 are with institutions, awaiting a response to a Request For Information;
  - 2,922 are on hold (for reasons such as the request of the applicant; whether further information has been requested from the applicant; difficulties contacting the applicant)
  - 8,046 are in progress of the Scheme, of which
    - 5,272 are being actioned;
    - 2,774 are temporarily unable to be actioned (e.g. awaiting extra information or contact)



# National Redress Scheme

## Final Response of the Second Year Review

- Final report of the second year review of the National Redress Scheme – 23 June 2021
- The Australian Government released the final response of the Second Year Review of the National Redress Scheme – 4 May 2023
- The “*additional improvements*” reflected in the Final Response include:
  - Offering reassessment of an application if a relevant institution subsequently joins the scheme;
  - Removing the restrictions on people applying from prison;
  - Making changes to the process related to serious criminal convictions to reduce the number of people required to go through the full special assessment process;
  - Changing the internal review process to allow additional information to be provided by applicants
  - Further expanding access to redress for former child migrants
  - Removal of requirement for applicants to provide a statutory declaration

# Commercial Litigation



- Stay Applications
  - *GLJ v the Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32;
- Secondary Liability
  - *RWQ v the Catholic Archdiocese of Melbourne & Ors* [2022] VSC 483;
- Vicarious Liability
  - *Bird v DP (a pseudonym)* [2023] VSCA 66.



# ***GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore [2023] HCA 32***

## Background

- *Royal Commission into Institutional Responses to Child Sexual Abuse 2016*
- Removal of the limitation period for child abuse
- The new legislation “*does not limit a court’s power to summarily dismiss or permanently stay proceedings where the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible*”

# *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore [2023] HCA 32*



*“... Parliament [has] ensured that no claim for damages for death or personal injury resulting from child abuse can be characterised as "historical". Just as there is no "historical murder" while a person is alive to mourn the victim, there is no "historical child sexual abuse" while there is someone alive claiming to have suffered harm from the abuse.*

## *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore [2023] HCA 32*

- Plaintiff alleged abuse in 1968 by Father Clarence Anderson, a Priest of the Roman Catholic Church in the Diocese of Lismore, between 1963 and 1970
- Father Anderson died in 1996 (prior to the Church becoming aware of the allegations in 2019)
- The Diocese sought orders for a permanent stay or dismissal of proceedings on the following grounds:
  - Neither Father Anderson nor the Diocese had notice of the allegations prior to Father Anderson's death in 1996 (significant disadvantage due to passage of time);
  - Father Anderson and any other members of Clergy had since passed away and would not be able to call witnesses (not able to receive a fair trial);
- The NSW Supreme Court refused the application; the NSW Court of Appeal allowed the Stay; the **High Court of Appeal refused the stay**

# ***GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore [2023] HCA 32***

- The proceedings were not an abuse of process, the majority held:
  - It was immaterial that 55 years had passed since the alleged assault (inability to call Father Anderson did not mean it was manifestly unfair);
  - *“for a trial to be fair it need not be perfect or ideal”*
  - A considerable body of documentary evidence available. The Diocese was not *“utterly in the dark”* about whether Father Anderson sexually assaulted GLF;
    - GLJ’s family were of Catholic faith and attended mass every Sunday;
    - In 1968, Father Anderson was the priest assigned to GLJ’s family to support them after an accident involving GLJ’s father (he regularly visited the home);
    - The alleged assaults occurred in the home when home alone;
    - Four other men gave witness statements (unsworn) claiming they were sexually abused by Father Anderson;
    - Historical documents showed that other members of the clergy were aware of other sexual abuse allegations against Father Anderson



## ***GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore [2023] HCA 32***

- Whether a proceeding is so unfair as to prejudice a fair trial will turn on the facts and merits of each case
- The onus remains on institutions to establish that it will prejudice a fair trial | a high bar to overcome
- Mere unavailability of pressure insufficient in and of itself
- The substantive matter remains unresolved – evidentiary issues to be dealt with at trial

# *RWQ v The Catholic Archdiocese of Melbourne & Ors*

## [2022] VSC 483

- The Plaintiff “RWQ” sought to claim damages against the Catholic Archdiocese of Melbourne for Nervous shock which he alleged arose from the abuse of his son
- The Plaintiff Alleged:
  - His son (“AAA”) and a friend (“BBB”) were abused by the second defendant during his tenure as the Archbishop of Melbourne in or around 1996;
  - As a result of the abuse, AAA commenced using illicit drugs at the age of 14 and used drugs consistently until his death from an overdose in 2014;
  - He was informed of the abuse of AAA by a member of the SANO Task Force of Victoria Policy on 1 July 2015; and
  - As a result of learning about the abuse, he suffered nervous shock (a recognised psychiatric illness)
- RWQ sought to make a claim at common law



# *RWQ v The Catholic Archdiocese of Melbourne & Ors*

## [2022] VSC 483

- The Catholic Diocese sought to argue that they could not be a defendant to the claim because (they asserted) the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* did not apply
- The key question was whether it was a claim which was “*founded on or arising out of child abuse*”
- The findings of the case open the door to many further claims made by the families of abuse victims who have suffered vicarious or secondary trauma as a result of that abuse.
- The determination was one of statutory interpretation – ordinarily findings of liability in other contexts are rare and have applied to small groups of individuals who can demonstrate proximity to the “*relevant event*” (i.e. the act of negligence), not simply proximity to the consequences of negligence.
- Upheld unanimously on appeal: *RWQ v The Catholic Archdiocese of Melbourne & Ors* [2023] VSCA 197.
- Special Leave to Appeal to the High Court was **refused**.

## *Bird v DP (a pseudonym)* [2023] VSCA 66

- DP was raised in a devout Catholic home in Port Fairy, Victoria. In the late 1960s, Father Brian Coffey was the local parish Assistant Priest.
- Coffey would visit DP's family home to provide pastoral care, and would sit with DP in his bedroom (alone) to talk.
- Coffey was alleged to have abused DP on two occasions – firstly at the wake of his grandmother's funeral, and secondly at DP's family home on Boxing Day.
- In 2020, DP commenced proceedings against the Ballarat Diocese through Bishop Paul Bird seeking damages for psychiatric injuries sustained as a result of the above.
- In the first instance, the Supreme Court held that on a balance of probabilities, DP was abused by Coffey in the manner he alleged, the Diocese was vicariously liable for Coffey's conduct, and that DP be awarded \$230,000.00 in damages.
- Bp. Bird appealed the original decision.



## *Bird v DP (a pseudonym)* [2023] VSCA 66

- Grounds for appeal – in circumstances where Coffey was not an employee of the Diocese, the trial Judge should not have found Bird vicariously liable for Coffey’s conduct.
- On appeal, Court held that Coffey’s role as Assistant Priest was “akin to employment”:
  - he was unable to delegate or subcontract his work;
  - his appointment to the local parish was always at the direction of the Bishop;
  - his work was representative of the Diocese; and
  - he conducted his role as assistant priest; and the work he performed in undertaking that role was in a manner that was very interconnected with the function and work of the Diocese.
- Coffey was an “emanation of the Diocese’ – therefore, vicarious liability could exist in the absence of an employer/employee relationship.

# Claims Farming

## What is it?

- A person (the claim farmer) approaches an individual (the potential claimant) and pressures or harasses them into making a compensation claim
- Tactics include cold calling, offering assistance to make a claim, or implying they act on behalf of a government agency or insurer
- The potential claim's personal information is sold to a law practice or claims management service, who handle the claim.
- The fees are substantial and often end up being passed onto the potential claimant

# Claims Farming

## Am I a victim of claim farming?

- You are not a victim if you approached a lawyer of your choice to represent you following an injury. If someone has approached you and convinced you to make a claim for personal injury, you may have been claim farmed.
- The new laws are aimed at preventing claim farmers from profiting by selling your information or claim. You can still make a claim yourself, or through a lawyer of your choice or an insurance provider.

## How can I avoid claims farmers?

- Be wary of cold callers – ask them where they are calling from and why they have called.
- Record their details so that you can then search for their name, organisation and phone number. You may also want to record their details in case you want to make a report.
- Hang up if you receive an unsolicited call.
- Providing personal information can put you at risk.

## How do I report it?

- For Workers Compensation claims → the Workers Compensation Regulatory Services (under the Office of Industrial Relations)
- For Motor Accident Claims → The Motor Accident Insurance Commission
- For Public Liability (PIPA) Claims → The Legal Services Commission

# QUESTIONS?



## Next Webinar

Monday

**8<sup>th</sup> of April** 12:30pm

### Religious freedom, employment and church entities

[https://us02web.zoom.us/webinar/register/WN\\_f\\_HXr-pSSE6tn\\_8W02uBQ#/registration](https://us02web.zoom.us/webinar/register/WN_f_HXr-pSSE6tn_8W02uBQ#/registration)



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