



**Submissions in Response
to Submissions of
Counsel Assisting –
Case Study 8**

from

the Truth Justice and Healing Council

Royal Commission into Institutional Responses to Child Sexual Abuse

**Case Study No. 8 Response of the Catholic Church to the complaint
made by John Ellis under *Towards Healing***

13 August 2014

Case Study 8 – Submissions in Response

- 1 These submissions are made on behalf of the Truth Justice and Healing Council (the **Council**), the Catholic Archdiocese of Sydney (the **Archdiocese**), the Professional Standards Office of NSW/ACT (the **PSO**), Catholic Church Insurance Limited (**CCI**) and the National Committee for Professional Standards (together, the **Church parties**), who each were granted leave to appear at Case Study 8.
- 2 The submissions respond to the Submissions of Counsel Assisting (**CA**) in Case Study 8, dated 10 June 2014 (the **Submissions**).
- 3 This case study is relevant to Issues Papers 2, 5 and 6 released by the Royal Commission which relate to *Towards Healing*, civil litigation and redress schemes, respectively. CA has indicated that the issues of civil litigation and redress schemes will be the subject of further examination by the Royal Commission (at paragraphs [196], [268], [588] - [589] of the Submissions).
- 4 The Church parties accordingly do not in these submissions address the whole subject matter of Issues Papers 2, 5 and 6.
- 5 In this submission, the Church parties make reference to the following formal submissions to the Royal Commission made on behalf of the Church parties, namely:
 - (a) Ex 8.3 at Tab A, being the written submissions by the Council (149 pages plus annexures) lodged on 30 September 2013 (TJHC September 2013 Submission)
 - (b) the opening address by Mr Gray SC on 9 December 2013, in the hearing of Case Study 4 (Opening)¹
 - (c) the written submissions by the Council in relation to Issues Paper 5, Civil Litigation, lodged on 15 April 2014, and
 - (d) the written submissions by the Council in relation to Issues Paper 6, Redress Schemes. lodged on 12 August 2014.

Peter Gray SC
 Blackstone Chambers

Tiffany Wong
 Banco Chambers

13 August 2014

¹ T2490:7-T2504:23

Part A – General Observations

1 Reflections on the Hearing

- 1 The courage and fortitude of Mr John Ellis was evident to all who attended the hearing in Sydney. The Church parties support Mr Ellis, and any others who wish to tell their story to the Commission, whole-heartedly.
- 2 The Church parties acknowledge that they substantially failed, in many significant respects, to discharge their moral and pastoral responsibilities to Mr Ellis during the *Towards Healing* process as it was applied in the time prior to the litigation. They also acknowledge that the approach of the Archdiocese during the subsequent litigation caused further distress and hurt to Mr Ellis. The Church parties have on a number of occasions expressed their regret and remorse for these failures, and have apologised to Mr Ellis unreservedly for the suffering, hurt and stress caused to him and his family. They do so again now. Cardinal Pell repeated and reiterated his apology and regret to Mr Ellis at the end of his evidence. Since the conclusion of the litigation, the Archdiocese has provided Mr Ellis with both pastoral support and substantial financial support in a way which, it is respectfully submitted, is consistent with both the moral obligation that the Archdiocese acknowledges that it owes to Mr Ellis and the underlying principles of *Towards Healing*.
- 3 The rationale for the introduction of *Towards Healing* was, in part, the Church's awareness of the disadvantages, for at least some victims, of the civil litigation system. Those disadvantages have been addressed in the TJHC September 2013 Submission, and are also referred to briefly in these submissions at Part C, section 10.1. They include the public, adversarial, impersonal and usually lengthy nature of civil proceedings, as well as legal difficulties associated with such issues as proving the facts in question, causation and limitation periods among others.
- 4 *Towards Healing* is intended to provide, to those victims who choose to use it, a process which does not have those disadvantages, and which by contrast offers support to victims, including financial support, within a relatively short time frame, in a pastoral, personal context.
- 5 In Mr Ellis' case, as the Church parties frankly acknowledge, the Church parties failed in numerous ways to implement *Towards Healing* as it should have been implemented.
- 6 The evidence before the Royal Commission establishes, however, that the way in which the Archdiocese now implements *Towards Healing* ensures that the experience of a victim who uses the process is very different from that of Mr Ellis. Current Archdiocesan practice is to ask victims how the Archdiocese can assist them and then to provide assistance (including financial assistance) where appropriate. Often there are a number of requests by victims over time, and the Archdiocese's practice is to consider such requests as and when received rather than "settling" matters on a full and final basis. In particular, the pastoral door is always open to victims. The Archdiocese no longer requires deeds of release in *Towards Healing* matters.

- 7 The current practice of the Archdiocese in relation to *Towards Healing* is summarised in paragraphs 21 - 33 of the statement of Mgr John Usher, Chancellor since 2005, to which the Commission is respectfully referred.² Msgr Usher also gave oral evidence to similar effect.³
- 8 The Church parties believe, and submit, that the pastoral dimension is vital in its response to allegations of child sexual abuse, and in meeting the moral obligation the Church has to victims. Moreover, the disadvantages of the civil litigation system, for victims of such abuse, are real, and some victims are not prepared to use that system. The introduction of a uniform national redress scheme, should that occur, in parallel to the availability of the civil litigation process, would be likely to be of assistance to many victims.
- 9 *Towards Healing* having failed Mr Ellis, in the ways acknowledged in these submissions, he chose to commence civil proceedings. In that litigation, as with any litigation in our Australian system, the parties were bound by, among other things, the laws of the land, the rules of Court, and the professional and ethical obligations that parties and their lawyers owe to the Court and to each other. And where a Church body is sued in the civil courts, it is entitled, as is any other Australian citizen or group, to defend itself based on the law. Within that framework, our legal system delivers justice, fairly and impartially, according to law.
- 10 That is what took place, in legal terms, in the Ellis litigation. The proceedings were subject to the rules and requirements of our court system, they were conducted by skilled lawyers on both sides, and they were presided over by judges of the Supreme Court. In all these ways, the litigation was orthodox and unremarkable. In that sense, and at that level, the litigation was fair.
- 11 The Court found in favour of the contentions advanced by the Archdiocese, and rejected those advanced on behalf of Mr Ellis. The legal result (in the unanimous judgment of three members of the Court of Appeal, from which the High Court refused special leave to appeal) was clear.
- 12 Moreover, that clear legal result would have been no different even if the Archdiocese had not taken any of the steps which CA criticises in her proposed finding 8.
- 13 CA appears to suggest that the Archdiocese should have conformed, or should conform, to the Model Litigant Rules applicable to (but not binding on) government bodies. For reasons outlined later in these submissions, the Church parties do not agree. However, the Church parties do accept, indeed they positively submit, that Church bodies sued in litigation of this kind should strive to do more than merely to comply with the proper requirements of the civil law as summarised in paragraph 9 above.
- 14 That higher approach is such that Church litigants should, in addition, strive at all times to have regard to, and concern for, the impact on the other party, i.e. the victim, of any steps which might be taken, however proper or legally orthodox, in the course of defending the claim brought by the victim. In other words, Church defendants should, as far as it is possible to do so in the inherently and unavoidably adversarial arena of civil litigation, strive to adhere to the value of compassion for the individual.

² Ex 8-13 at paragraphs [21] to [33]

³ T6217:9-T6218:2; T6379:14-T6380:16

- 15 It is with that in mind that the Church parties have proposed, in these submissions, alternative finding 8, outlined at paragraph [547] below. The criticism to which the Archdiocese is open, with respect, is not that it failed to conduct the litigation “fairly” - both because its conduct and that of its lawyers did not fail to comply with any law or rule, and because there is no yardstick by which such “fairness” is otherwise to be measured - but that it failed to conduct the litigation in a manner that adequately took account of Mr Ellis’ pastoral and other needs as a victim of sexual abuse.
- 16 As with *Towards Healing*, the Archdiocese now approaches litigation, in cases of this kind, very differently from the way it approached the Ellis litigation: see Part C, sections 10.2 and 10.3.
- 17 The Church parties welcome this case study, and the opportunity to revisit and reconsider the ways in which Mr Ellis was treated, both initially under *Towards Healing* and subsequently in the litigation. The Church parties are committed to continuing to learn from their errors and to develop and improve their processes. The response to Mr Ellis after the litigation reflects that commitment.

2 Findings Against Individuals Generally

- 18 The Church parties note that the Submissions propose some adverse findings against individuals that have the potential to cause reputational damage to those individuals. In those circumstances, those individuals have a right to natural justice.⁴
- 19 Any adverse finding in relation to an individual should only be proposed, or made, if the relevant assertion or allegation or proposition has been put to that individual directly and fully so as to afford the individual a genuine opportunity to answer the thrust of the relevant assertion or suggested finding.
- 20 In some instances, as will appear in these submissions, CA has proposed an adverse finding or findings in relation to an individual although no such opportunity was given to the witness. Where this is the case, the Church parties submit that it is not open to the Commission to make such findings, and no adverse finding should be made against those individuals.
- 21 An adverse finding from a Royal Commission against any person is a serious outcome. It is respectfully submitted that such a serious outcome is not warranted for every point of departure from the *Towards Healing* protocol. The Commission’s terms of reference focus on systemic issues at an institutional level.⁵ In the respectful submission of the Church parties, the Commission’s findings (and particularly adverse findings) should only be directed to individuals where there is direct and uncontroverted evidence that it was the individual’s actions, as opposed to the processes adopted by the institution, that caused the outcome that is the subject of the finding, and such findings are truly necessary to achieve the Commission’s objectives. It is submitted that substantially the actions taken in Mr Ellis’ case would be found to be the actions of the Archdiocese, or where it also involves the PSO, the Church parties as a whole, rather than the actions of particular individuals.

⁴ *Annetts v McCann* (1990) 170 CLR 596

⁵ See for example (f) and (g) of the Letters Patent.

-
- 22 In addition, as outlined below, where the Royal Commission considers that conclusions are appropriate as to failures of process, they should in our submission be framed as findings which relate to the institutions involved rather than to the individuals. Especially where matters of general principle or practice are involved, which would affect the process in the future, it is suggested that the Commission might make a recommendation as to the practice it believes should be adopted, rather than a finding against someone who has followed, in good faith, a practice which the Commission may consider is not appropriate.
- 23 One consequence of the manner in which the Submissions have been presented is that the Church parties are obliged to decline to accept the appropriateness of some of the proposed findings as they have been framed, even though the Church parties in many instances accept that the factual substratum of those proposed findings is accurate.

Part B – *Towards Healing*

3 Introduction

3.1 The Nature of the *Towards Healing* Process

- 24 *Towards Healing* offers a person who has been abused, by a priest or religious or other Church personnel, the opportunity to tell his or her story, personally and directly, to someone in authority within the Church, who is able to accept responsibility for what happened to him or her, acknowledge the damage he or she has suffered, give a sincere apology, and offer pastoral care and reparation.⁶
- 25 The offering and provision of pastoral care to victims is at the heart of *Towards Healing*. Pastoral care is the spiritual care of a person or of a body of people such as a parish or a diocese.⁷

3.2 Not a Compensation Scheme

- 26 Importantly, *Towards Healing* is not, and was never intended to be, a scheme for providing “compensation” to victims. Rather, its principal aim was and is to provide pastoral care in the form of “whatever assistance is appropriate”.⁸ In most cases, however, a contribution of some financial assistance, as a form of reparation, is made.⁹
- 27 Since December 2000, the *Towards Healing* protocol has stated that the Church Authority shall “respond to the needs of the victim in such ways as are demanded by justice and compassion”. This is not an exhortation to the Church Authority to meet each and every request made by a victim for financial assistance.
- 28 Rather, *Towards Healing* gives each Church Authority a wide latitude to arrive at an appropriate response, including the amount of reparation paid to a victim, guided first and foremost by the victim’s needs, but also by any other factors that can properly be taken into account as “demanded by justice and compassion”. These factors may include the extent to which the crime contributed to the victim’s financial hardship, the comparability of the proposed reparation payment with amounts paid to other victims of similar crimes and the capacity of the particular Church Authority to make such a payment.
- 29 The levels of such financial payments vary considerably from case to case, from Church Authority to Church Authority, and have changed considerably over time. At the time Mr Ellis made his complaint under *Towards Healing* (2003-2004), reparation payments typically considered to be appropriate by Church Authorities were at levels that now seem low. In more recent times such

⁶ Ex 8-3 at Tab A, section 1, paragraph [1], page 11; Opening T2495:1–10

⁷ Ex 8-3 at Tab A, section 1, paragraph [2], page 11

⁸ Towards Healing 2000 Ex 8-3 at Tab E, paragraph 18

⁹ Ex 8-3 at Tab A, section 1, paragraph [52], page 19, and section 7; Opening T2496:37–2497:20

payments have been considerably higher.¹⁰ Evidence given in the hearing also confirmed that there is no set formula or template for determining reparation amounts.¹¹

- 30 Towards Healing does not set out, and has never set out, to match or replicate the levels of damages which a court might award to a successful plaintiff in a common law action. Financial assistance, where paid under *Towards Healing*, is not and has never been calculated by reference to the extent of the harm, as common law damages are.
- 31 Hence, it is respectfully submitted, *Towards Healing* payments will almost invariably be lower than what a court might award to a successful plaintiff at the end of contested proceedings. The objectives and conceptual framework of *Towards Healing* on the one hand, and civil litigation on the other hand, are very different.
- 32 That is one reason why the Council has called for the establishment of an independent body under government auspices, funded by all relevant institutions including Church and religious bodies of all denominations, to deal with financial awards to victims who choose not to sue at common law.¹² In that way, consideration of the financial amount would be removed from *Towards Healing*, which would be left to focus on what has always been its central purpose, namely reaching out to victims in a pastoral way. The inherent tension in *Towards Healing*, between that pastoral approach on the one hand, and the reality of financial considerations on the other hand, would thereby be substantially lessened if not eliminated.

3.3 The Nature of the *Towards Healing* Protocol

- 33 While the *Towards Healing* protocol is a public statement of the Church's position, setting out how the Church will approach complaints where a victim chooses to use the *Towards Healing* process,¹³ the protocol is not a statute. Its terms and its principles, it is respectfully submitted, are not to be construed as though they comprise a legislative instrument or a commercial contract.
- 34 Rather, a more flexible and adaptable approach is called for. This is a process which is attempting to help victims of child sexual abuse. The subject matter, especially for the victim, is painful and personal and complicated. Sometimes the decent, kind, empathetic thing to do might be to adopt an approach not necessarily covered or envisaged in the protocol. If so, it may well be that that is what should be done. An example in this case study, it is submitted, is the proposed attendance of Mr Michael Salmon at the facilitation (as to which see 79, 146 and 147 below).

3.4 Justice and Compassion

- 35 Each successive iteration of the *Towards Healing* protocol has referred to the overriding priority of ensuring that victims are treated by the Church with justice and compassion. For example, in the

¹⁰ T6427:16–18; T6451:41 – T6452:7; T6467:43–45; T6486: 2–14

¹¹ T5615:18–38; T5616:44–T5617:4; T6217:9–20

¹² Submission from the TJHC Issues Paper 6: Redress Schemes page 32

¹³ Ex 8-3 at Tab A, section 1, paragraph [5], page 11

original 1996 document¹⁴, see Part One, clauses 15 and 17; in the (2000) edition¹⁵ and current (2010) edition,¹⁶ see clauses 17, 19 and 41.1.

- 36 The concepts of both “justice” and “compassion” are undoubtedly central to the whole philosophical approach underpinning *Towards Healing*. If a Church Authority or a PSO deals with a victim in a way or ways that are truly unjust, or truly not compassionate, that Church Authority or PSO would no doubt deserve criticism.
- 37 The suffering of victims of sexual abuse most certainly deserves a response that is informed by both justice and compassion. Indeed such suffering cries out for just such a response. *Towards Healing* undoubtedly requires it. Where it has not been forthcoming, the Church parties would join with the Royal Commission in criticising its absence. But each of these two concepts is rich in meaning and complexity, in nobility and humanity. If the Church parties, and in particular individuals, are to be saddled with heavy findings of a Royal Commission to the effect that they have not met such standards, then fairness and justice also demand that they be given a chance to be told what exactly is the presumed standard that they are alleged to have failed to meet. That has not occurred.

3.4.1 Compassion

- 38 A purpose of *Towards Healing* is to provide a framework for a compassionate response to a victim. That response is provided by individuals who are empowered to act on behalf of the Church Authority (in particular, the Archbishop as the Church Authority and the Chancellor as the Archbishop’s delegate) and those individuals interact with the victim to provide the pastoral support and other assistance that *Towards Healing* promises victims.
- 39 In this case study, Mr Ellis himself said that some elements of the Archdiocese’s response to Mr Ellis were compassionate and kind.¹⁷ On the other hand, there were concessions by various Church witnesses, including Cardinal Pell, that some aspects of the Archdiocese’s response to Mr Ellis were not compassionate. The Church parties submit that the Royal Commission would not adopt an approach that singles out particular actions as being compassionate or not compassionate, and would not make findings against any individuals, regarding whether their actions were, or were not compassionate.
- 40 That is not to suggest that there was not a substantial failure of the *Towards Healing* process in Mr Ellis’s first engagement in *Towards Healing*. However, it is submitted that the Royal Commission would accept that each of the Archdiocese’s officers were trying, however imperfectly, to be compassionate at every stage.¹⁸
- 41 The Church parties respectfully submit that in the circumstances, the Royal Commission should decline to make findings regarding whether any particular actions, or any particular individuals, were or were not compassionate.

¹⁴ Ex 4-1 at Tab E

¹⁵ Ex 8-3 at Tab E

¹⁶ Ex 4-1 at Tab B

¹⁷ T5434: 32-T5435: 16; 5443.13-36

¹⁸ See for example, the evidence of Cardinal Pell at T6591: 23-T6592: 7

3.5 From 2002 to the present: The Archdiocese's current approach to *Towards Healing*

- 42 The decision to introduce *Towards Healing* was made in 1996, and the first *Towards Healing* cases commenced in 1997. Since then, the Church has progressively developed, reviewed and improved both the protocol itself and the processes by which it is implemented.¹⁹ Over that period, there have also been extensive developments in the social and institutional understanding of child sexual abuse, and the devastating effect of that abuse on victims.
- 43 These matters have been addressed generally in each of:
- the TJHC September 2013 Submission, at sections 5, 6 and 11,²⁰ and
 - the Opening, at T2496:6–18 and T2503:24–41
- to each of which the Commission is respectfully referred.
- 44 As was there observed, *Towards Healing* is a “living” process, one which does and should evolve over time, in response to the lessons which come out of the many separate engagements with individual victims.²¹
- 45 One consequence is that inevitably there will be and are (on the evidence) some very obvious differences between the features of a *Towards Healing* process which took place at the time of Mr Ellis’ complaint in the early 2000s and one which took place in say 2010 (for example, that of DK) or 2013 (for example, that of Mrs Ingham).²²
- 46 In the case of the Archdiocese, the evidence in this regard is very clear.
- 47 There has been a significant and substantial change in the manner in which the Archdiocese manages complaints under *Towards Healing* since Mr Ellis first lodged his complaint in June 2002. The crux of the present-day approach is to ask how the Archdiocese can assist victims and then to provide assistance, including financial assistance, where appropriate.²³ The Archdiocese acts on the basis that the pastoral door is always open to victims of abuse.²⁴
- 48 Following the conclusion of the Ellis litigation, the Archdiocese engaged in a deliberate review of the Archdiocese’s procedures in *Towards Healing*, which involved “a lengthy and ongoing process which has entailed reviewing files, identifying and rectifying anomalies, and working to ensure that matters dealt with by the Archdiocese have been brought into compliance with ... *Towards Healing*”.²⁵
- 49 As a consequence of the review of *Towards Healing* files undertaken following the Ellis litigation, Cardinal George Pell made detailed recommendations for the improvement of *Towards Healing* in

¹⁹ Ex 8-3 at Tab A, section 1, paragraph [16], page 13, and section 5

²⁰ Ex 8-3 at Tab A

²¹ Ex 8-3 at Tab A, section 1, paragraph [20], page 13; Opening T2496:6–18

²² Case Study 4

²³ Ex 8-14 at paragraph [171]; Ex 8-13 at paragraph [28]

²⁴ Ex 8-14 at paragraph [171]; Ex 8-13 at paragraph [32]

²⁵ Ex 8-12 at paragraph [164]; see also Ex 8-1 Tab 156 at page 1

submissions made in 2009²⁶ and again in 2011²⁷ to two national reviews of the protocol. The recommendations included specific suggestions in relation to topics such as timeliness, the assessment process, the role of the Church Authority, deeds of release and pastoral care of victims. In particular, Cardinal Pell suggested that there be one person responsible for the timeliness and consistency of contact with the victim, and that there be clearer guidelines for Church Authorities regarding the tension between investigating and resolving complaints and providing pastoral support to victims.

- 50 These recommendations demonstrate an ongoing evolution in the response of the Archdiocese to victims of abuse and a commitment to continual improvement of the Archdiocese's processes.
- 51 The current practices of the Archdiocese are outlined in the 2012 document entitled "Sexual Abuse: The Response of the Sydney Archdiocese".²⁸ This document confirms that helping victims and ensuring that they are heard, believed and treated with compassion and respect is the first priority of the Archdiocese and that the Archdiocese seeks to implement its processes in a manner which achieves this outcome.²⁹
- 52 At present, Monsignor John Usher, the Chancellor of the Archdiocese, acts as the representative of the Archbishop in *Towards Healing* matters and is the delegate of the Church Authority for the purposes of *Towards Healing*.³⁰ The approach currently taken by Monsignor Usher and the Archdiocese towards *Towards Healing* complaints is as follows:
- (a) after a complaint has been made, Mr Salmon, director of the PSO, normally arranges for Monsignor Usher to meet with the victim as soon as possible,³¹
 - (b) when Monsignor Usher first meets with a victim about their *Towards Healing* complaint, he begins by saying that he is there to listen to them and that he believes them. He invites them to talk about what happened to them and offers them an apology on behalf of the Archdiocese and the Church and assures them that the Archdiocese takes these matters very seriously,³²
 - (c) if the complaint is about a priest who is deceased, or who has dementia or is otherwise unable to respond, it is not possible to hear the priest's side of the story. In such circumstances, Monsignor Usher's practice is to tell the victim that they are believed. He offers to help them and begins to explore their needs with them, avoiding the need for a formal assessment process,³³

²⁶ Ex 8-14 at paragraph [169] and Ex 8-1 Tab 156

²⁷ Ex 8-12 at paragraph [166]; Ex 8-1 Tab 171

²⁸ Ex 8-3 at Tab B

²⁹ Ex 8-3 at Tab B at STAT.0169.001.0032

³⁰ Ex 8-13 at paragraph [23]

³¹ Ex 8-13 at paragraph [23]

³² Ex 8-13 at paragraph [24]

³³ Ex 8-13 at paragraph [25]

- (d) if the accused perpetrator is still living, the complaint is referred to the police and the NSW Ombudsman, with the victim's name kept anonymous if requested. The priest is stood down,³⁴
 - (e) Monsignor Usher focuses on assisting the victims from the earliest stage, by asking victims what will be helpful and assisting to meet those needs,³⁵
 - (f) the Archdiocese has moved away from requiring deeds of release in *Towards Healing* over the last 3 to 4 years, recognising that they were not just and fair for victims,³⁶
 - (g) the Archdiocese does not operate on the basis that there is any cap on the amount payable to victims under *Towards Healing*, as evidenced by the substantial payments that have been made to victims during the recent years,³⁷ and
 - (h) Monsignor Usher is able to offer victims an immediate response, pay for their counselling and commit to meeting their needs.³⁸
- 53 The Archdiocese believes that these processes, many of which have been in place since shortly after Monsignor Usher became Chancellor in 2005, will ensure that failures of the type that occurred in the management of Mr Ellis' complaint, will not happen again.
- 54 Having regard to this evidence, the Church parties respectfully submit that the Royal Commission should make findings that the Archdiocese and Cardinal Pell:
- (a) looked critically at how *Towards Healing* operated within the Archdiocese following Mr Ellis' case,
 - (b) conducted a review of *Towards Healing* files,
 - (c) made detailed and well-considered submissions to two national reviews of *Towards Healing*, which were aimed at addressing material deficiencies in *Towards Healing* that had manifested in Mr Ellis' case and in other cases,
 - (d) changed the way that they approached *Towards Healing*, to as far as possible ensure a truly victim-focused response aimed at meeting needs,
 - (e) have not insisted on deeds of release for the past three to four years, and
 - (f) since Monsignor Usher's appointment in 2005, have not imposed any cap on the amounts payable to victims under *Towards Healing*.

³⁴ Ex 8-13 at paragraphs [26] to [27]

³⁵ Ex 8-13 at paragraph [28]

³⁶ Ex 8-14 at paragraph [172]; T6215:33–T6216:34; T6376:17–24

³⁷ Ex 8-19; T6399:9–T6403:18

³⁸ T6379:25–27

4 Key Aspects of *Towards Healing* (2000)

4.1 Principles

[CA Submissions paras 12 - 16]

- 55 The Church parties generally accept the summary of evidence set out at paragraphs [12] to [16] of the Submissions, subject to the following matters.
- 56 In relation to paragraph [12], the Church parties note there were amendments to *Towards Healing* (2000) in May/June 2003, which applied to Mr Ellis' complaint.³⁹
- 57 In relation to paragraph [14], the reference to *Towards Healing* providing "*the assessment of risk regarding those still holding a position within the Church*" should read "*one of several methods by which Church bodies assess risk regarding those still holding a position within the Church*" (emphasis added).
- 58 At paragraph [15] the reference to "*a just response to those who are accused*" should read "*an effective response to those who are accused*" (emphasis added). The Church parties further note there have been changes to the principles set out in *Towards Healing* over time, including, by way of example, the extension of *Towards Healing* to physical and emotional abuse and to persons who may be in a pastoral role other than clergy or religious.⁴⁰

4.2 Procedures

[CA Submissions paras 17 - 36]

- 59 The Church parties generally accept the summary of evidence set out at paragraphs [17] to [36] of the Submissions, subject to the following matters.
- 60 The summary of *Towards Healing* (2000) contained in these paragraphs appears to be limited to those clauses that have relevance to Mr Ellis' complaint. It does not attempt to be, nor is it, a summary of the protocol more generally. For example, the procedures set out in paragraphs [21] to [36] are only relevant because Mr Ellis chose not to report the matter to the police and Duggan was in a nursing home and unable to offend due to his physical health.⁴¹
- 61 In relation to paragraph [31], the requirement that the bishop or leader seek the advice of the consultative panel in determining how to respond to the complainant was inserted by clause 35.8.2 of the May/June 2003 amendments.

³⁹ Ex 8-3 at Tab D

⁴⁰ See Ex 8-3 at Tab E, clause 5, which refers to physical and emotional abuse and clause 2 which refers to "*other people who are employed by an official agency of the Catholic Church or appointed to voluntary positions may also be in a pastoral role.*" Ex 8-3 Tab A, section 6, paragraphs [34] to [45], pages 86 to 89.

⁴¹ Ex 8-3 at Tab E, clause 38.1; Ex 8-1 at Tabs 4, 7 and 10

-
- 62 In relation to paragraph [32], clause 41.3.2 of the *Towards Healing* (2000) protocol does not refer to any process by which approval can be given by the executive officer of the National Committee for Professional Standards for the Director of Professional Standards to attend a facilitation. That process was not inserted into the protocol until 2010.⁴²
- 63 As to paragraph [35] of the Submissions, clause 43.1 of *Towards Healing* (2000) does not provide that the Church Authority may seek a review of the *Towards Healing* process. Express reference to the ability of the Church Authority to seek such a review was not inserted into the protocol until 2010.⁴³
- 64 Footnote 50 at paragraph [36] of the Submissions should refer to clause 43.7 of the *Towards Healing* protocol.

⁴² Ex 4-1 at Tab B, clause 41.4.2

⁴³ Ex 4-1 at Tab B, clause 44.1

5 Structure of the Sydney Archdiocesan Office

[CA Submissions paras 37 - 46]

5.1 The Chancery

- 65 The Church parties generally accept the summary of evidence set out at paragraphs [38] to [41] of the Submissions, subject to the following matters.
- 66 Paragraph [39] provides a summary of the current structure of the Chancery. Dr Michael Casey gave evidence that the distribution of responsibilities (as generally outlined at paragraph [39]), did not exist when the then Archbishop (now Cardinal) George Pell (**Cardinal Pell**) was installed as Archbishop of Sydney in May 2001.⁴⁴ He said the roles of Business Manager and Chancellor had previously been combined in the office of Diocesan Secretary, a role held by Fr Brian Lucas until about March 2002.⁴⁵ After Fr Brian Lucas retired from this role, Mr Michael Moore served as acting Financial Administrator until February 2003, when Mr Danny Casey was appointed as Business Manager.⁴⁶
- 67 In relation to paragraph [40], Fr John Doherty was appointed as Acting Chancellor in about May 2002 and held the role until Monsignor Brian Rayner's appointment in April 2003.⁴⁷

5.2 Archbishop's Office

- 68 The Church parties generally accept the summary of evidence set out at paragraphs [42] to [46] of the Submissions, subject to the following matters.
- 69 At paragraph [44] of the Submissions, footnote 73 should refer to paragraph [25] of Exhibit 8-12, not paragraph [21].
- 70 In relation to paragraph [46] of the Submissions, it should be noted that the position of General Counsel of the Archdiocese came into existence after Mr Ellis' litigation had run its course, as part of the Archdiocese's response to the issues that had arisen in that litigation.⁴⁸ There was no position of General Counsel in existence during the period of Mr Ellis' first *Towards Healing* process or during the litigation.

⁴⁴ Ex 8-12 Casey at paragraph [55]

⁴⁵ See also Rayner T5761.47 – T5762.3

⁴⁶ Ex 8-12 at paragraph [56]

⁴⁷ Ex 8-9 Rayner at paragraph [9]

⁴⁸ Ex 8-14 at paragraph [37]

6 Overview of Mr Ellis' *Towards Healing* process

[CA Submissions paras 47 - 106]

- 71 The Church parties generally accept the summary of evidence set out at paragraphs [47] to [106] of the Submissions, subject to the following matters.
- 72 In relation to paragraph [54], Mr John Davoren gave evidence that he became Director of the PSO in 1997.⁴⁹
- 73 In relation to paragraph [55], an email from Mr Davoren to Fr John Doherty on 7 June 2002 recommended that Mr Ellis be asked if he wished to have some immediate counselling.⁵⁰ However, there is no document that records that such an offer was made during the time that Mr Davoren held the position of Director of the PSO.
- 74 In relation to paragraph [60], the letter from Mr Davoren to Archbishop Pell also included the following paragraph, between the two paragraphs extracted by CA:
- One plan that has been discussed as the next step [sic] was a meeting under supervision with Fr Duggan as a pastoral response that might be of assistance to Mr Ellis. There are some potential problems with this approach, and I recommend that such a meeting not take place. Rather, I suggest that if Mr Ellis wishes to meet with Fr Duggan he seek to arrange that through the hospital, and that it be left to the hospital to decide whether or not and how such a visit should be arranged.*⁵¹
- 75 In relation to point (b) of paragraph [64], Mr Ellis requested that appropriate steps be taken “to establish whether Father Duggan could be interviewed”, rather than requesting that appropriate steps be taken “to interview Father Duggan”.⁵²
- 76 In relation to paragraph [70], on 26 June 2003 Mr Salmon wrote to Mr Ellis to confirm the status of Duggan’s mental health, the appointment of the Contact Person and the engagement of Mr Michael Eccleston as assessor.⁵³
- 77 In relation to paragraph [71], also on 2 July 2003, Mr Salmon wrote to Mr Ellis to offer him the opportunity to meet with Duggan accompanied by Monsignor Rayner.⁵⁴ The invitation was a standing offer that could be taken up at any time. Mr Ellis did in fact meet with Duggan in July or August 2003 and said he felt that it helped to see him.⁵⁵
- 78 At paragraph [74] of the Submissions, CA refers to the evidence of Mr Raymond Brazil regarding a “cap” on payments under Towards Healing at that time. Mr Brazil’s evidence was that his understanding at the time was that there was “an **informal ceiling** on Towards Healing payments of \$50,000” and that he would typically tell complainants of this “**informal cap**” (emphasis added).

⁴⁹ Ex 8-5 Davoren at paragraph [14]

⁵⁰ Ex 8-5 Davoren at paragraph [30]; Ex 8-1 at Tab 7

⁵¹ Ex 8-1 at Tab 25

⁵² Ex 8-1 Tab 47A CTJH.402.01001.0037 at CTJH.402.01001.0039-40

⁵³ Ex 8-1 at Tab 62

⁵⁴ Ex 8-1 at Tab 63

⁵⁵ Ex 8-4 Ellis at paragraphs [177] and [178]

⁵⁶ He said that he knew there was no actual cap under *Towards Healing*, but that there was a prevailing view amongst at least some Church Authorities at the time that payments would be usually not likely to go above \$50,000.⁵⁷

- 79 Paragraph [76] of the Submissions refers to a file note of a meeting between Mr Salmon, Mr Brazil and Monsignor Rayner in late April 2004. That file note also recorded that Mr Salmon would attend the facilitation.⁵⁸ Mr Salmon said that this was because:

*"I had a history of dealing with the matter which predated my involvement as Director of Professional Standards, and I thought I would be able to assist the parties achieve an outcome on the day."*⁵⁹

- 80 In relation to paragraph [80], Mr Ellis, in his letter dated 14 July 2004 did not state that he did not think the deed was appropriate, but rather that he did not think the deed of release was "*an appropriate starting point*".⁶⁰ Mr Ellis stated that his preferred course was to draft an alternate form of document (as opposed to entering into the deed) but, at the request of Mr Brazil, he also provided detailed comments on the deed.⁶¹

- 81 In relation to paragraph [84], the PSO file note, dated 20 July 2004, notes that a "*number of key issues remain unresolved*" following the facilitation rather than Mr Ellis' complaint being unresolved.⁶²

- 82 In relation to paragraph [95], on 9 September 2004, Monsignor Rayner prepared a final draft of a letter regarding the appointment of a spiritual director for Mr Ellis. However, on or about 22 September 2004, the Archdiocese received advice from their solicitors, Corrs Chambers Westgarth (**Corrs**), that it would be better not to correspond directly with Mr Ellis while the litigation was on foot.⁶³

- 83 In relation to paragraph [101], the final sentence of that paragraph does not accurately summarise the advice from Corrs. Corrs did not advise the Archdiocese not to re-engage with Mr Ellis in the *Towards Healing* process. Rather, they recommended that the National Review Panel be asked to reconsider its recommendations in the light of the commencement of the litigation.⁶⁴ Subsequently, the National Committee for Professional Standards and David Landa agreed that no apology should be proffered to Mr Ellis while he was pursuing litigation, that any contact by the Archdiocese with Mr Ellis should be through the Archdiocese's solicitors, and that a *Towards Healing* process could not be followed simultaneously with litigation.⁶⁵ The Archdiocese accepted Corrs' advice.

- 84 The Church parties further respectfully draw attention to the following features of the evidence.

⁵⁶ Ex 8-8 Brazil at paragraph [23]

⁵⁷ T5740:26-39

⁵⁸ Ex 8-1 at Tab 80

⁵⁹ Ex 8-7 Salmon at paragraph [75]

⁶⁰ Ex 8-1 at Tab 96

⁶¹ Ex 8-1 at Tab 96 at CTJH.402.01001.0279_R

⁶² Ex 8-1 Tab 105

⁶³ Ex 8-2 at Tab 232

⁶⁴ Ex 8-1 at Tab 142

⁶⁵ Ex 8-1 at Tab 144; T5630: 7-18

85 Cardinal Pell was on a period of leave from 20 August 2002 to 13 October 2002, during which time an Administrator was appointed to run the Archdiocese of Sydney.⁶⁶ The Cardinal's evidence was that during that time he was kept apprised of important developments in the Archdiocese. While this may have included the progress of Mr Ellis' complaint, he had no actual recollection of that,⁶⁷ and Dr Casey said he had no recollection of mentioning the Ellis matter to the Cardinal at this time.⁶⁸

86 A file note dated 1 November 2002 headed "*Mtg John Davoren and Fr JD*" noted, amongst other things:

*"Archbishop would like John Davoren's advice here [...] Ellis still wants to see Duggan despite the dementia"*⁶⁹

87 On 19 November 2002, Fr Doherty sent an email to Mr Davoren, noting that the Ellis matter had been discussed at the last bishops' meeting and:

*"[Archbishop Pell] wanted to get a briefing before he made any decision about facilitation. We should set up something with [Archbishop Pell], perhaps next week."*⁷⁰

Mr Davoren said he did not recall briefing the Archbishop in person on this issue and that it was likely his briefing took the form of his letter to the Archbishop dated 10 December 2002.⁷¹

88 Cardinal Pell told the Commission he accepted the advice set out in Mr Davoren's letter of 10 December 2002 that Mr Ellis' complaint could not be established on the balance of probabilities.⁷² He said that at the time he sent the letter of 23 December 2002, he believed that the assessment of Mr Ellis' case, as required under the *Towards Healing* protocol, had been proceeding and that Mr Davoren was proposing a conclusion. He said he regretted his mistake on that matter.⁷³ He said his overwhelming presumption at the time was that if he got advice from the PSO then he followed it.⁷⁴ This was consistent with his strong conviction that the *Towards Healing* process should as far as possible be managed independently of the Archdiocese.⁷⁵

89 On 20 January 2003, Mr Michael Hill emailed Mr Salmon about a facilitated meeting that was to be organised between Mr Ellis and Bishop Cremin.⁷⁶

90 On 3 February 2003, Mr Davoren recommended that this meeting not go ahead in circumstances where there was no corroboration of the complaint.⁷⁷ Cardinal Pell told the Commission he accepted this line of reasoning at the time but now realised it was quite wrong.⁷⁸ He said he would

⁶⁶ Ex 8-14 at paragraph [81]

⁶⁷ Ex 8-14 at paragraph [82]

⁶⁸ Ex 8-12 at paragraph [72]

⁶⁹ Ex 8-1 at Tab 21

⁷⁰ Ex 8-1 at Tab 23

⁷¹ Ex 8-5 at paragraph [53]; Ex 8-1 at Tab 25

⁷² T6306:38-41

⁷³ T6307:35-40

⁷⁴ T6308:5-7

⁷⁵ Ex 8-14 at paragraphs [75] and [84]

⁷⁶ Ex 8-1 at Tab 31 and Tab 32

⁷⁷ Ex 8-1 at Tab 33

⁷⁸ T6316:14-15

not have endorsed Mr Davoren's recommendations if he had realised that the reasoning was wrong at the time.⁷⁹

- 91 On 21 February 2003, Mr Dominic Cudmore sought legal advice from Makinson d'Apice Lawyers (**Makinson d'Apice**) about the best way for the Archdiocese to satisfy itself as to Duggan's mental health status.⁸⁰ That advice was received on 24 February 2003.⁸¹
- 92 On 28 April 2003, the Archdiocese received advice from Makinson d'Apice regarding how to approach Monsignor Bayada, who held a Power of Attorney to manage Duggan's affairs, to obtain permission for a medical assessment.⁸²

⁷⁹ T6316:17–18

⁸⁰ Ex 8-1 at Tab 39

⁸¹ Ex 8-1 at Tab 40

⁸² Ex 8-1 at Tab 52B

7 Mr Ellis' *Towards Healing* process during Mr Davoren's time as Director of Professional Standards NSW/ACT

- 93 The Church parties generally accept the summary of evidence set out at paragraphs [108] - [110], [112] - [115], [117] - [132], [134], [145] - [160], [162] - [163], [165] and [168] - [172] and [174].
- 94 For the reasons given in the next section of these submissions, the Church parties say that the following paragraphs of the Submissions do not contain a fair summary of the evidence:
- (a) the last sentence of paragraph [107] in the section entitled "*Appointment of a Contact Person*", and
 - (b) paragraphs [135] - [144] in the section entitled "*Meeting and Outcome*".
- 95 The Church parties also say the following evidence is relevant to the proposed findings.

7.1 Appointment of a contact person

[CA Submissions paras 107 - 111]

- 96 Mr Davoren said that at the time Mr Ellis first contacted the PSO and indicated that he wished to make a complaint under *Towards Healing*, the process was that the victim would be asked questions about the type of "Contact Person" to whom they would be comfortable providing a full report. The victim would then be put in touch with a Contact Person who would meet with them to take down the full details of the complaint.⁸³
- 97 Br Laurie Needham assisted Mr Ellis to prepare a Statement of Complaint on 3 June 2002, a week after Mr Ellis first telephoned the PSO to make a complaint.⁸⁴ Mr Ellis said that he "*found the experience of speaking with Brother Needham supportive and encouraging*" and that he "*felt believed, and this strengthened [his] faith that the Church would respond compassionately and sensitively*" to him.⁸⁵
- 98 The last sentence of paragraph [107] of the Submissions is not a fair summary of the evidence, to the extent that it suggests that no Contact Person was appointed at all. Although Mr Davoren did not have any personal involvement in the appointment of Br Needham as a Contact Person, a procedure was in place by which those with responsibility for answering the PSO complaint telephone number were required to refer the matter to a suitable Contact Person as soon as possible. The evidence establishes that this procedure was followed with respect to Mr Ellis' complaint.⁸⁶

⁸³ Ex 8-5 Davoren at paragraph [17]; T5494:33-39

⁸⁴ Ex 8-1 at Tab 4

⁸⁵ Ex 8-4 Ellis at paragraph [127]

⁸⁶ T5494:46-5495:2

7.2 Assessment of Duggan's lucidity

[CA Submissions paras 117 - 133]

- 99 Prior to receiving Mr Ellis's complaint, the Archdiocese had been informed that Father Duggan's mental state had deteriorated considerably. On 16 January 2002, Sister Augustine, of Mount St Joseph's Home, wrote to Monsignor Kerry Bayada informing that "*any form of decision making is beyond him* [Father Duggan]".⁸⁷
- 100 In relation to paragraph [119] of the Submissions, Mr Ellis was first informed that his complaint had been sent to Archbishop Pell in a letter sent to him by Mr Davoren dated 5 June 2002.⁸⁸
- 101 Paragraph [120] of the Submissions refers to an email sent by Mr Ellis to Mr Davoren on 22 August 2002 seeking an update on the progress of his matter. Prior to Mr Ellis sending this email, on or about 15 July 2002, he had received a letter from Mr Davoren that relevantly stated:⁸⁹

"The advice I have now received from Sister Rosemarie, Director of Nursing at the Nursing Home section of the Little Sisters at Randwick is that Fr Duggan's mental state has deteriorated seriously. His memory is variable, he cannot make a mature decision and has no capacity to understand the full implications of a decision."

- 102 Mr Davoren responded to Mr Ellis' email of 22 August 2002 (referred to in paragraph [120] of the Submissions) later that same day, noting that the Archbishop had agreed to the meeting between Mr Ellis and Duggan that Mr Ellis had spoken of provided that Duggan was reasonably able to participate, setting out the proposed arrangements for such a meeting and seeking Mr Ellis' feedback on the plan.⁹⁰

7.3 Meeting and Outcome

[CA Submissions paras 134 - 144]

7.3.1 Introduction

- 103 In paragraphs [135] - [144] of the Submissions, CA submits that the evidence of Monsignor Rayner, that he "*never doubted that Mr Ellis was telling the truth about being sexually abused by Fr Duggan*",⁹¹ should be accepted. CA further submits that shortly after Monsignor Rayner's meeting with Mr Ellis and Duggan in July or August 2003, Monsignor Rayner advised Mr Salmon and Cardinal Pell of that belief.

⁸⁷ CTJH.400.04002.0227 annexed to these submissions

⁸⁸ Ex 8-1 at Tab 5

⁸⁹ Ex 8-1 at Tab 10; Ex 8-4 at paragraph [130]

⁹⁰ Ex 8-1 at Tab 12

⁹¹ Ex 8-9 Rayner at paragraph [33]

- 104 For the reasons that follow, the Church parties say that this is an incomplete summary of the evidence and respectfully submit that the following findings should be made:
- (a) Monsignor Rayner, acting on behalf of the Archdiocese at the facilitation, accepted the complaint within the meaning of clause 41.1 of *Towards Healing* (2000)
 - (b) Although he accepted Mr Ellis' complaint for the purposes of *Towards Healing*, Monsignor Rayner in fact had reservations about the Assessment/Investigation Report prepared by Mr Eccleston dated 24 November 2003 (**Eccleston Assessment**) due to a perceived lack of corroboration of Mr Ellis' complaint
 - (c) Monsignor Rayner expressed these reservations to Mr Salmon and to Mr Patrick Monahan of Monahan & Rowell Lawyers (**Monahan & Rowell**), the Archdiocese's solicitor, and
 - (d) The evidence does not establish with certainty whether or not Monsignor Rayner also informed Cardinal Pell of his reservations regarding the Eccleston Assessment.
- 105 Notwithstanding Monsignor Rayner's evidence that he "*never doubted that Mr Ellis was telling the truth*", it seems clear Monsignor Rayner did have reservations at least about whether Mr Ellis's claims could ever be satisfactorily proven, and about the Eccleston Assessment. His answers to Mr Monahan's questions make it clear that there were aspects of Mr Ellis' claim that Monsignor Rayner was not prepared to accept.⁹²

7.3.2 The Archdiocese accepted Mr Ellis' complaint

- 106 The evidence establishes that after receiving the Eccleston Assessment, the Archdiocese accepted Mr Ellis' complaint, for the purposes of *Towards Healing*. The evidence of such acceptance includes:
- (a) the decision that the complaint would go to facilitation and an apology would be given,⁹³ and
 - (b) statements made by Monsignor Rayner to Mr Ellis during the facilitation, to the effect that Monsignor Rayner "*never had any reason to doubt what [Mr Ellis] has said*", and the apology given by Monsignor Rayner to Mr Ellis for the abuse he had suffered.⁹⁴

7.3.3 Monsignor Rayner had reservations regarding the Eccleston Assessment

- 107 Despite his acceptance of Mr Ellis' complaint on behalf of the Archdiocese for the purposes of *Towards Healing*, the Church parties submit that the evidence establishes that Monsignor Rayner in fact had reservations about the Eccleston Assessment and that he communicated those doubts to others, including Mr Patrick Monahan and Mr Salmon.

⁹² Ex 8-2 at Tab 204

⁹³ T5643:27-30

⁹⁴ Ex 8-1 at Tabs 102 at page 2 and 104 at page 4

108 At the hearing, Monsignor Rayner gave the following evidence:

“Q: Did you tell anyone you had reservations about the assessment because Father Duggan couldn’t contribute anything?”

A: I may have used the word “reservation” at times. What I understood from that was that it would have been far tidier if Father had admitted the abuse, so there’s that bit of a [hole] or that reservation that things aren’t a hundred per cent. But that’s my only reservation there, just as there’s no other evidence except the honesty of Mr Ellis.”

109 Mr Salmon gave evidence that he had attended a meeting with Monsignor Rayner, prior to the facilitation, during which Monsignor Rayner had expressed reservations about the strength of the Eccleston Assessment.⁹⁵ These reservations related to *“the fact that, at the end of the day, the accused person had never been able to respond to the allegations”* and that *“there was no evidence that he had been an offender up until that point”*.⁹⁶

110 Accordingly, the first sentence of paragraph [141] of the Submissions is not a complete or accurate summary of the evidence.

111 Mr Salmon’s recollection that Monsignor Rayner had expressed such reservations was confirmed in an email sent by Dr Michael Casey to Mr Paul McCann on 24 June 2005 in which Dr Casey stated that *“Michael Salmon has advised me that there were reservations about the assessment, not least because of Fr Duggan’s incapacity to respond and the absence of any prior evidence of predatory behaviour.”*⁹⁷

112 Moreover, on 24 August 2004, approximately one month after the facilitation, Monsignor Rayner had a conversation with Mr Monahan.⁹⁸ A transcript of that conversation records the following exchange (emphasis in original):⁹⁹

“PJM: Obviously one of the major problems that we have got with the matter is that Fr Duggan himself is not able to give us instructions about what happened. Do you have any input on that front?”

BR: On what, sorry?

PJM: On what Ellis alleges happened? Do we believe Ellis or not?

BR: There is no corroborative evidence because Fr Duggan is suffering dementia.

PJM: Yes.

⁹⁵ Ex 8-7 Salmon at [106]

⁹⁶ Salmon T5642:31–43

⁹⁷ Ex 8-2 at Tab 259

⁹⁸ Ex 8-2 at Tab 204

⁹⁹ Ex 8-2 at Tab 204, page 3

BR: *So, we can't pursue it with anything. There is no form on the part of Duggan as far as we have on file or that we are aware of, and if there had been we would not have taken him into the Diocese. We would not have incardinated a liability.*

...

PJM: *Where was he before you incardinated him into your Diocese?*

BR: *He was in the Benedictine monastery somewhere in the UK.*

PJM: *Right, and he didn't come with any past problems?*

BR: *No. In fact, he was described by Archbishop writing back their superior, as a wonderful person, you know?"*

- 113 Later in the conversation, Mr Monahan asked Monsignor Rayner about “*what sort of bloke*” Mr Ellis was, to which he replied (emphasis in original): “*He is not a strong character at all, very pedantic, slow, tedious, and I think all the time they are after money.*”¹⁰⁰
- 114 Those answers, by Monsignor Rayner to Mr Monahan, show that Monsignor Rayner did have reservations about Mr Ellis’ claim, and in conjunction with the evidence of Dr Casey constitute grounds for the Royal Commission to accept that the Archdiocese and the PSO did have reservations about Mr Eccleston’s report.
- 115 On two occasions during the hearing, Monsignor Rayner was given an opportunity to explain why, when asked by Mr Monahan whether he believed Mr Ellis, he did not give a positive answer but instead gave an answer indicating why Mr Ellis’ complaint could be doubted, if not disbelieved.¹⁰¹ The proper inference to be drawn from the answers given by Monsignor Rayner to Mr Monahan is that Monsignor Rayner, while accepting Mr Ellis’ complaint for the purposes of *Towards Healing*, in fact had doubts about Mr Eccleston’s conclusion as to Mr Ellis’ complaint.
- 116 CA has submitted in paragraph [144] of the Submissions that “*Dr Michael Casey at least had the impression that Monsignor Rayner believed Mr Ellis, again at least by the time of the facilitation*”. This submission is seriously inaccurate in two separate respects. First, the transcript reference given in the Submissions to support this finding (in paragraph [142], footnote 225) is to evidence given by Mr Daniel Casey, not Dr Michael Casey.¹⁰² Secondly, Mr Daniel Casey’s evidence was that he had the impression that “*there was doubt*” as to whether Mr Ellis and his allegations should be believed, not that “*Monsignor Rayner believed Mr Ellis*”, as stated in paragraph [144]. The evidence of Mr Daniel Casey, far from supporting the submission in paragraph [144], directly contradicts it.

¹⁰⁰ Ex 8-2 at Tab 204, page 5

¹⁰¹ T5831:30 5832:27; T5929:45 5934:30

¹⁰² Note that paragraph [143] of the Submissions is also inaccurate to the extent that it attributes the evidence referred to in that paragraph to Dr Michael Casey instead of to Mr Daniel Casey.

- 117 In relation to Dr Michael Casey, Monsignor Rayner himself gave evidence that he did not recall telling Dr Michael Casey that he believed Mr Ellis, and doubted that he would have.¹⁰³ Further, it was not put to Dr Michael Casey that he had a discussion with Monsignor Rayner as to his belief in Mr Ellis' complaint, either before or after the facilitation occurred.

7.3.4 Monsignor Rayner informed Cardinal Pell of his acceptance of the complaint and his reservations regarding the Eccleston Assessment

- 118 As explained in paragraphs [240], [241] and [244] below of these submissions (and as accepted by CA, at paragraph [237] of the Submissions), Monsignor Rayner did not, at the time of giving evidence to the Royal Commission, have any independent recollection of any conversation he had with Cardinal Pell during his time as Chancellor regarding Mr Ellis' complaint. It follows that Monsignor Rayner's evidence in this regard was only a reconstruction. Mgr Rayner's evidence was framed in terms of practice, rather than specifics. It would be an unsatisfactory basis upon which to reject the direct recollections of other witnesses.¹⁰⁴
- 119 The evidence set out in paragraphs [107] to [117] above establishes that Monsignor Rayner actually had reservations regarding the Eccleston Assessment and the truth of Mr Ellis' complaint and that he expressed these reservations to at least Mr Salmon and Mr Monahan. Cardinal Pell has no clear recollection of speaking with Monsignor Rayner on this topic.¹⁰⁵ The Royal Commission could not be satisfied, on the evidence, that Monsignor Rayner did speak to the Cardinal on that topic.

7.3.5 Conclusion

- 120 It is submitted that the Royal Commission would give substantial weight to the contemporaneous records of Mr Monahan, and the recollection of Mr Salmon as to Mgr Rayner's doubts about Mr Ellis' complaint.
- 121 In the light of this evidence, the Church parties respectfully submit that the Royal Commission should not make a finding that Monsignor Rayner had no doubts as to the veracity of Mr Ellis' complaint, as suggested in paragraph [144] of the Submissions, or that he so informed any of Mr Salmon, Dr Michael Casey, Mr Danny Casey, or Cardinal Pell.

7.4 Appointment of Assessor and Duration of Mr Ellis' *Towards Healing* process

[CA Submissions paras 145 - 174]

- 122 The Church parties generally accept the summary of evidence set out at paragraphs [145] - [160], [162] - [163], [165] and [168] - [174].

¹⁰³ T5778:17-18

¹⁰⁴ T5800: 21 - 36

¹⁰⁵ T6320:45-T6321:14

7.5 Proposed Finding 1

123 CA proposes one finding in relation to this topic. That proposed finding, and the response of the Church parties to it, are as follows:

Proposed Finding	Response
1. Mr Davoren failed to comply with the principles and procedures in <i>Towards Healing</i> (2000) in the handling of the complaint by Mr Ellis by:	Accepted, in part, if amended as set out below at paragraph [124]
a. not appointing a Contact Person (clause 36.1)	Factual substratum is accepted if amended as set out below at paragraph [124]
b. not providing Mr Ellis with a copy of the protocol (clauses 36.2 and 36.4)	Factual substratum is accepted if amended as set out below at paragraph [124]
c. not referring the complaint to an assessor (clauses 38.7 and 40)	Factual substratum is accepted
d. poor case management, including not undertaking the process as quickly as possible, and poorly managing the question of Father Duggan's lucidity (clause 40.13)	Factual substratum is accepted
e. not acknowledging that victims can go through a long period of silence, denial and repression (clause 6)	Factual substratum is not accepted
f. not acknowledging that the effects of abuse can vary and that some factors involved are the ... relationship with the offender, the duration and frequency of the abuse and the degree of violation of trust and abuse of power involved (clause 7)	Factual substratum is not accepted
g. not providing a compassionate response (clause 17)	Factual substratum is not accepted

124 For the reasons set out below, the Church parties submit that the findings proposed in components (e), (f) and (g) of Proposed Finding 1 should not be made and that Proposed Finding 1 should be amended to read as follows:

“(1) During the period June 2002 to April 2003, the PSO failed to comply with the procedures in *Towards Healing* (2000) in its handling of the complaint by Mr Ellis by:

- (a) not appointing a Contact Person to act as a support person for Mr Ellis after assisting with the making of the initial complaint (clause 35.4)
- (b) not ensuring that Mr Ellis was provided with a copy of the *Towards Healing* protocol (clause 36.4)
- (c) not referring the complaint to an assessor (clauses 38.7, 39.3 and 40), and

- (d) poor case management, including not undertaking the process as quickly as possible, and poorly managing the question of Father Duggan's lucidity (clause 35.3.1 and 40.13)."

Proposed Finding 1

- 125 Clauses 35 - 40 of *Towards Healing* (2000) do not form part of the *Towards Healing* "principles". Rather, they form part of the "procedures" set forth in that document.
- 126 For the reasons outlined in Part A Part B of these submissions at paragraphs [18] - [23], it is respectfully submitted that any departures from matters of procedure do not warrant an adverse finding by a Royal Commission in relation to an individual who may have been responsible for that departure.
- 127 If Proposed Finding 1 is to be made (either in whole or in part), it is respectfully submitted that it should attribute responsibility for any failures to follow the procedures of *Towards Healing* (2000) to the PSO and not to Mr Davoren personally.

Component 1(a)

- 128 If a person wishes to invoke the procedures outlined in the *Towards Healing* protocol, clause 36.1 of *Towards Healing* (2000) states that the Church personnel who receive notice of the complaint "shall refer the matter to a Contact Person as soon as possible". This procedure was followed, as Br Needham was appointed as the Contact Person within 25 minutes of the complaint being received.¹⁰⁶
- 129 The Church parties accept that after Br Needham performed the role of assisting Mr Ellis to prepare his Statement of Complaint, Br Needham did not have any further contact with Mr Ellis and did not act as a support person for Mr Ellis or assist him with communications with the Church Authority or the assessor, as contemplated by clause 35.4 of *Towards Healing* (2000).
- 130 On two occasions in June 2002, Mr Davoren sent letters to Mr Ellis offering to arrange for a support person to assist Mr Ellis.¹⁰⁷ There is no evidence to suggest that Mr Davoren made any further arrangements in this regard.
- 131 For these reasons, the Church parties submit that component 1(a) should be amended as set out in paragraph [124] above to make it clear that the failure of the PSO was not in relation to the initial appointment of a Contact Person, but instead consisted of a failure to appoint a Contact Person to act as a support person for Mr Ellis after the initial complaint had been received.

Component 1(b)

- 132 The Church parties accept that Mr Ellis was not provided with the *Towards Healing* protocol and that the protocol needed to be provided to Mr Ellis in order for the Contact Person to comply with the following procedure stated in clause 36.4 of *Towards Healing* (2000):

¹⁰⁶ See paragraphs [96] to [98] above; Ex 8-1 at Tab 3

¹⁰⁷ Ex 8-1 at Tabs 5 and 9

“The Contact Person shall explain the procedures for addressing the complaint and ensure that the complainant gives his or her consent to proceeding on the basis laid down in this document.”

- 133 The Church parties do not accept that there was any obligation upon Mr Davoren personally to provide a copy of the protocol to Mr Ellis. Compliance with clause 36.4 would be demonstrated if the PSO had put a procedure in place by which either the person answering the PSO complaint telephone number or the Contact Person provided a copy of the *Towards Healing* protocol to the victim. In the absence of any evidence regarding the existence of such a procedure, the Church parties accept that component 1(b), as amended in paragraph [124] above, is available on the evidence before the Royal Commission.

Components 1(c) and (d)

- 134 The Church parties accept that during the period that Mr Davoren was the director of the PSO, the PSO failed to appoint an assessor in circumstances where the procedures in clauses 38.7, 39.3 and 40 of *Towards Healing* (2000) required such an appointment to be made.
- 135 The Church parties further accept that during that same period, Mr Ellis' complaint was poorly case-managed by the PSO, as there were unnecessary delays in the appointment of an assessor caused by, among other things, poor management of the issue of Duggan's lucidity.

Components 1(e) and (f)

- 136 Mr Davoren gave evidence that he did understand that victims can go through a long period of silence, denial and repression, as stated in clause 6 of *Towards Healing* (2000).¹⁰⁸
- 137 Mr Davoren was not asked, and gave no evidence as to, whether he also understood that the effects of abuse can vary and that some factors involved are the relationship with the offender, the duration and frequency of the abuse and the degree of violation of trust and abuse of power involved, as stated in clause 7 of *Towards Healing* (2000).
- 138 At no stage was it put to Mr Davoren that he failed to comply with the principles and procedures in *Towards Healing* (2000) by failing to acknowledge the matters set out in components 1(e) and (f) of Proposed Finding 1. Moreover, even if Mr Davoren had agreed with the proposition that he had failed to acknowledge matters set out in clauses 6 and 7 of *Towards Healing* (2000), these clauses do not contain any principles or procedures with which Mr Davoren was required to comply. No findings should be made in the terms stated in components 1(e) and (f).

Component 1(g)

- 139 For the reasons outlined in section 3 above, no findings should be made as to whether a particular act was, or was not compassionate.
- 140 It is not apparent that any of the matters referred to in Proposed Finding 1, as amended in paragraph [124] above, evidence a failure on the part of Mr Davoren to feel sorrow or sympathy

¹⁰⁸ T5479:38–5480:8

for Mr Ellis. Whether or not Mr Davoren complied with the *Towards Healing* protocol is an entirely separate discourse to whether or not he acted compassionately towards Mr Ellis. Insufficient questions were put to Mr Davoren to enable the question of whether he acted compassionately towards Mr Ellis to be the subject of findings by the Royal Commission.

8 Mr Ellis' *Towards Healing* process during Mr Salmon's time as Director of the Professional Standards Office NSW/ACT

[CA Submissions paras 175 - 195]

- 141 The Church parties generally accept the summary of evidence set out in paragraphs [175] - [180], [182] - [185] and [187] - [195].
- 142 For the reasons given in section 8.2 of this submission, the Church parties say that paragraph [181] is not a fair summary of the evidence.
- 143 They also rely on the further matters set out in the next section of this submission.

8.1 Consent in relation to the appointment of a facilitator

- 144 Paragraph [181] of the Submissions states that Mr Salmon accepted that it was likely that he did not seek Mr Ellis' consent regarding the appointment of Mr Brazil as Facilitator, and agreed that this was inconsistent with *Towards Healing*. Mr Salmon's evidence on this topic was as follows:¹⁰⁹

“Q: Did you consult with Mr Ellis as to whether he was happy for Mr Brazil to be the facilitator?

A: I don't recall whether I offered any alternatives, but I expect I would have suggested to Mr Ellis the reason why I favoured Raymond Brazil, my experience of Raymond Brazil.

Q: But it's likely that you didn't, in obvious terms, seek his consent?

A: Yes, yes.

Q: You would accept that it would be consistent with *Towards Healing* to have, in obvious terms, sought his consent?

A: Yes, I agree with that.”

- 145 The Church parties submit that the appropriate conclusion to draw from Mr Salmon's evidence is that he discussed the proposed appointment of Mr Brazil with Mr Ellis, albeit that he may not have, “in obvious terms”, sought his consent. Mr Salmon's acceptance that it would have been consistent with *Towards Healing* for him to have, “in obvious terms”, sought Mr Ellis' consent, does not necessarily entail an acceptance by him that not to do so was inconsistent with *Towards Healing*. A recommendation of a particular facilitator, for stated reasons, not resisted or ever criticised by Mr Ellis, does not establish such an inconsistency.

¹⁰⁹ T5608:8–21

8.2 Consent for Director of Professional Standards to participate in a facilitation

- 146 In paragraph [183] of the Submissions, CA refers to Mr Salmon's statement that he wished to participate in the facilitation as he thought that he *"would be able to assist the parties to achieve an outcome that day."* Mr Salmon gave further evidence at hearing that he understood that the intended response by the Church Authority was to keep the payment to Mr Ellis low, and that one of the reasons that he wished to attend the facilitation was that he *"might have been able to perhaps use some influence, as a party in that process, to have the figure increased in that facilitation context"*.¹¹⁰
- 147 The Church parties submit that this evidence demonstrates that Mr Salmon's purpose for intending to attend the facilitation was well-meaning and consistent with the principles of *Towards Healing* – namely to assist Mr Ellis to achieve an amount of reparation higher than he otherwise would have received from the Church Authority and more appropriate to his needs.

8.3 Proposed Findings

- 148 CA has proposed two findings in relation to this topic. Those proposed findings, and the response of the Church parties to them, are as follows.

Proposed Finding	Response
2. Mr Salmon actively and properly managed Mr Ellis' complaint in that he assisted in the organisation of the medical assessment of Father Duggan; the appointment of an assessor; the appointment of a Contact Person namely Bill Johnson; arranged counselling for Mr Ellis and appointed a facilitator.	Accept
3. The requirements of <i>Towards Healing</i> (2000) were not met: <ul style="list-style-type: none"> a. by not seeking the consent of Mr Ellis prior to the appointment of Mr Brazil as the facilitator (clause 41.3) b. by Mr Salmon's attendance at the facilitation without consulting with Mr Ellis (clause 41.3.2) 	Do not accept

Proposed Finding 2

- 149 The Church parties accept that this finding should be made.

¹¹⁰ T5617:28–38; T5621:25–29

Proposed Finding 3

Component 3(a)

- 150 The Church parties do not accept that any finding should be made as to a suggested “failure” by Mr Salmon, “in obvious terms”, to seek the consent of Mr Ellis to the appointment of Mr Brazil. Any such “failure” is of a relatively minor nature, in light of the absence of any complaint from Mr Ellis or any other party to the facilitation, either as to the appropriateness of Mr Brazil’s appointment as facilitator or the manner in which Mr Brazil conducted the facilitation.
- 151 The evidence demonstrates that by the time Mr Brazil was appointed as facilitator, he was highly experienced as he had conducted a wide variety of mediations, conciliations and facilitations in a diverse range of cases for entities such as Centacare, the New South Wales Department of Juvenile Justice, the New South Wales Department of Health and the New South Wales Workers Compensation Commission, as well as the PSO.¹¹¹
- 152 Even if it were to be assumed that Mr Salmon did not adequately consult Mr Ellis regarding Mr Brazil’s appointment, that was a minor misstep in his handling of Mr Ellis’ complaint and it is inappropriate that a personal finding be made against Mr Salmon, when his handling of the process was otherwise appropriate.

Component 3(b)

- 153 The Church parties do not accept Proposed Finding 3(b) for three reasons.
- 154 First, Mr Salmon did not participate in the facilitation, as he left before the facilitation got underway.¹¹² Therefore, clause 41.3.2 of *Towards Healing* (2000) was not breached by Mr Salmon, as he did not, in any meaningful sense, participate in the facilitation process.
- 155 Secondly, even if Mr Salmon’s proposed attendance at the facilitation could amount to a breach of clause 41.3.2 of *Towards Healing* (2000), his intentions were to assist Mr Ellis to achieve a higher amount of reparation. This is an instance in which any divergence from the *Towards Healing* protocol did not result in a failure to honour its spirit or intent – rather, Mr Salmon’s proposed attendance at the facilitation was for the purpose of ensuring that Mr Ellis obtained a better outcome from the *Towards Healing* process. No criticism should be made of Mr Salmon in this regard.
- 156 Thirdly, any such breach (which is not conceded) could only be described as minor in nature. No hardship or inconvenience was suffered by Mr Ellis as a result of Mr Salmon’s *proposed* attendance at the facilitation.

¹¹¹ Ex 8-8 at paragraph [7]

¹¹² Ex 8-4 at paragraphs [225] – [226]; Ex 8-7 at paragraph [79]; Ex 8-1 at Tabs 102, 103, 104, 104A and 105

9 Handling of Mr Ellis' complaint by the Church Authority

[CA Submissions paras 197 - 295]

- 157 The Church parties generally accept the summary of evidence set out at paragraphs [197] - [199], [201] - [204], [206] - [212], [215] - [221], [224] - [236], [245] - [259], [260] - [262], [265] - [267], [269] - [278], [282] - [286], [288] - [290] and [292] - [294] of the Submissions.
- 158 The Church parties do not accept that paragraphs [205], [213], [222] - [223], [238] - [244], [279] - [281] and [291] contain a fair summary of the evidence, for the reasons set out below.
- 159 The Church parties submit that the Royal Commission should not accept the evidence of Monsignor Rayner summarised in paragraph [237], in preference to the evidence of Cardinal Pell, and would conclude that Monsignor Rayner's recollection amounts to no more than a reconstruction and is mistaken.
- 160 They also rely on the further matters set out in the next section of these submissions.

9.1 Cardinal Pell's involvement in Mr Ellis' complaint

9.1.1 The Role of the Chancellor

- 161 *Towards Healing* (2000) defines 'Church authority' as including:

*"a bishop, a leader of a religious institute and the senior administrative authority of an autonomous lay organisation, and their authorised representatives, responsible for the Church body to which the accused person is or was connected."*¹¹³

- 162 At the time Mr Ellis made his complaint under *Towards Healing*, the responsible Church authority was Cardinal Pell, in his capacity as Archbishop of Sydney, and his authorised representatives, who included Monsignor Rayner as Chancellor of the Archdiocese at that time.¹¹⁴

- 163 The Chancellor is a decision-maker in his own right and has "delegated or specific standing authority within [his] areas of responsibility."¹¹⁵ When Monsignor Rayner held the position of Chancellor, he was also appointed to the roles of Vicar-General and Moderator of the Curia. These are canonical roles, described under the Code of Canon Law in the following terms:

- (a) **Vicar General:** "In virtue of his office, the Vicar General has the same executive power throughout the whole diocese as that which belongs by law to the diocesan Bishop: that is, he can perform all administrative acts, with the exception however of those which the Bishop has reserved to himself, or which by law require a special mandate of the Bishop",¹¹⁶ and

¹¹³ Ex 8-3 at Tab E, clause 34, page 8

¹¹⁴ T6592:9-26; Ex 8-14 at paragraph [68]; Ex 8-9 at paragraph [15]

¹¹⁵ Ex 8-12 at paragraph [42]; T5754:38-42

¹¹⁶ Ex 8-25, Code of Canon Law, Can 479, §1

- (b) **Moderator of the Curia:** “Where it is useful, [the diocesan Bishop] may appoint a Moderator of the curia, who must be a priest. Under the Bishop’s authority, the Moderator is to coordinate activities concerning administrative matters and to ensure that the others who belong to the curia properly fulfil the offices entrusted to them.”¹¹⁷

- 164 Cardinal Pell delegated much of the responsibility for dealing with *Towards Healing* complaints to the Chancellor, who managed the day to day progress of these matters and would, from time to time, raise more significant issues with Cardinal Pell as required.¹¹⁸ Monsignor Rayner gave evidence that his job was “to work with the director of professional standards and to represent the Archbishop particularly in that liaison”, which included attending facilitations on behalf of the Archbishop.¹¹⁹
- 165 Cardinal Pell also delegated to Monsignor Rayner the responsibility of liaising with lawyers acting on behalf of the Archdiocese in relation to legal matters, which included child sexual abuse disputes. Monsignor Rayner liaised with the following firms: Makinson & d’Apice, Corrs, Carroll & O’Dea and Monahan & Rowell.¹²⁰
- 166 Cardinal Pell’s explained his approach towards delegating responsibilities to his Chancellors as follows:¹²¹

“...I’m not a micro-manager, it’s impossible, and my practice was to give people a job and to let them get on with it, and until they established that they were mucking things up, that’s exactly what I did.”

9.1.2 The Role of the Director of the PSO

- 167 With respect to the relationship between the Archdiocese and the Director of the PSO, Cardinal Pell said:¹²²

*“... in my mind it has always been very important under Towards Healing that the Director of Professional Standards have and maintain responsibility for dealing with complaints, independently of the relevant Church Authority. The Director of Professional Standards arranges the assessments of complaints where he considers it necessary if there are disputes or uncertainty as to the facts, and then also arranges the facilitations which typically follow. **The Church Authority, in this case the Archdiocese of Sydney, would ordinarily act in accordance with those arrangements as made by the Director.** I proceed on the assumption that the Director is undertaking the process in a manner that is consistent with the Towards Healing document. **Unless a recommendation from the Director appeared to me to be plainly wrong, I would accept it.**”*
 [emphasis added]

¹¹⁷ Ex 8-25, Code of Canon Law, Can 473, §2

¹¹⁸ Ex 8-14 at paragraph [73]

¹¹⁹ T5755:1–17

¹²⁰ T5757:39–T5758:46

¹²¹ T6289:20–24; T6286:3–7

¹²² Ex 8-14 at paragraph [75]; see also T6283:45–6284:3; T6298:7–41; T6308:2–7

168 By June 2002, when Mr Ellis made his complaint under *Towards Healing*, Cardinal Pell had been Archbishop of Sydney for approximately one year, having been installed in that position on 10 May 2001.¹²³ Having come from the Melbourne Archdiocese, which applied the procedures set out in the *Melbourne Response*, Cardinal Pell was not familiar with the practical implementation of all of the procedures in *Towards Healing* and relied upon Mr Davoren to ensure compliance with the *Towards Healing* protocol.¹²⁴ Cardinal Pell stated that his:¹²⁵

“expectation was that the PSO would manage the response to [Mr Ellis]’ complaint and ensure compliance with the Towards Healing protocol. Thereafter, in general, my understanding was that the PSO was doing so, and I was not involved in the detail or day to day aspects of the handling of the complaint.”

169 A key aspect of Cardinal Pell’s approach towards managing complaints under *Towards Healing* was that he did not wish to be accused of interfering with the process, and wanted the PSO to make decisions independently of the Archdiocese.¹²⁶

9.1.3 Cardinal Pell’s personal involvement in Mr Ellis’ complaint

170 Cardinal Pell considers sexual abuse of children by clergy to be particularly abhorrent. Battling this evil was a major priority for Cardinal Pell while he held the positions of Archbishop of Melbourne and Sydney.¹²⁷ The principal area of focus for Cardinal Pell in seeking to address these crimes was to evaluate the procedures in place and work constructively to improve those procedures, with the aim that justice be done.¹²⁸

171 It was not possible, given the demands placed upon Cardinal Pell while Archbishop of Sydney, for him to be involved in the detail of the handling of each complaint made under *Towards Healing*. Nor was he so involved, on the evidence. The Cardinal was responsible for 137 parishes in the Sydney Archdiocese in addition to his duties as a Cardinal (as from October 2003) and the various positions he has held in that role since 2002.¹²⁹ The complexity and diversity of Cardinal Pell’s duties as Archbishop of the Sydney Archdiocese meant that it was not possible for him to keep abreast of each development in the *Towards Healing* process that was occurring with respect to all the various complainants.

172 Cardinal Pell stood down from his role as Archbishop of Sydney from 20 August to 13 October 2002 while an inquiry was conducted by the Honourable AJ Southwell QC into a complaint of sexual abuse made against Cardinal Pell.¹³⁰ Cardinal Pell did not have any involvement in the administration of the Archdiocese during this period, other than being kept apprised of important developments.¹³¹

¹²³ Ex 8-14 at paragraph [52]

¹²⁴ Ex 8-14 at paragraph [79]

¹²⁵ Ex 8-14 at paragraph [77]

¹²⁶ Ex 8-14 at paragraph [84]; T6284:15–21

¹²⁷ Ex 8-14 at paragraph [12]

¹²⁸ Ex 8-14 at paragraphs [17] - [21]

¹²⁹ Ex 8-14 at Annexure B (see, particularly page 3 onwards)

¹³⁰ Ex 8-14 at paragraph [81]; Ex 8-12 at paragraphs [69] and [73]

¹³¹ Ex 8-14 at paragraphs [81] - [82]; Ex 8-12 at paragraph [72]

- 173 In 2003, Cardinal Pell was still in the process of making appointments to key advisory positions within the Archdiocese. On 24 February 2003, he appointed Mr Daniel Casey to the position of Business Manager¹³² and in late April 2003, he appointed Monsignor Rayner to the positions of Vicar General, Chancellor and Moderator of the Curia.¹³³ As it happens, Mr Salmon also took up the position as Director of the PSO, replacing Mr Davoren, in late April 2003.¹³⁴
- 174 The Church parties accept that Cardinal Pell took the steps or was aware of the matters set out in paragraph [199] of the Submissions in relation Mr Ellis' *Towards Healing* complaint. However, of those 22 matters, only the following three were at the instigation of Cardinal Pell, that is, were not precipitated by some letter or immediate request made to him by the Director of the PSO or his advisers:
- (a) Cardinal Pell's request for Mr Davoren's advice on Mr Ellis wanting to meet with Duggan despite his dementia,¹³⁵
 - (b) Cardinal Pell including Mr Ellis' complaint as part of the agenda for a bishops' meeting,¹³⁶ and
 - (c) Cardinal Pell seeking a briefing in relation to whether a facilitation should be held.¹³⁷
- 175 Each of these three steps was taken by Cardinal Pell during the time that Mr Davoren was the Director of the PSO. The second and third of them essentially reflected the Cardinal's concern that the response to Mr Ellis' complaint seemed to be "*dragging on*", "*that the priest had dementia*" and that the Church authority had to determine "*would it be helpful or not for the meeting to take place*".¹³⁸
- 176 Cardinal Pell's taking of those three steps, during Mr Davoren's time, occurred in the following context:¹³⁹
- "Mr Davoren was unwell; he had a bypass. Mr Davoren is a very good man. He worked hard to help the victims, but he was a muddler and sometimes he wasn't logical. And also I think . . . his approach to these matters was pre-1996. He didn't seem to have a scrupulous understanding or commitment to exactly following protocols."*
- 177 Mr Davoren was already in the position of Director of the PSO when the Cardinal was installed as Archbishop.¹⁴⁰ The Cardinal did not take any measures to have him removed, as Mr Davoren retired in April 2003 due to ill health.¹⁴¹

¹³² Ex 8-18 at paragraph [2]

¹³³ Ex 8-9 at paragraph [9]

¹³⁴ T5577:4-14; T5598:6-7

¹³⁵ Ex 8-1 at Tab 21; T6295:44-T6296:1

¹³⁶ T6296:20-37; T6297:8-42

¹³⁷ Ex 8-1 at Tab 23; T6298:18-22

¹³⁸ T6296:39-45

¹³⁹ T6284:30-37

¹⁴⁰ T6284:39-40

¹⁴¹ T6284:42-47.

- 178 After Monsignor Rayner and Mr Salmon were appointed, in about April 2003, the evidence records only one instance when Cardinal Pell was consulted in relation to Mr Ellis' *Towards Healing* process. That was in May 2003, only days after those appointments took effect.¹⁴² The Church parties do not suggest that this means that Cardinal Pell did not have any knowledge or involvement in the progress of Mr Ellis' complaint from this point onwards. However, it does strongly indicate that the day-to-day management of that complaint was firmly in the hands of Cardinal Pell's authorised representative, Monsignor Rayner, and of Mr Salmon, as Director of the PSO.
- 179 By contrast with the factors listed by CA in paragraph [199] of the Submissions, it is submitted that what is noteworthy is the number of fundamental steps in Mr Ellis' *Towards Healing* process in respect of which Cardinal Pell did not have any involvement. Leaving to one side the issue of the Cardinal's knowledge and approval of amounts of reparation (considered further below), these included:
- (a) the appointment of a contact person,¹⁴³
 - (b) arranging counselling for Mr Ellis,¹⁴⁴
 - (c) assisting with the conduct of the assessment by providing information and responding to the assessors inquiries,¹⁴⁵
 - (d) discussions, meetings and other steps taken in preparation for the facilitation¹⁴⁶
 - (e) attending the facilitation,¹⁴⁷
 - (f) pursuit of various steps to be taken following the facilitation, for example, regarding the appointment of a spiritual director and a possible meeting between Mr Ellis and Cardinal Pell,¹⁴⁸ and
 - (g) responding to Mr Ellis' requests for review of his *Towards Healing* process and implementation of recommendations following the reviews.¹⁴⁹

9.1.4 Summary

- 180 Cardinal Pell's involvement in Mr Ellis' *Towards Healing* process can be summarised as follows:
- (a) Cardinal Pell relied upon the Director of the PSO and the Chancellor of the Archdiocese to make the day-to-day decisions regarding the handling of Mr Ellis' complaint, and they did do so,

¹⁴² Ex 8-1 at Tabs 53 and 54

¹⁴³ Ex 8-1 at Tabs 59 and 60

¹⁴⁴ Ex 8-1 at Tab 67

¹⁴⁵ Ex 8-1 at Tabs 64 and 66 at page 12.

¹⁴⁶ Ex 8-1 at Tab 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 91A, 92, 93, 95, 96, 97, 98, 99, 100 and 101

¹⁴⁷ Ex 8-1 at Tabs 102, 103, 104, 104A and 105

¹⁴⁸ Ex 8-1 at Tabs 78A, 106, 117, 121, 126 and 128

¹⁴⁹ Ex 8-1 at Tabs 109, 110, 111, 112, 113, 114, 115, 116, 118, 119, 120, 122, 125, 127, 134, 135, 136, 138, 140, 141, 143 and 144

- (b) When Cardinal Pell became aware in about late 2002 that there were delays in the handling of Mr Ellis' complaint under Mr Davoren, he took some steps, of his own instigation, to try to achieve some progress, and
- (c) Following the appointments of Monsignor Rayner and Mr Salmon in April and May 2003, Cardinal Pell resumed a substantially "hands-off" role in relation to Mr Ellis' complaint. Cardinal Pell approved the appointment of an assessor and a facilitator, but did not attend the facilitation or take part in any steps taken in preparation for the facilitation.

9.2 The letter dated 23 December 2002

[CA Submissions paras 201 - 214]

- 181 The Church parties, especially Cardinal Pell, very much regret that the letter dated 23 December 2002 (the **December letter**) incorrectly stated that the facts of the matter could not be established and that the Archdiocese could not do anything to reach a clear resolution,¹⁵⁰ and are deeply sorry for the hurt and distress that the letter caused to him and his family. As expressly acknowledged by Cardinal Pell in his evidence, an assessor should have been appointed notwithstanding the difficulties related to Duggan's dementia, and the failure to arrange for such an assessment to take place was a failure to comply with the procedures in the *Towards Healing* protocol.¹⁵¹
- 182 The Church parties also accept that the last paragraph of the December letter was capable of conveying and did convey to Mr Ellis the message that the Church authority did not consider it could take any further steps under the *Towards Healing* process in relation to Mr Ellis' complaint.¹⁵²
- 183 However, to acknowledge that the December letter was capable of conveying that meaning does not mean that there was no reasonable basis for Cardinal Pell's assertion that he *did not intend* the December letter to signify that the *Towards Healing* process would be brought to an end. Cardinal Pell stated (emphasis added):¹⁵³

"In the third paragraph of [the December letter], I expressed my regret "that a clear resolution of this matter is not possible". It was not my intention to convey to Mr Ellis that there was nothing the Archdiocese could do about resolving his complaint overall. I expected that the PSO would continue to take whatever steps still needed to be taken under Towards Healing notwithstanding that there would be no formal meeting between Mr Ellis and Fr Duggan. I did not appreciate then that Mr Davoren's opinion did not constitute an assessment for the purposes of Towards Healing and that therefore no assessment had yet been carried out. In hindsight it seems to me that this paragraph of my letter could have been better expressed."

¹⁵⁰ T6308:9–16, 34–38

¹⁵¹ Ex 8-14 at paragraph [79]; T6293:20-45; T6307:15–40

¹⁵² Ex 8-4 at paragraph [140]; T5341:18–20; T6308:45–T6309:4

¹⁵³ Ex 8-14 at paragraph [89]; see also paragraphs [86] and [87]; T6313:45–T6314:8

- 184 Cardinal Pell's evidence was that the changes that he made to the December letter were motivated by a desire for the letter to be correct and not internally inconsistent. Cardinal Pell had accepted Mr Davoren's advice that the complaint could not be established.¹⁵⁴
- 185 Paragraph [205] of the Submissions is not a fair summary of Cardinal Pell's evidence. Cardinal Pell did not make a positive statement to the effect that the December letter "*did not signify that the Towards Healing process would be brought to an end.*" Rather, Cardinal Pell acknowledged, with the benefit of hindsight, that the last paragraph of the letter "*could have been better expressed*". In other words, Cardinal Pell accepted awareness that the paragraph was capable of conveying a meaning which was not what he intended to convey at that time.
- 186 It was not put to Cardinal Pell that he did not intend Mr Ellis' *Towards Healing* process to continue. And the absence of an intention on his part to put an end to the *Towards Healing* process is strongly supported by the steps actually taken by the Archdiocese to continue the *Towards Healing* process only a month or so after the December letter was sent. These steps included making arrangements for a facilitated meeting with Cardinal Pell or his representative, Bishop Cremin, as well as proceeding to obtain an assessment of Duggan's health.¹⁵⁵
- 187 Cardinal Pell was not aware that the advice given by Mr Davoren to Cardinal Pell in Mr Davoren's letter of 10 December 2002 was wrong at the time of revising and sending the December Letter, as he had not adverted to the fact that a proper assessment had not yet taken place.¹⁵⁶
- 188 Cardinal Pell's failure to advert to this fact can be explained in part by his absence from the management of the Archdiocese during August to October 2002, being the very period during which such an assessment ought to have been carried out.¹⁵⁷ Cardinal Pell also misunderstood Mr Davoren's role in relation to the assessment process. At that time, Cardinal Pell was more familiar with the procedures under the *Melbourne Response* which allowed the Independent Commissioner to manage as well as undertake the assessment of the complaint, which was not the position under *Towards Healing*.¹⁵⁸ Cardinal Pell did not advert to the difference between the *Melbourne Response* and *Towards Healing* at that time.¹⁵⁹
- 189 Cardinal Pell relied upon his independent PSO adviser, Mr Davoren, to properly apply the procedures in *Towards Healing*.¹⁶⁰ He then followed Mr Davoren's advice, assuming that such procedures had been followed.¹⁶¹ After receiving a copy of the Eccleston Assessment, Cardinal Pell became aware that such reliance was misplaced.¹⁶²
- 190 Paragraph [213] of the Submissions is by no means a fair summary of the evidence. The annotation referred to in paragraph [213] was not made on the email set out at paragraph [212] of the Submissions. Rather, that annotation was made on an email from Mr Davoren to Fr Doherty and others dated 3 February 2003, in which Mr Davoren recommended that a proposed meeting

¹⁵⁴ T6306: 29 - 41

¹⁵⁵ Ex 8-1 at Tabs 31, 32, 33 and 35.

¹⁵⁶ T6299:19-36; T6300:7-17; T6306:43-6307:40

¹⁵⁷ See paragraph 172 above

¹⁵⁸ T6295:4-10

¹⁵⁹ T6299:27-31; T6300:31-33

¹⁶⁰ See paragraph 168 above

¹⁶¹ Ex 8-14 at paragraphs [35], [79], [88]-[89]

¹⁶² T6324:35-39; T6326:31-44

between Mr Ellis and Bishop Cremin not proceed until a clear picture of Duggan's health had been obtained.¹⁶³ The evidence regarding this correspondence is referred to further at paragraph 90 above.

9.3 Discussions about reparation

[CA Submissions paras 222 - 259]

9.3.1 The "cap or upper limit"

- 191 With respect to paragraph [222] of the Submissions, Mr Salmon, Mr Brazil and Monsignor Rayner did not give evidence that there was a "cap or upper limit" of \$50,000 in relation to the financial gestures offered under *Towards Healing*. On this topic, Mr Salmon said (emphasis added):¹⁶⁴

"Although there was no formal cap to a financial payment under Towards Healing in 2004 or at any other time, there was then a general view amongst some of the Church Authorities dealing with complaints that \$50,000 was a significant payment which would be at the higher end of amounts that a Church Authority might be prepared to pay pursuant to a Towards Healing complaint. That figure was the cap under the Melbourne Response at the time. However, my understanding was that this was no means an inflexible figure under Towards Healing. I understood at the time that there had been a number of payments above \$50,000 under Towards Healing."

- 192 Similarly, in relation to Mr Brazil and Monsignor Rayner:

- (a) Although Mr Brazil described the amount of \$50,000 as an "informal ceiling" or "informal cap",¹⁶⁵ he gave evidence that he knew there was no actual cap under *Towards Healing*. Rather, he understood that there was a prevailing view amongst at least some Church Authorities at the time that they would usually not be likely to go above \$50,000,¹⁶⁶ and
- (b) Monsignor Rayner understood "that in the ordinary course the Archdiocese did not usually make payments in excess of \$50,000 in *Towards Healing* matters".¹⁶⁷

- 193 The statement in paragraph [222] of the Submissions that there was a cap or upper limit of \$50,000 is not a fair summary of the evidence of Mr Salmon, Mr Brazil and Monsignor Rayner on this topic.

- 194 The Church parties do accept that there was a "*general understanding that reparation payments to complainants were normally \$50,000 or under*", as stated in the second sentence of paragraph [223] of the Submissions, but do not accept that they were required to notify the public of this

¹⁶³ Ex 8-1 at Tab [33]

¹⁶⁴ Ex 8-7 at paragraph [93]

¹⁶⁵ Ex 8-8 Brazil at paragraph [23]

¹⁶⁶ Brazil T5740:26-39

¹⁶⁷ Ex 8-9 at paragraph [45]

general understanding, nor that such a general understanding was inconsistent with *Towards Healing* (2000). Clause 41.1 of *Towards Healing* (2000) provides (emphasis added):¹⁶⁸

*“In the event that the Church authority is satisfied of the truth of the complaint, whether through admission of the offender, a finding of a court, a canon law process or a Church assessment, **the Church authority shall respond to the needs of the victim in such ways as are demanded by justice and compassion.** Responses may include the provision of an apology on behalf of the Church, the provision of counselling services or the payment of counselling costs. **Financial assistance or reparation may also be paid to victims of a criminal offense or civil wrong, even though the Church is not legally liable.**”*

- 195 The Church parties accept that when a Church authority is determining an amount of financial assistance or reparation, clause 41.1 requires the Church authority to take the victim’s needs into account.
- 196 However, as explained in Part B, section 3.2 above, clause 41.1 does not require the Church authority to pay whatever amount of financial assistance or reparation that a victim may regard as meeting his or her financial needs. Rather, the Church authority must consider its response to the needs of the victim (including whether or not financial reparation is appropriate and if so in what amount) by reference to the demands of justice and compassion, neither of which concepts is defined in nor limited by *Towards Healing*.
- 197 Cardinal Pell expressed the view that *Towards Healing* is underdeveloped in relation to the principles upon which financial assistance should be provided to victims.¹⁶⁹ Other than requiring that the needs of the victim be taken into account, *Towards Healing* leaves it to the Church authority to determine what other factors may be relevant, which may include the gravity of the offence and whether a causal link has been established between the harm inflicted and the victim’s financial needs.¹⁷⁰
- 198 The Church parties do not accept that the first sentence of paragraph [223] of the Submissions is a correct statement of the requirements of *Towards Healing* (2000). That sentence suggests that the only matter that a Church authority could take into account in determining the amount of reparation is the needs of individual complainants. The inquiry is far more difficult and nuanced than the first sentence of paragraph [223] suggests.
- 199 More recently, the Archdiocese of Sydney has made to payments to victims under *Towards Healing* that have far exceeded \$50,000. A more detailed summary of the change in approach towards the calculation of reparation payments by the Archdiocese of Sydney is at section 19 below.

¹⁶⁸ Ex 8-3 at Tab E

¹⁶⁹ T6360:24–29

¹⁷⁰ Ex 8-14 at paragraph [168]; T6585:3–6586:29

9.3.2 Whether Cardinal Pell was told about the amounts of reparation sought by or to be offered to Mr Ellis

- 200 As explained in further detail below (with the exception of subparagraph (a), which is dealt with in section 9.1.1 above), the probability is that Cardinal Pell was not told about the specific amounts of reparation offered to or sought by Mr Ellis. This is supported by the following evidence:
- (a) Both Cardinal Pell and Monsignor Rayner gave evidence that Monsignor Rayner was an authorised representative of the Church Authority for the purposes of *Towards Healing*. Monsignor Rayner's responsibilities as authorised representative included liaising with the PSO and attending facilitations,
 - (b) Cardinal Pell gave evidence that those responsibilities delegated to the Chancellor included decisions regarding amounts of reparation and that it would have been impossible for Cardinal Pell to be involved in these types of decisions having regard to the extent of his responsibilities in relation to the management of the Archdiocese,
 - (c) In a manner consistent with this delegation, the documents in Mr Ellis' *Towards Healing* file demonstrate that Monsignor Rayner personally made all decisions regarding the conduct of Mr Ellis' facilitation, including amounts to be offered as reparation to Mr Ellis. There is no suggestion anywhere in the documents that Cardinal Pell was ever specifically consulted during the course of the negotiations that occurred prior to the facilitation,
 - (d) The existence of the \$50,000 "informal cap" on *Towards Healing* payments makes it inherently unlikely that Monsignor Rayner would have consulted with Cardinal Pell before rejecting a settlement offer that was double that informal ceiling. If Monsignor Rayner had been minded to consider accepting such a figure (as he was not), there might have been a need for him to seek approval to exceed the informal ceiling. But the offer was so far in excess of that level that there was not the slightest need or reason for him to do so before rejecting it,
 - (e) The notes taken by Mrs Nicola Ellis during the facilitation record that Monsignor Rayner informed Mr and Mrs Ellis that the decision about reparation was a decision that he made personally. Monsignor Rayner was unable to give any satisfactory explanation as to why Mrs Ellis' notes would record him having made this statement if it was not in fact true,
 - (f) Mr Salmon gave evidence that he understood the Church Authority to be Monsignor Rayner, and that Monsignor Rayner would have come up with the amount of reparation himself, and
 - (g) Cardinal Pell gave evidence that he could not recall ever having been consulted about amounts to be offered in *Towards Healing* facilitations.
- 201 Monsignor Usher gave evidence that (as Chancellor succeeding Monsignor Rayner) he himself made the decisions regarding the amounts of reparation and that he did not consult Cardinal Pell regarding these amounts. It is appropriate to infer that the position was the same during Monsignor Rayner's time.

- 202 Monsignor Rayner's evidence, to the effect that he would have sought and obtained the approval of Cardinal Pell to make an offer to a victim and would have consulted Cardinal Pell regarding every proposed offer to be made to a victim,¹⁷¹ is not only inconsistent with the evidence of Cardinal Pell, but also with the evidence of Mr Ellis, with the documents in Mr Ellis' *Towards Healing* file, with Mrs Ellis' notes of the facilitation, and with the evidence of Mr Salmon and Monsignor Usher. It should be rejected.

Cardinal Pell's evidence

- 203 On several occasions during the course of the hearing, Cardinal Pell gave evidence to the following effect:¹⁷²

"I can't remember ever being asked my opinion on how much money might be paid in reparation/compensation to a Towards Healing victim. I've thought very carefully about this. I've got no such recollection."

- 204 Cardinal Pell further stated, in response to Monsignor Rayner's evidence that he obtained authorisation from the Cardinal in relation to the offers he made:¹⁷³

"I certainly did not participate in any extended discussion on the matter. I certainly did not nominate any amount of money. . . . And the suggestion that after a man has lost a job of \$300,000 a year, I would agree to offer him \$5,000 extra by way of compensation I regard as grotesque."

- 205 Cardinal Pell responded squarely to CA's suggestion it was "inconceivable" he was not aware of the offers by explaining:¹⁷⁴

"it's not a question of what's conceivable or logically possible. The fact is that I wasn't. I wasn't informed about any of this. Now, my recollections have hardened a little bit beyond what is written there, and it's hardened by this thought and that is that I can't recall ever being consulted on deciding how much might be offered in a Towards Healing offer for reparation or compensation."

- 206 Cardinal Pell confirmed that he did not make decisions in individual cases as to whether a complainant should receive compensation in respect of a *Towards Healing* complaint and that this was because his permission wasn't needed as it had already been given on a general basis.¹⁷⁵
- 207 Cardinal Pell considered that it was *"quite impossible in an archdiocese the size of mine"* for him to micro-manage monetary negotiations with victims and that he entrusted this task to his Chancellors and let them get on with the task.¹⁷⁶ Cardinal Pell gave evidence that Monsignor Rayner had the authority to make payments within the range of \$20,000 to \$40,000 and did not

¹⁷¹ Ex 8-9 at paragraphs [47] and [68]; T5770:32-44; T5789:42-45; T5793:39-43; T5891:25-T5892:4; T5895:21-25

¹⁷² T6285:36-39; T6287:23-31; T6334: 37-T6335:2

¹⁷³ T6289:45-T6290:5; see Ex 8-14 at paragraphs [97] - [98]

¹⁷⁴ T6334: 37-T6335:2

¹⁷⁵ T6287:45-T6288:4; see also T6285:2-17

¹⁷⁶ T6286:3-9; T6289:19-26; Ex 8-14 at paragraph [73]; see also evidence of Monsignor Usher at T6388:46-T6389:8

consult Cardinal Pell on any regular basis in relation to reparation payments at all, as it was within his authority to make those decisions as Vicar General.¹⁷⁷

- 208 At the time Mr Ellis' complaint was made, reparation amounts were usually within the range of \$20,000 to \$40,000. Cardinal Pell stated that he could not recall any case in which he was consulted on an amount paid within that range, and that it was only if a proposed payment was much higher than \$40,000 that he would have expected it to be reported to him.¹⁷⁸ Such was not the case in relation to Mr Ellis.

The evidence of Mr Ellis

- 209 The Church parties note and adopt the contents of the Submissions at [260] and [261], and also refer to paragraph [243] of these submissions below.
- 210 Plainly the "reasons" there listed, as conveyed to Mr Ellis by Mr Brazil, were "reasons" that commended themselves to Monsignor Rayner. There is no suggestion anywhere in the evidence that Cardinal Pell was told of, or agreed with, any of these "reasons" at that time.

Mr Ellis' *Towards Healing* file

- 211 Cardinal Pell's evidence that he delegated to Monsignor Rayner the day-to-day management of *Towards Healing* complaints, including the task of negotiating and deciding upon amounts to be offered as reparation, is consistent with the following references in the documents in Mr Ellis' *Towards Healing* file:
- (a) In a case note dated 23 June 2003: *"As per recent discussion with Mon Rayner I [Mr Salmon] offered John Ellis the option of formal assessment"*,¹⁷⁹
 - (b) In a letter from Mr Salmon to Mr Ellis dated 2 July 2003: *"This letter is to confirm my telephone advice of today that Monsignor Brian Rayner, the Chancellor of the Archdiocese of Sydney, has requested that I formally afford you the opportunity to visit Fr Duggan, accompanied by the Monsignor"*,¹⁸⁰
 - (c) In an email from Mr Cudmore to Mr Salmon dated 15 December 2003: *"I have spoken to Msgr Rayner re: Ellis/Duggan. Msgr Rayner is of the view that Bishop Cremin would be ideal to carry out the facilitation on this matter..."*,¹⁸¹
 - (d) In an email from Mr Cudmore to Mr Salmon and Ms Lehn dated 16 December 2003: *"I have spoken with Msgr Rayner and he has also agreed that you should proceed and engage the facilitator"*,¹⁸²

¹⁷⁷ T6684:13–18

¹⁷⁸ T6505:34–42

¹⁷⁹ Ex 8-1 at Tab 59

¹⁸⁰ Ex 8-1 at Tab 63

¹⁸¹ Ex 8-1 at Tab 69

¹⁸² Ex 8-1 at Tab 70

- (e) In a case note dated 22 March 2004: *"RH spoke with facilitator. He advised that he had spoken briefly with complainant re needs. He expected to have more information by end of week for Msgr Rayner"*,¹⁸³
- (f) In a case note dated 20 April 2004: *"Date set for facilitator to brief CA on his discussions with John & Nicki Ellis. Date set for 29/4/04 (12-1pm) at PSO. (confirmed with Mons Rayner and Raymond Brazil)"*.¹⁸⁴ This case note confirms that "CA" (ie., Church Authority) was a reference to Monsignor Rayner, who was the person attending the meeting on its behalf,
- (g) In a case note of a meeting held on 29 April 2004 at the PSO, attended by Mr Salmon, Monsignor Rayner and Mr Brazil: *"Ellis maybe requesting to the order of \$90k for accommodation imposts – [Church Authority] willing to pay approximately \$25k as an ex gratia offer . . ."*,¹⁸⁵
- (h) In a case note dated 26 May 2004: *"Phone call from Raymond Brazil who reported that on the basis of an adverse psychological report John Ellis has been asked to by his employers to resign as a partner in his legal firm. . . . Raymond Brazil will contact Mons Rayner and inform him [that] this development will presumably be a factor in the ensuing negotiations"*,¹⁸⁶
- (i) In a case note dated 22 June 2004: *"[Mr Brazil] had worked on an agenda with the complainant . . . he now needed to see Mons Rayner"*,¹⁸⁷
- (j) In a file note taken by Mr Cudmore of a telephone call with Mr Brazil on 5 July 2004: *"John Ellis wants to see the Deed of Release. . . . I will speak to Msgr [Brian Rayner] tomorrow"*,¹⁸⁸
- (k) In a file note taken by Mr Cudmore of a telephone call with Mr Brazil on 15 July 2004: *"Raymond asks whether Msgr would still be happy to proceed with facilitation next week even while the issue of Deed + possible further action remain 'open'. I said I do not know + will have to consult Msgr"*,¹⁸⁹
- (l) Letters and emails from Mr Ellis addressed to Monsignor Rayner,¹⁹⁰ and
- (m) Letters from Monsignor Rayner to Mr Brazil, Mr Ellis and CCI.¹⁹¹

¹⁸³ Ex 8-1 at Tab 76

¹⁸⁴ Ex 8-1 at Tab 79

¹⁸⁵ Ex 8-1 at Tab 80

¹⁸⁶ Ex 8-1 at Tab 81

¹⁸⁷ Ex 8-1 at Tab 82

¹⁸⁸ Ex 8-1 at Tab 84

¹⁸⁹ Ex 8-1 at Tab 97

¹⁹⁰ Ex 8-1 at Tabs 85, 89, 95, 96, 100 and 101

¹⁹¹ Ex 8-1 at Tabs 87, 88, 121

- 212 Particularly telling is a file note by Mr Cudmore of a telephone conversation that occurred between Mr Brazil, Monsignor Rayner and Mr Cudmore on 15 July 2004. The file note records:¹⁹²

"[Mr Brazil] has spoken to John Ellis. He has explained that cheque is handed over in exchange for a Deed being signed. John has no 'present intention' of bringing a damages claim. JE has made a conscious decision to 'defer' the issue of Deed/cheque etc until the nature of the facilitation is seen.

*Raymond still thinks there is value in proceeding with facilitation on 20 July 2004. **If no agreement on financial amount then Msgr Rayner not interested in further meetings.** Raymond indicated that JE wanted meeting recorded. **Msgr said that there is to be no recording of the meeting.**"*

- 213 This file note and the other documents referred to above demonstrate that it was Monsignor Rayner who made decisions regarding all aspects of the facilitation process, including whether a facilitation would even be held, and that the other participants in the negotiations, namely Mr Ellis and Mr Brazil, fully understood that this was so. The complexity and frequency of the communications that occurred prior to the facilitation also demonstrates that it would have been both impractical and impossible for Cardinal Pell to be involved in that process.

The notes taken by Mrs Ellis at the facilitation

- 214 Mrs Ellis' notes record that during the facilitation, Monsignor Rayner was asked how the Archdiocese came up with any figure for reparation, to which he responded:¹⁹³

*"There are terrible degrees of abuse. Terrible physical violence requiring hospitalization. Gesture would be the maximum for that sort of person. Abuse over 3 to 8 years or more . . . **It is a personal decision that I make** . . . Is also relevant whether the abuse continued to an age when 'decision could have been made'. **It is arbitrary**, but trying to act in good faith. Culpability of Bishops who knew molester is different from that of Bishop who doesn't know there is a problem." [emphasis added]*

- 215 The notes then record the following exchange between Mrs Ellis and Monsignor Rayner (emphasis added):¹⁹⁴

***NE:** When you are making these decisions, do you consult with any other Church agency where there are specialists in sexual abuse, for instance, Centacare? Are you informed by expertise re. nature/sequelae of sexual abuse?*

***BR:** **I don't consult with any other agencies.** There is the Professional Standards Resource Group. There we discuss the response but not the gesture, and any actions being taken against a particular priest."*

¹⁹² Ex 8-1 at Tab 99

¹⁹³ Ex 8-1 at Tab 102, pages 4–5

¹⁹⁴ Ex 8-1 at Tab 102, page 5

- 216 On their face, the notes record not only that Monsignor Rayner flatly asserted that he personally made the decisions as to the amounts of reparation, but also that he spelt out what matters that he (not anyone else) took into account in determining those amounts and that he made those decisions himself, without consulting with any other Catholic agencies.
- 217 In Monsignor Rayner's statement, he did not deny stating during the facilitation that *"it is a personal decision that I make"*. Rather, he said only that he did not now recall whether or not he had said those words and that if he did say them, they were not accurate.¹⁹⁵
- 218 When asked in the witness box whether he had made that statement, Monsignor Rayner first denied doing so, but then suggested that if he did, it was *"to deflect the matter from the archbishop, and, even worse, it may have been to make myself look like someone of importance"*.¹⁹⁶
- 219 Monsignor Rayner's evidence on this topic is inconsistent with the contemporaneous record, and with the direct evidence given by Mr Danny Casey regarding the approach Monsignor Rayner took to the determination of the amounts offered by him in Towards Healing¹⁹⁷. The Church parties submit that it is far more likely that Mrs Ellis' notes are a correct record of what was said by Monsignor Rayner during the facilitation on this topic, and that when Monsignor Rayner told Mr and Mrs Ellis that he made these decisions personally, himself, that was an accurate account of the decision making process at the time within the Archdiocese.

The evidence of Mr Salmon

- 220 Mr Salmon gave the following evidence:¹⁹⁸

"My experience would have been that [Monsignor Rayner] would have made that figure himself, but I have no reference to whether he would have had any discussions prior - with anybody else, and what his general discretion was in these matters, but to the best of my knowledge, in dealing with him, as in dealing with the succeeding chancellor, he would have made that decision - he seemed to have a fair degree of delegation to make the decision.

... I don't have any knowledge of whether he would have taken advice from anybody else in the chancery, and what his mandate and what his discretion was. What I'm saying is that in my dealings with him, he seemed to have at least a delegation or a discretion to come up with a figure, and that was similar experience with the chancellor that succeeded him."

- 221 Mr Salmon also gave evidence that the offer of \$25,000 discussed during a meeting held at the offices of the PSO on 29 April 2004 was *"a figure that was the monsignor's figure. It wasn't anybody else's."*¹⁹⁹

¹⁹⁵ Ex 8-9 at paragraph [68]

¹⁹⁶ T5911:14-18

¹⁹⁷ T6475:32 - 38

¹⁹⁸ T5612:24-42; see also T5613:13-T5614:10

¹⁹⁹ T5615:11-16

The evidence of Monsignor Usher

222 Monsignor Usher gave evidence that he was not required to obtain the approval of Cardinal Pell before making offers of financial assistance to victims. Monsignor Usher stated:²⁰⁰

"I do recall early in my days in the Archdiocese of Sydney, as the chancellor, saying to the cardinal about these Towards Healing matters, I recall saying to him, "Do you want me to come back to you on these matters?" He said, "Oh, no, you get on with the job." I can remember that sort of expression, he said, "But if you have any problems, come back to me." I might inform him after I've made a decision, but I don't feel I have an obligation to seek his approval before I make a payment."

223 Monsignor Usher's evidence was that, in his role as Chancellor, he had a wide delegation to meet with victims and broad discretion to provide them with the financial and pastoral assistance he saw fit, by reference to the victim's needs, including to Mr Ellis following the litigation.²⁰¹ More recently, a procedure has been put in place which requires Monsignor Usher to consult with an advisory committee regarding larger financial payments to victims, which ensured that Monsignor Usher could continue to make decisions regarding reparation without having to go back to the Cardinal.²⁰²

224 It should be inferred that the delegated authority of Monsignor Rayner and Monsignor Usher to deal with *Towards Healing* complaints, and their respective practices in that regard, were the same. That is, both had the authority to meet with victims, at a facilitation or otherwise, and make decisions about the appropriate manner of meeting each victim's financial and pastoral needs, without any obligation to obtain the approval or authorisation of Cardinal Pell prior to making those decisions, and both in fact conducted themselves in that way.

Summary

225 For the reasons summarised above, the Royal Commission would consider that Monsignor Rayner's evidence does not provide a satisfactory basis for a finding that Monsignor Rayner either required or sought approval from Cardinal Pell before making an offer to any victim including Mr Ellis.

9.3.3 Cardinal Pell did not know of the reparation amounts by 17 September 2004

226 The Church parties respectfully submit that, far from being "inconceivable" as suggested in CA's Proposed Finding 4, the realistic and appropriate conclusion to be drawn from the evidence before the Royal Commission is that by 17 September 2004, Cardinal Pell did **not** know that Mr Ellis had put forward the amount of \$100,000, and was also unaware that Monsignor Rayner had initially offered \$25,000, and later \$30,000, as reparation (collectively, the **reparation amounts**).

²⁰⁰ T6389:34–42

²⁰¹ Ex 8-13 at paragraphs [23] – [32]; [126]–[152]

²⁰² T6379:27–36; T6380:10–13; Ex 8-13 at paragraph [155]

227 In summary, this is for the following reasons:

- (a) Monsignor Rayner had authority to determine the amounts of reparation to be offered to a victim without consulting Cardinal Pell, provided that the amount of reparation was within the usual range of \$20,000 to \$40,000 (see paragraphs [205] – [208] above),
- (b) It is unlikely that Monsignor Rayner would have informed Cardinal Pell of his intention to reject Mr Ellis' proposal of \$100,000, as he considered it to be a very large amount that was well outside the range usually offered by the Archdiocese (see paragraphs [279] - [283] below),
- (c) Monsignor Rayner personally decided the amounts of reparation to be offered to Mr Ellis and did not consult with Cardinal Pell or any other Catholic agencies before making that decision (see paragraphs [214] - [219] above),
- (d) The offers made by Monsignor Rayner to Mr Ellis of \$25,000 and \$30,000 were within the usual range. There was therefore no reason for Monsignor Rayner to inform Cardinal Pell of those offers prior to the facilitation taking place,
- (e) Cardinal Pell regarded the offer of \$30,000 as "*grotesque*" having regard to the fact that Mr Ellis had recently lost his employment as a partner at a large Sydney law firm.²⁰³ If Cardinal Pell had been informed of the reparation amounts and Mr Ellis' loss of employment, he would have taken steps to consult with his advisers as to whether the approach being taken was correct. Cardinal Pell did not recall any such steps being taken.²⁰⁴ Nor is there any documentary evidence to suggest that such discussions took place,
- (f) Mr Salmon, Mr Davoren, Mr Danny Casey and Dr Michael Casey gave evidence that they did not personally inform Cardinal Pell of the reparation amounts (see paragraphs [228] - [239] below). They also did not have any personal knowledge as to whether Monsignor Rayner informed Cardinal Pell of the reparation amounts (see paragraphs [230], [233], [235] and [237] below), and
- (g) Monsignor Rayner's evidence was not corroborated by that of any other witness or by any documentary evidence, and there were a number of inconsistencies in his evidence and his affidavit.²⁰⁵ The Church parties submit that the where evidence of Monsignor Rayner is inconsistent with the documentary record or the recollections of other witnesses, the Commission would not accept Monsignor Rayner's evidence in preference to that other evidence.

Evidence of Mr Davoren, Mr Salmon, Mr Daniel Casey and Dr Michael Casey

228 The Church parties submit that paragraphs [238] to [244] of the Submissions are not a fair summary of the evidence given by Mr Davoren, Mr Salmon, Mr Daniel Casey and Dr Michael

²⁰³ T6289:45–T6290:5

²⁰⁴ T6690:39–T6691:35

²⁰⁵ See paragraphs [243] and [245] below

Casey as to whether the Cardinal “*would have been informed*” about the reparation amounts. They further submit that the summary is so incomplete as to be misleading, in that it fails to include Cardinal Pell’s response to the evidence actually given by those individuals.

Mr Davoren

229 Mr Davoren’s evidence was as follows (emphasis added):²⁰⁶

“Q. *Were you involved in the process of deciding whether a complainant should receive compensation?*

A. *No.*

Q. *Never?*

A. *I was sometimes asked advice about it, but **I had no role in making decisions about that.***

Q. *Who did you understand made that decision?*

A. *I **understood** it was the church authority.*

Q. *That doesn’t help me very much. Who?*

A. *Well, **finally** the archbishop.*

Q. *So it was your understanding that those decisions were made by the archbishop?*

A. *In the cases involving Sydney, yes.*

Q. *In every case?*

A. *Yes.”*

230 Mr Davoren thus had no personal involvement in the process of deciding whether a complainant should receive compensation, save that he was sometimes asked for advice about it. No questions were asked as to the basis for his “understanding” that the decisions were “finally” made by the archbishop, nor whether by “finally” he merely meant that ultimately the archbishop of the day had overall responsibility for decisions made on his behalf by others, nor to what time period his understanding related. In that latter regard it may be noted that Cardinal Clancy was the Archbishop for most of the period that Mr Davoren was Director of the PSO, and not Cardinal Pell.

231 Cardinal Pell gave evidence that Mr Davoren’s understanding was not correct.²⁰⁷

Mr Salmon

232 Mr Salmon’s evidence on this topic was as follows (emphasis added):²⁰⁸

²⁰⁶ T5502:12-28

²⁰⁷ T6687:22-25

²⁰⁸ T5612:44-T5613:29

- “Q. As you appreciate, the request for \$100,000 was outside of what you understood the church might even contemplate?
- A. Yes.
- Q. Did that mean, in your experience, that the request being outside ordinary bounds, special consideration would be given to it?
- A. I think it's a reasonable proposition that reasonable attention would be given to it.
- Q. What, in your experience, would you have expected to have happened in the consideration of a request like that?
- A. I **would have expected** that there **would have been** some consultation between the appropriate people in the chancery.
- Q. Who did you see as the appropriate people?
- A. I **would assume** that there **would have been** some reference back to the archbishop, but there **may have been** other people that **would have been** consulted as well.
- Q. So you would have expected the archbishop to be involved?
- A. I **would have expected** that that figure - that there **would have been** some knowledge of that figure, yes.
- Q. When you say "some knowledge of that figure" --
- A. Well, some knowledge of the figure of \$100,000, that that's what's being --
- Q. You mean knowledge in the archbishop?
- A. Yes.”

233 Mr Salmon’s responses are repeatedly qualified by phrases such as “*would have expected*” and “*would assume*”. It is apparent that Mr Salmon had no direct personal knowledge of whether there was a practice or procedure by which Cardinal Pell was informed, either routinely or ever, of amounts proposed as reparation.

234 Cardinal Pell gave evidence that the “expectations” of Mr Salmon were not unreasonable, but in fact, “*it didn’t occur like that*”.²⁰⁹

Mr Daniel Casey

235 The evidence of Mr Daniel Casey does not support an inference that Cardinal Pell was informed of the reparation amounts. Mr Daniel Casey stated that he did not have any role as Business Manager in determining amounts to be paid under *Towards Healing*, that he did not engage in discussion with any person about what was happening leading up to the Ellis facilitation in terms of offers, and that he had no knowledge or involvement in the matter, save for a brief discussion

²⁰⁹ T6688:20–21

he had **with Monsignor Rayner** (not with the Cardinal) regarding the reparation amounts, which he did not pass on to the Cardinal.²¹⁰

Dr Michael Casey

236 Dr Michael Casey gave the following evidence (emphasis added):²¹¹

*“Q. Given those matters, Dr Casey, it is more than likely, is it not, that the cardinal **would have sought** from you or somebody else information about any discussions about money up to the facilitation?*

*A. **If he did seek advice on those matters, I don't think it would have been from me.***

*Q. Leaving aside you, you would accept, would you not, that given the extent of the cardinal's involvement in Mr Ellis's complaint, he **would have sought** information about reparation discussions up to the facilitation; isn't that right?*

*A. Well, yes, and that information **would normally be provided to him** by the chancellor and the director of professional standards.*

Q. You wouldn't doubt that the chancellor provided that information to him, if asked?

*A. **That would be my expectation. I would have no direct knowledge of it necessarily, but that would be my expectation.***

Q. And your expectation is that he would seek that information from the chancellor?

*A. **My expectation** would be that the chancellor would bring it to him.*

THE CHAIR: Q. That would be for the cardinal to say "yes" or "no", wouldn't it?

A. I'm sorry, your Honour?

Q. The information would be brought to the cardinal so he could make the decision, as you understood it?

*A. Yes, **that's what I would have expected.***

Q. Your expectation was that the cardinal would decide any issue in relation to the payment of money?

*A. **That's what I would have expected**, yes.*

MS FURNESS: Q. Did you have any understanding of how the amounts of money were arrived at?

*A. **No, none at all.**”*

237 Dr Michael Casey was not responsible for and had no involvement in the process (if any) by which the Cardinal was kept informed of any matters of this kind. Almost all of Dr Michael

²¹⁰ T6430:18–35

²¹¹ T6079:25–T6080:19

Casey's answers set out in the extract above were qualified by words to the effect of *"that's what would be my expectation"*, repeatedly confirming that he had no personal knowledge as to what actually took place.

238 In response to Dr Michael Casey's evidence that he expected Cardinal Pell was informed of the reparation amounts, Cardinal Pell gave evidence that Dr Casey *"is completely honest and completely reliable, but he's not the Archbishop and he knows what he knows, and there are some things that he didn't know"*.²¹²

239 The evidence of Dr Michael Casey does not assist the Royal Commission to determine whether or not Cardinal Pell was informed of the reparation amounts.

Evidence of Monsignor Rayner

240 The Church parties submit that the evidence of Monsignor Rayner was substantially a reconstruction and would not be accepted in the absence of any corroboration from another witness or documentary evidence. With respect to a number of important issues, the evidence given by Monsignor Rayner was inconsistent with contemporaneous documents and evidence given by a number of other witnesses.

241 First, Monsignor Rayner's evidence at paragraph [33] of his witness statement that he has *"never doubted that Mr Ellis was telling the truth about being sexually abused by Fr Duggan"* is at least to some extent at odds with his evidence given during the hearing that he did in fact have reservations regarding the Eccleston Assessment. It was also inconsistent with evidence given by Mr Salmon and Mr Daniel Casey and the transcript of Monsignor Rayner's conversation with Mr Monahan on 24 August 2004.

242 Secondly, the evidence outlined above points to the conclusion that Monsignor Rayner personally decided upon the amounts to be offered to Mr Ellis, and that his own evidence to the contrary should not be accepted. Cardinal Pell, Monsignor Usher and Mr Salmon gave evidence that the Chancellor had authority to determine the amounts offered as reparation without consultation with the Cardinal and, in the case of Monsignor Usher, did do so. That Monsignor Rayner had the same authority, and followed the same practice, was confirmed by Monsignor Rayner himself, as recorded in Mrs Ellis' notes from the facilitation (see paragraphs [214] - [219] above). It is also consistent with the recollection of Mr Danny Casey regarding Monsignor Rayner's approach to determining the amount offered to victims, which was in the following terms:

*Monsignor Rayner, from time to time, would come in to my office and tell me that, "There is another abuse matter. This person wants X amount. I'm going to give them X minus Y", and it's in that sort of context. I remember it in those sort of terms, "This one wanted \$100,000. I'm going to give him \$30,000." That's the extent of my recollection.*²¹³

243 Thirdly, Mgr Rayner's account in his oral evidence itself contained inconsistencies. His first response was that he did not know and *"would have had that figure given to me"* after discussion

²¹² T6288:6-46

²¹³ T6475: 32 - 38

with the Archbishop.²¹⁴ Later, he stated that he could not recall how he came to that figure or who he discussed it with,²¹⁵ that he did not know why the church seemed to be locked in at \$25,000²¹⁶ and that the Archbishop would not have come up with the offer.²¹⁷ Monsignor Rayner later also conceded that he himself did take various matters into account in arriving at the amount of reparation to be offered to Mr Ellis, including that there had not been extensive violence or hospitalisation and that the culpability of a Bishop who is aware of the abuse is different from the culpability of a Bishop who is not.²¹⁸

- 244 Fourthly, in relation to his supposed conversations with Cardinal Pell regarding the reparation amounts, Monsignor Rayner initially gave evidence that he “*would have*” informed Cardinal Pell of the reparation amounts.²¹⁹ When pressed, he first claimed to have an actual recollection of a specific conversation in which he informed Cardinal Pell of the amounts,²²⁰ only to change this evidence by admitting that he did not have a recollection of any particular conversation he had with Cardinal Pell in relation to any *Towards Healing* case.²²¹ In the Submissions at paragraph [237], CA accepts that Monsignor Rayner did not in fact recall any particular conversation with Cardinal Pell and was only purporting to give evidence of an asserted practice.
- 245 As to his statement given to the Royal Commission, Monsignor Rayner gave evidence that it contained several inaccuracies, which he claimed were due to the fact that the statement was “*prepared for me*”, that he didn’t know if he “*concentrated on every word*” and that he had found it difficult to run a parish and to be at the Royal Commission.²²² The Church parties respectfully submit that there are sufficient doubts about the accuracy and reliability of Monsignor Rayner’s witness statement that the Royal Commission would not rely upon it wherever it conflicts with the documentary evidence or the evidence of any other witness.

Conclusion

- 246 For the reasons outlined in paragraphs [226] - [245] above and [247] - [252] below, there is no proper evidential foundation for a finding to be made that Cardinal Pell was aware of the reparation amounts by 17 September 2004.
- 247 The proposition advanced by CA is that Cardinal Pell must have known of those amounts by that date, having regard to the 12 factors listed in Proposed Finding 4 on page 68 of the Submissions. The essential thrust of those factors is twofold, namely:
- (1) that Cardinal Pell had some involvement in, and some knowledge of, other aspects of Mr Ellis’ *Towards Healing* complaint, and
 - (2) that each of Monsignor Rayner, Mr Salmon, Dr Michael Casey and Mr Danny Casey knew of the amounts.

²¹⁴ T5789:31–45

²¹⁵ T5793:4–32

²¹⁶ T5794:23–27

²¹⁷ T5800:21–26

²¹⁸ T5798:44–T5799:12; T5803:4–T5804:17

²¹⁹ T5800:28–31

²²⁰ T5892:16–40

²²¹ T5893:24–T5894:15

²²² T5920:8–T5921:40

248 As to the first of these, the Church parties refer to paragraphs [170] to [180] above.

249 As to the second of these, the evidence is that:

- (1) Mr Salmon, Mr Danny Casey and Dr Michael Casey did **not** tell Cardinal Pell, and
- (2) Mr Salmon and Dr Michael Casey merely assumed, or expected, or understood, that **someone else** “would have” told Cardinal Pell.

250 For Cardinal Pell to have known, someone had to tell him. The only witness whose evidence comes close to such a claim is Monsignor Rayner. Yet even Monsignor Rayner does not now say that he told Cardinal Pell, only that he “would have” done so, in accordance with an asserted practice. But Monsignor Rayner’s evidence on this topic should not be accepted, for the reasons outlined at [200] – [202] [227(g)] and [240] - [245] above.

251 On the other hand, Cardinal Pell has given straightforward and consistent evidence that in fact he was not told the reparation amounts, by Monsignor Rayner or anyone else. He further said that if he had been told, firstly he would remember, and secondly he would have taken certain steps.²²³ There is no reason for the Commission to do other than accept that evidence. The Church parties respectfully submit that the Commission should do so without reservation.

252 Cardinal Pell, to his credit, accepted that there was “a very remote” possibility that he was told of the amount which Mr Ellis was seeking (\$100,000)²²⁴. That concession was given in a context where the Cardinal had just given evidence that his actual recollection was that in fact he was not told. It is submitted that the Royal Commission would treat this concession not as proof that he was actually told, but as Cardinal Pell reasonably accepting that he may be wrong in his recollection.

9.4 How the amounts were calculated

[CA Submissions paras 260 - 268]

253 In relation to paragraph [260] of the Submissions, Mr Ellis further said in his letter to Mr Salmon dated 31 July 2004 and his email to Mr Salmon on 2 August 2004, that notwithstanding the reasons for the calculation of the financial gesture evidently provided by Monsignor Rayner to Mr Brazil on 12 June 2004, when the matter was addressed at the facilitation: “*Msg Rayner had a very different explanation of how the amount of the gesture had been arrived at.*”²²⁵

²²³ T6690:39-T6691:35

²²⁴ T6340:16

²²⁵ Ex 8-1 at Tab 112 paragraph [34]; Tab 113; re paragraph #34

9.5 After the facilitation

[CA Submissions pp 68 - 70]

- 254 The Church parties submit that paragraphs [279] - [280] of the Submissions do not contain a fair summary of Cardinal Pell's evidence on the issue of whether Mr Ellis ought to have been provided with a spiritual director after the commencement of the litigation. The extract of Cardinal Pell's evidence referred to in the first sentence of paragraph [279] should be placed in its full context as follows:²²⁶

“Certainly the counselling by other people, spiritual direction - that certainly should have been made available. I was frightened that if - my knowledge of the law is not expert - that if the dialogue kept going within the Towards Healing while the litigation was on, it risked grievous confusion. If a judge had ordered a mediation, that would have been entirely - or suggested, it would have been entirely different. In retrospect, I don't know whether my decision there was correct or not, but a number of advisers agreed with it.” [emphasis added]

- 255 In response to a question from CA as to why the churchman did not come to the fore in these circumstances, the Cardinal stated:²²⁷

“Because it was a legal case. If it had been – when you go to court, you employ lawyers and you generally follow their advice, especially if you're inexperienced. If it's a matter of pastoral counselling or care, I'd have much more confidence in my ability to influence things.”

- 256 Cardinal Pell said he had no recollection of being made aware that Mr Ellis was asking for arrangements to be made for a spiritual director:²²⁸

“My view then would have been, and my view is now, that Mr Ellis should certainly have been given help in terms of finding a suitable spiritual director.”

- 257 The Church parties submit that the attempt at paragraph [281] of the Submissions to “contrast” Monsignor Usher's evidence with the evidence of Cardinal Pell as set out in paragraphs [279] - [280] is founded on an unfair characterisation of Cardinal Pell's evidence on the role of pastoral care in the context of litigation, and should not be accepted.
- 258 In relation to paragraph [282] of the Submissions, the sentence cited from the email from Mr Cudmore to Monsignor Rayner dated 20 September 2004 is not extracted in full. The full sentence notes that Corrs recommends *“the letter be 'put on hold' pending the outcome of the Limitations Period Hearing in October”* (emphasis added).²²⁹ The Notice of Motion on the

²²⁶ T6350:21 –30

²²⁷ T6351:2–6

²²⁸ Ex 8-14 at paragraph [104]

²²⁹ Ex 8-2 at paragraph Tab 233

Limitations Period issue was originally listed in the Supreme Court of NSW on 25 October 2004,²³⁰ just over one month after the date of the email.

259 In relation to paragraph [289] of the Submissions, Mr Salmon further stated that:²³¹

“After a long facilitation process that had effectively started when Raymond Brazil had taken on the role, so the process had commenced in real terms well before the July 2004 facilitation, and it had still not resolved anything much and there were arguments about the deed and other aspects to it, I wasn't confident that a meeting with the Cardinal would particularly take it anywhere.”

260 In relation to paragraph [291] of the Submissions, the Church parties note that the full extract from the letter from Monsignor Rayner to Mr Ellis dated 12 August 2004 states:²³²

*“given the legal avenues which you are pursuing against the Archdiocese, it would not be appropriate for the Archbishop to meet with you as part of the "Towards Healing" process as that is overtaken, **at this stage**, by your decision, **to which you are entitled**, to engage in legal action against the Archdiocese.”* (emphasis added)

261 Further, by 12 August 2004, Monsignor Rayner had already received a 12-page letter from David Begg & Associates, setting out Mr Ellis' legal position and seeking a without prejudice meeting “to reach a complete settlement of the matter without the need for litigation.”²³³ The letter, dated 28 July 2004, made clear that should the matter not reach settlement by the proposed date of 3 August 2004 or soon thereafter, Mr Ellis would institute proceedings under the Limitations Act. That he did do on 31 August 2004.²³⁴

262 In these circumstances, the Church parties submit that the last sentence of paragraph [291] is a misleading characterisation of the evidence and should be rejected. The request for a meeting with the Cardinal was not being “rejected”; rather the view was being taken, rightly or wrongly, that it would not be appropriate “at this stage”.

9.6 Proposed Findings

263 Counsel Assisting proposes four findings in relation to this topic. Those proposed findings, and the response of the Church parties to them, are as follows.

Proposed Finding	Response
4. By 17 September 2004, Cardinal Pell knew of the amount of \$100,000 put forward by Mr Ellis, the amount of \$25,000 initially offered by his Chancellor, and of the final offer of \$30,000. It is inconceivable that he did not have this knowledge given the	Do not accept

²³⁰ Ex 8-2 at paragraph Tab 231

²³¹ Salmon T5628:36–42

²³² Ex 8-1 at Tab 121

²³³ Ex 8-1 at Tab 107 CTJH.400.01004.0267 at CTJH.400.01004.0278-0279

²³⁴ Ex 8-2 at Tab 205

Proposed Finding	Response
following:	
a. The nature and number of steps in which he was involved in in Mr Ellis' complaint.	Accept factual substratum, but not that it establishes or supports a finding as to Cardinal Pell's knowledge
b. The seriousness of the complaint.	Accept factual substratum, but not that it establishes or supports a finding as to Cardinal Pell's knowledge
c. The amount sought by Mr Ellis was outside the usual range offered within <i>Towards Healing</i> (2000).	Accept factual substratum, but not that it establishes or supports a finding as to Cardinal Pell's knowledge
d. The evidence of Mr Salmon, Dr Michael Casey, Mr Davoren and Mr Daniel Casey as to their expectations or assumptions, as set out earlier, as to the Cardinal's knowledge.	Do not accept factual substratum
e. That by this time Monsignor Rayner, Mr Salmon, Dr Michael Casey and Mr Daniel Casey knew of those amounts.	Accept factual substratum, but not that it establishes or supports a finding as to Cardinal Pell's knowledge
f. That the Cardinal's full time and principal advisers knew of those amounts (namely, Dr Michael Casey, Mr Daniel Casey and Monsignor Rayner)	Accept factual substratum, but not that it establishes or supports a finding as to Cardinal Pell's knowledge
g. The evidence of Monsignor Rayner, including as to his usual practice of informing the Cardinal of offers made.	Do not accept factual substratum
h. Cardinal Pell's knowledge that amounts of money would have been discussed as part of the facilitation.	Accept factual substratum, but not that it establishes or supports a finding as to Cardinal Pell's knowledge
i. Cardinal Pell knew the facilitation was held and that it did not resolve the complaint.	Accept factual substratum, but not that it establishes or supports a finding as to Cardinal Pell's knowledge
j. Cardinal Pell knew litigation had commenced.	Accept factual substratum, but not that it establishes or supports a finding as to Cardinal Pell's knowledge
k. That by this time the solicitors for the Archbishop and the Trustees knew of those amounts.	Accept factual substratum, but not that it establishes or supports a finding as to Cardinal Pell's knowledge
l. Cardinal Pell's acute concern that people who had survived abuse by clergy would be justly dealt with.	Accept factual substratum, but not that it establishes or supports a finding as to Cardinal Pell's knowledge
5. Cardinal Pell acted contrary to the principles and procedures underpinning <i>Towards Healing</i> (2000) by informing Mr Ellis that nothing more could be done for him in a letter dated 23 December 2002, and thereby not providing a compassionate response.	Do not accept as framed

Proposed Finding	Response
6. The following conduct of the Archdiocese of Sydney failed to comply with <i>Towards Healing</i> (2000):	
a. <i>Towards Healing</i> provided that reparation, if paid, would be in response to the needs of individual complainants (clause 41.1). The general understanding that reparation payments to complainants were normally \$50,000 or under was inconsistent with that clause and was not communicated to the public in the <i>Towards Healing</i> (2000) document or in any other publically available document.	Do not accept
b. The determination of the figure of \$25,000 and then the figure of \$30,000 had no or insufficient reference to the needs of Mr Ellis as required by clause 41.1 and was not consistent with <i>Towards Healing</i> (2000). Further, matters irrelevant to his needs were taken into account in its calculation.	Accept first sentence; do not accept second sentence as framed
c. By not providing Mr Ellis with a spiritual director, the Archdiocese was not acting with compassion (clause 19) and failed to address his needs as required by clause 41.1 of <i>Towards Healing</i> (2000).	Do not accept as framed
7. The Archdiocese of Sydney fundamentally failed Mr Ellis in its conduct of the <i>Towards Healing</i> process by not complying with <i>Towards Healing</i> and not treating him consistently with the requirements of justice and compassion. Cardinal Pell's conduct as set out above, contributed to that failing.	Do not accept

264 For the reasons which follow, the Church parties submit that Proposed Findings 4 to 7 should not be made either at all or as framed in the Submissions.

Proposed Finding 4

265 For the reasons outlined in paragraphs [191] - [252] above and paragraphs [266] - [295] below of these submissions, the Church parties do not accept that Proposed Finding 4 should be made, or that it could safely be made having regard to the weight of all the evidence. The Church parties respectfully submit that, far from being "inconceivable", the appropriate conclusion to be drawn from the evidence before the Royal Commission is that Cardinal Pell in fact did not know either

that Mr Ellis had put forward the amount of \$100,000, or that Monsignor Rayner had only offered \$25,000, and later \$30,000, as reparation (collectively, the **reparation amounts**).

- 266 The Church parties submit that the Commission should so find. A suggested available finding is discussed at paragraphs [267] - [269] below.
- 267 As to the present Proposed Finding 4, the Church parties further respectfully submit that the evidence demonstrates that it is not only conceivable, but probable that Cardinal Pell was not informed of the reparation amounts by 17 September 2004. If, contrary to these submissions, the Royal Commission were to determine that Cardinal Pell was informed of one or more of the reparation amounts by 17 September 2004, that finding should only be made on the basis that Cardinal Pell's recollection was honest but mistaken, but not "*inconceivable*" - that is without logical foundation.
- 268 If the proposed finding that it was "inconceivable" were to be understood as meaning merely that it would be surprising if Cardinal Pell was not made aware of the offers, that proposition is unremarkable. It may well be considered that the Cardinal should have been told. But if the use of the word "inconceivable" is to be understood as seeking a rejection of the Cardinal's evidence on this point, then the Church parties submit that any such outcome would be contrary to all the evidence referred to above. There is no proper basis for such a submission or such a finding. Not one witness has given evidence that he told Cardinal Pell. It is respectfully submitted that Cardinal Pell gave his evidence with candour and frankness at all times, that he did his utmost to assist the Royal Commission, and that he did not shy away from making numerous concessions regarding the manner in which Mr Ellis' complaint and litigation was handled by the Archdiocese, including in relation to his own personal involvement. At no stage was it put to Cardinal Pell that any evidence he gave was dishonest or intending to mislead. It is not necessary for the Commission to make any finding as to whether or not it was "inconceivable" that Cardinal Pell knew of the offers, but if any finding were to be made, it is submitted that the strong weight of evidence points to the probability that Cardinal Pell was not informed of the amounts offered to or sought by Mr Ellis.
- 269 A further basis upon which Proposed Finding 4 should not be made as framed is that it is directed solely to the knowledge of a single individual, Cardinal Pell, and not to the knowledge or conduct of the Archdiocese, being the institution responsible for managing Mr Ellis' complaint. As set out in section Part A, section 2 above, it is not appropriate that Proposed Finding 4 be made against Cardinal Pell as an individual. Various people in the Archdiocese undoubtedly knew of the reparation amounts at various times. Various consequences may flow from that knowledge on the part of the Archdiocese. Cardinal Pell, however, did not know those amounts until much later.

Component 4(a)

- 270 The Church parties accept that Cardinal Pell was involved in a number of steps in Mr Ellis' complaint. The Church parties do not accept that the nature of Cardinal Pell's involvement supports a finding that he was aware of the reparation amounts by 17 September 2004.

- 271 During the time that Mr Davoren held the position of Director of the PSO, the documents in the Tender Bundle contain many references to consultation with the Cardinal which demonstrates that during this period, the Cardinal had direct involvement in a number of decisions that were made and steps that were taken in relation to Mr Ellis' complaint, acting on the advice of Mr Davoren.
- 272 During the period from April 2003, when Monsignor Rayner and Mr Salmon were appointed as Chancellor and Director of the PSO respectively, until the commencement of the litigation on 30 August 2004, the Tender Bundle contains only a single reference to Cardinal Pell being directly and specifically consulted regarding the management of Mr Ellis' complaint, which occurred on 2 May 2003, only days after their appointments had occurred.²³⁵ Cardinal Pell gave evidence that he approved the appointment of an assessor and a facilitator, which steps he approved on the recommendation of Mr Salmon.²³⁶ There is, however, no documentary evidence to suggest that Cardinal Pell did anything more than that.
- 273 To the contrary, the evidence strongly supports the likelihood that Monsignor Rayner, in his capacity as authorised representative of the Church Authority, had extensive involvement in the reparation negotiations and that he had the authority to and did decide – without consulting the Cardinal – how much reparation should be offered to Mr Ellis, as set out in paragraphs [191] - [252] above.
- 274 The nature of Cardinal Pell's involvement in Mr Ellis' complaint from April 2003 onwards was extremely limited. It does not support a finding that he was aware of the reparation amounts by 17 September 2004.

Components 4(b) and (l)

- 275 The Church parties accept the factual substrata of these two components, namely that Mr Ellis' complaint was plainly very serious²³⁷ and that Cardinal Pell had an acute concern that people who had survived abuse by clergy would be justly dealt with.²³⁸
- 276 However, as outlined in paragraphs [161] to [169] above, Cardinal Pell had put in place a system for dealing with *Towards Healing* complaints which required the Chancellor and Director of the PSO to manage the day-to-day administration of these complaints. Cardinal Pell gave evidence that it was "*quite impossible in an archdiocese the size of mine*" for him to micro-manage monetary negotiations with victims and that he entrusted this task to his Chancellors and relied upon them to do the job properly.²³⁹ The fact that Cardinal Pell was not apprised of the detail of the management of *Towards Healing* complaints does not detract from their seriousness, nor Cardinal Pell's resolve that they would be justly dealt with.
- 277 Given the subject matter, it was and is necessarily the case that **all** of the complaints received under *Towards Healing* both at the time Mr Ellis made his complaint and subsequently were and are of a serious nature. It was not put to Cardinal Pell or to any other witness that Mr Ellis'

²³⁵ Ex 8-1 at Tabs 53 and 54

²³⁶ Ex 8-14 at paragraph [96]; T6329:7–39

²³⁷ Ex 8-14 at paragraph [77]

²³⁸ T6285:42–45

²³⁹ T6286:3–9; T6289:19–26; Ex 8-14 at paragraphs [68], [73] and [97]

complaint was more serious than all of the other complaints received or handled during this period, nor that Cardinal Pell adopted any different procedure with respect to Mr Ellis' complaint because of the gravity of the matters of which he complained or for any other reason.

- 278 The Church parties respectfully submit that the seriousness of Mr Ellis' complaint is not relevant to the determination of whether or not Cardinal Pell was aware of the reparation amounts.

Component 4(c)

- 279 The Church parties accept the factual substratum of this component, namely that the amount sought by Mr Ellis of \$100,000 was outside the usual range offered within *Towards Healing* (2000), on the assumption that CA is referring to the usual range offered by the Archdiocese at the time the amount was proposed, in April 2004.
- 280 Monsignor Rayner gave evidence that \$100,000 *"seemed like a very large amount to me at that time"*, and that he was *"conscious at that time that in the ordinary course the Archdiocese did not usually make payments in excess of \$50,000 in Towards Healing matters."*²⁴⁰ It was not put to Monsignor Rayner or any other witness that it was unusual for a victim to request an amount of \$100,000 in reparation. The fact that Mr Ellis' request of \$100,000 was outside the usual range of payments is not a basis for inferring that it was an unusual request, or one which required particular comment or discussion. Rather, it is a fact that makes it inherently unlikely that the approval of the Cardinal was sought to reject it.
- 281 Cardinal Pell gave evidence that offers made by the Archdiocese were usually within the range of \$20,000 to \$40,000, and that *"if anything had been unusual or much higher than that, I would have expected it to be reported to me."* He also stated that *"if there had been a discussion about \$100,000"*, he would have expected it to be reported to him.²⁴¹ The Church parties submit that, in context, Cardinal Pell was referring to discussions about whether the Archdiocese would be prepared to offer an amount of \$100,000, not a discussion about whether the Archdiocese was proposing to reject a proposal that such an amount be paid. No approval was needed from Cardinal Pell to reject a proposal of \$100,000 (which would be usual) – only to accept such a proposal (which would be unusual).
- 282 The proper inference to be drawn from the factual substratum of component 4(c) is that Monsignor Rayner had no need to inform the Cardinal of Mr Ellis' proposed amount, as Monsignor Rayner considered that the proposal fell outside the usual range and should not be accepted by the Archdiocese.
- 283 The factual substratum of component 4(c) does not support a submission that Cardinal Pell knew of Mr Ellis' proposed amount of \$100,000. To the contrary, the fact that Mr Ellis' proposed amount fell outside the usual range offered by the Archdiocese meant that it was highly unlikely that Cardinal Pell was informed of Mr Ellis' proposal.

²⁴⁰ Ex 8-9 at paragraph [45]

²⁴¹ T6505:29–46

Component 4(d)

- 284 For the reasons set out in paragraphs [238] - [239] above of these submissions, the Church parties do not accept that the summary that appears at paragraphs [238] to [244] of the Submissions is a fair summary of the evidence of Mr Davoren, Mr Salmon, Mr Danny Casey and Dr Michael Casey.
- 285 The Church parties submit that the evidence of each of those witnesses demonstrates that none of them had any personal knowledge as to whether or not Monsignor Rayner informed Cardinal Pell of the reparation amounts. All they could offer was necessarily speculation as to what they supposed would have been likely to have occurred. Their evidence therefore is not of any probative value in relation to whether Proposed Finding 4 ought to be made.

Components 4(e), (f) and (k)

- 286 The Church parties accept the factual substrata of these components, namely that Monsignor Rayner, Mr Salmon, Dr Michael Casey and Mr Daniel Casey knew of the reparation amounts by 17 September 2004. The Church parties further accept that Mr McCann, Mr John Dalzell and Ms Ross of Corrs, the solicitors for the Archbishop and the Trustees (**Archbishop and Trustees' solicitors**), knew of these amounts by 17 September 2004.
- 287 The Church parties submit that the fact that Mr Salmon, Dr Michael Casey, Mr Daniel Casey and the Archbishop and Trustees' solicitors knew of these amounts does not assist the Royal Commission to determine whether Cardinal Pell knew of the reparation amounts by 17 September 2004, as none of these individuals informed Cardinal Pell of these amounts, nor was it part of their responsibilities to do so.²⁴² Evidence was given by Cardinal Pell that neither Mr Salmon nor Dr Casey in fact conveyed to him the reparation amounts and he did not consider that informing him of these amounts formed part of their prime responsibility.²⁴³
- 288 The Church parties accept that the fact that Monsignor Rayner knew of the reparation amounts by 17 September 2004 is relevant to the issue of whether Cardinal Pell knew of those amounts. However, for the reasons given in paragraphs [240] - [245] above, Monsignor Rayner's evidence to the effect that he informed Cardinal Pell of the reparation amounts, or "would have" done so, should not be accepted.

Component 4(g)

- 289 The Church parties respectfully submit that the Royal Commission should reject the evidence of Monsignor Rayner regarding a supposed usual practice of informing Cardinal Pell of offers made, and accept the evidence of Cardinal Pell both generally, that he left such matters to those whose responsibility they were, and specifically, that he was not informed of the reparation amounts by 17 September 2004, for the reasons set out in paragraphs [226] - [227] above and the Church parties' response to Proposed Finding 4 as a whole.

²⁴² M Casey T6079:25-30; T6080:46-T6081:5; T6082:3-19; T6082:38-T6083:1; D Casey T6430:18-20

²⁴³ T6690:25-28

Components 4(h), (i) and (j)

- 290 The Church parties accept the factual substrata of these components, namely that by 17 September 2004, Cardinal Pell knew that amounts of money would have been discussed as part of the facilitation, that the facilitation was held and that it did not resolve the complaint, and that litigation had commenced.
- 291 The Church parties do not accept that these facts support the submission by CA that Cardinal Pell was aware of the reparation amounts. As set out in paragraphs [161] - [169], Cardinal Pell had a procedure in place, whereby he delegated to the Chancellor the authority to determine reparation amounts. It was only if the Chancellor was proposing to offer an amount which was much higher than the usual range of between \$20,000 to \$40,000 at that time, that Cardinal Pell expected it to be reported to him.²⁴⁴
- 292 The facts relied upon by CA in components 4(h), (i) and (j) would not have given Cardinal Pell any basis for thinking that the circumstances of Mr Ellis' facilitation or his decision to commence litigation against the Archbishop and the Trustees fell outside the normal course, such that further inquiry by Cardinal Pell regarding the reparation amounts was warranted.
- 293 During the hearing, the following exchange occurred between CA and Cardinal Pell:
- Q: *It defies belief that when you are making a decision about whether to embark on litigation and instruct Corrs to defend a claim vigorously, you, trying to be just in the preservation of the patrimony, would not have gone to your chancellor and said, "What happened at facilitation?"*
- A. *Well, I didn't, and in mitigation of that error of judgment, there were a thousand other things going on, and it had been planted, which - I mean, it was at the centre of Mr Ellis's life; with a busy archdiocese, I wasn't focused sufficiently on it; and, secondly, I had it firmly embedded in my mind that we were talking about millions of dollars.*
- 294 Underlying the question of CA appears to have been an assumption that the Cardinal would have been surprised or concerned at the fact that facilitation had failed, and that the Cardinal would have wished to have been apprised of further information regarding the reasons for that failure before deciding to defend the litigation commenced by Mr Ellis.
- 295 Any such assumption is incorrect. In circumstances where the Cardinal understood that the reparation payments offered by the Archdiocese at facilitations were typically in the range of \$20,000 to \$40,000, and that Mr Ellis was seeking hundreds of thousands, if not millions of dollars in the litigation, it was abundantly clear, and would have been unsurprising and unremarkable, that a *Towards Healing* facilitation had not met and could not address the full extent of Mr Ellis' monetary claim.

²⁴⁴ T6505:29-42

Proposed Finding 5

- 296 As indicated in paragraphs [181] – [190] above, the Church parties accept that the December letter was contrary to the procedures in *Towards Healing* (2000), as an assessor should have been appointed under clauses 38.7, 39.3 and 40 of the protocol, regardless of the inability of Duggan to respond.
- 297 The Church parties respectfully submit that no personal finding should be made against Cardinal Pell in relation to this failure. As outlined in Part A, section 2 above of these submissions, such a finding is more appropriately framed as a failure of the institution with responsibility for managing the complaint. The December letter would not have been sent but for Mr Davoren’s misunderstanding of the requirements of *Towards Healing* and the failure of Cardinal Pell to advert to the fact that Mr Davoren’s approach was flawed because of that misunderstanding. Responsibility lies with both authorities, the PSO and the Archdiocese, for failing to ensure that the procedures were followed, not any one individual.
- 298 The Church parties further submit that, for the reasons outlined in section 3.4 above, no “finding” should be made which is framed by reference to “whether a particular action was or was not compassionate.”
- 299 Moreover, Cardinal Pell gave evidence that he personally did have sorrow and sympathy for Mr Ellis.²⁴⁵ That is, subjectively he was compassionate. The December letter itself expresses “regret” that a “clear resolution” was not possible.

Proposed Finding 6(a)

- 300 For the reasons set out in section 3.2 above, the Church parties do not accept that the sole criterion to be taken into account by a Church authority when determining the amount of reparation under clause 41.1 of *Towards Healing* (2000) was the needs of individual claimants.
- 301 The Church parties acknowledge that the evidence has established that in 2004, there was a general understanding among relevant persons that reparation payments to complainants were normally \$50,000 or under, for the reasons set out in paragraph [191] - [199] above. They also acknowledge that that general understanding was not communicated to the public.
- 302 The Church parties submit that the existence of any such general understanding was not inconsistent with clause 41.1 of *Towards Healing* (2000). It did not constitute a fetter upon the ability of the Archdiocese to make such payments to a victim as it believed were demanded by justice and compassion. Mr Salmon and Monsignor Rayner understood that it was possible for a payment to be made that exceeded \$50,000. It was just that payments in excess of that amount were not usually made.
- 303 There was no clause in *Towards Healing* (2000) that required a Church authority to set out, in advance, the factors that it would take into account when determining the amount of reparation to be paid to a victim. Nor did *Towards Healing* (2000) require the Archdiocese to communicate to

²⁴⁵ Ex 8-14 at paragraphs [7] and [8]; T6705:9–22

the public any internal understandings or expectations that individuals may have had regarding the amount of reparation that was normally paid.

304 The Church parties do not accept that Proposed Finding 6(a) should be made.

Proposed Finding 6(b)

305 The Church parties accept that the evidence supports a finding in the terms of the first sentence of Proposed Finding 6(b).

306 The offers of \$25,000 and then \$30,000 were insufficient to meet Mr Ellis' financial needs, in particular his needs caused by the loss of his position at Baker & McKenzie. The offers made by the Archdiocese were not consistent with clause 41.1 of *Towards Healing*, in that they failed to take into account Mr Ellis' financial needs in any real or meaningful sense.

307 However, the Church parties do not accept that the finding proposed in the second sentence of Proposed Finding 6(b) should be made.

308 First, for the reasons outlined in section 3.2 above, clause 41.1 permitted the Archdiocese to respond to the victim's needs in a manner that took into account other factors, as demanded by justice and compassion. Provided the response to the victim's needs is consonant with the "demands" of justice and compassion, clause 41.1 was not breached merely because regard was had (if it was) to other factors, besides the victim's needs, which were regarded as relevant.

309 Secondly, and in any event, as to the four factors listed in paragraph [261] of the Submissions, Mr Ellis gave evidence that at the facilitation Monsignor Rayner did not refer to any such supposed reasons, and said instead that "*no individual circumstances had been considered*".²⁴⁶

Proposed Finding 6(c)

310 The Church parties accept that the Archdiocese did not comply with *Towards Healing* (2000) by failing to provide Mr Ellis with a spiritual director when that was plainly one of his needs.

311 The Church parties again submit, however, that no "finding" should be made regarding whether any particular action was or was not compassionate.

Proposed Finding 7

312 The Church parties accept that there were a series of failings in the manner in which the Archdiocese conducted the *Towards Healing* process and that the procedure in *Towards Healing* (2000) was not followed in the respects identified in paragraphs [296], [306] and [310] above.

313 While those failings were substantial, as acknowledged in paragraphs [314] below, they were not fundamental. The protocol was eventually implemented, albeit after mistakes, unacceptable

²⁴⁶ Ex 8-1 at Tabs 112 and 113

delays, and poor case management, and was followed through to a conclusion, albeit without a successful outcome. As the reviewer Mr David Landa found,²⁴⁷ the process itself did not fail.

314 However, the Church parties acknowledge that all the failures identified by Mr Landa were serious and substantial failures, including:

- (a) the failure by Mr Davoren to appoint an ongoing Contact Person,
- (b) the failure to provide Mr Ellis with a copy of the protocol,
- (c) the failure by Mr Davoren to appoint an assessor,
- (d) conveying the impression to Mr Ellis that the process could not continue if Duggan could not respond to the complaint,
- (e) the mishandling of the issues surrounding Duggan's health and lucidity,
- (f) the long delays relating to all these matters, and
- (g) the failure to take into account Mr Ellis' needs in any real or meaningful sense at the time of the facilitation.

315 The Church parties again submit that, for the reasons outlined in section 3.4 above, no findings should be made which are framed by reference to whether or not particular actions were compassionate.

316 The Church parties also do not accept that any personal finding ought to be made against Cardinal Pell, including for the reasons outlined in Part A, section 2 above. It was not Cardinal Pell but the Archdiocese which had to respond and did respond to Mr Ellis' complaint. Responsibility in that regard was delegated to the successive Chancellors: first Fr Doherty, then Monsignor Rayner, and finally Fr Usher. That response by the Archdiocese was informed by the advice and input which the Archdiocese received from the PSO. Until Mr Davoren was replaced by Mr Salmon, that PSO advice and input was misconceived and inappropriate.

317 Nor do the Church parties accept that Proposed Finding 4, which concerns the knowledge of Cardinal Pell as at 17 September 2004, has any bearing on the manner in which the *Towards Healing* process was conducted, having regard to the fact that the facilitation occurred two months earlier, on 20 July 2004.

318 The Church parties also respectfully submit that the evidence establishes that the Archdiocese made significant further responses to Mr Ellis, under the *Towards Healing* rubric, after the litigation was finally over. In that regard, the Church parties point to the following matters:

- (a) On 5 August 2008, Monsignor Usher met with Mrs Nicola Ellis and commenced the process of assisting Mr Ellis through *Towards Healing*, by indicating that the Archdiocese would be willing to assist Mr Ellis on a pastoral basis,²⁴⁸

²⁴⁷ Ex 8-1 at Tab 136

- (b) On 21 August 2008, Monsignor Usher and Mr Salmon met with Mr and Mrs Ellis. Monsignor Usher immediately commenced providing both pastoral and financial assistance to Mr Ellis, agreeing to meet his counseling costs,²⁴⁹
- (c) In a further meeting in January 2009, Monsignor Usher arranged a meeting with Cardinal Pell, which took place in February 2009,²⁵⁰
- (d) In the three years between 2009 and 2012, the Archdiocese assisted Mr Ellis as follows:
 - (i) pastorally by arranging a meeting with Cardinal Pell and providing a written apology and acknowledgement of the mistakes that had been made in handling his case,²⁵¹
 - (ii) pastorally through Monsignor Usher regularly meeting with Mr and Mrs Ellis (which meetings still continue),²⁵² and
 - (iii) financially by:
 - (A) meeting Mr Ellis' counseling costs,²⁵³
 - (B) paying for a lengthy overseas holiday to New York, Paris and London,²⁵⁴
 - (C) compensating Mr Ellis for his loss of wages (including a 10% loading) while he was on holidays,²⁵⁵
 - (D) paying for significant renovations of Mr Ellis' house²⁵⁶
 - (E) paying for several additions to Mr Ellis' house²⁵⁷ and
 - (F) providing an additional payment of \$50,000 to Mr Ellis in October 2012,²⁵⁸ and
- (e) In total, Mr Ellis received approximately \$570,365 in financial assistance from the Archdiocese, as well as ongoing pastoral support from Monsignor Usher, and the ongoing availability of cover for counselling costs.²⁵⁹ It is submitted that objectively considered, the Archdiocese has provided substantial and ongoing pastoral and financial support to Mr Ellis through *Towards Healing*.

319 It is available for the Royal Commission to find, and it is submitted that the Commission should find, that the assistance provided to Mr Ellis from August 2008 to 2012, as summarised above, was appropriately responsive to Mr Ellis' needs.

²⁴⁸ Ex 8-13 at paragraph [125]

²⁴⁹ Ex 8-13 at paragraphs [126]–[127]

²⁵⁰ Ex 8-13 at paragraphs [129]–[132]

²⁵¹ Ex 8-13 at paragraphs [129]–[132] and [146]

²⁵² Ex 8-13 at paragraph [160]

²⁵³ Ex 8-13 at paragraphs [130(d)]

²⁵⁴ Ex 8-13 at paragraph [151]

²⁵⁵ Ex 8-13 at paragraph [151]

²⁵⁶ Ex 8-13 at paragraph [152]

²⁵⁷ Ex 8-13 at paragraph [152]

²⁵⁸ Ex 8-13 at paragraph [156]

²⁵⁹ Ex 8-19 EXH.008.019.0001 at EXH.008.019.0003; Ex 8-14 at paragraph [9]

Part C – Litigation

10 Introduction

10.1 Bringing claims in the courts

320 This case study has demonstrated some of the drawbacks in litigating abuse claims. Looking back, the Archdiocese acknowledges that the manner in which it conducted its defence of the litigation brought by Mr Ellis, although legally available, failed to have sufficient regard to his needs as a victim. The Archdiocese acknowledges Mr Ellis' hurt and suffering and repeats its apology for the impact that the litigation had on him.²⁶⁰

321 As discussed further below, the Archdiocese's approach to litigation has changed as a result of the litigation with Mr Ellis, and it seeks to conduct litigation brought by victims of abuse in a way that is reflective of its pastoral and moral responsibilities to them.

322 People who allege abuse are fully entitled to pursue a civil claim for compensation by initiating civil proceedings.²⁶¹ It is the position of the Archdiocese that (emphasis in original):²⁶²

*"In addition to any criminal investigation, **victims of sexual abuse by a priest or church worker of the Archdiocese have a right to take legal action against the officials or entities of the Archdiocese in the courts.** This right is not lost by taking part in Towards Healing, which offers an alternative to civil legal action."*

323 However, in commencing litigation, victims - like all litigants - become subject to the legal processes and demands of litigation. Further, Church parties and individuals who are named as defendants are entitled to defend the proceedings in the same way as every other Australian citizen.

324 The result is that civil litigation is not necessarily an effective mechanism for providing redress in relation to the long-lasting and harmful effects of sexual abuse.²⁶³ As the Council said in its September 2013 Submission,²⁶⁴ there are well-known difficulties in the path of a victim who may be giving consideration to bringing civil proceedings. Some of these issues include:

- (a) in cases of sexual abuse, the victim will generally have to prove that the abuse alleged actually did occur and that the damage for which he or she claims compensatory damages was caused by the abuse,
- (b) a civil action for damages is conducted and dealt with in public. By commencing an action, a victim may be required to undergo the ordeal of cross-examination, either about the details of the abuse itself or about other aspects of their lives,

²⁶⁰ T:6705:9-22; Ex 8-12 at paragraph [168]

²⁶¹ *Towards Healing: Guidelines for Church Authorities*, February 2011 (Ex 4-1 at Tab K, page 8); Ex 8-3 at Tab A, section 7.1 at paragraph [6]

²⁶² Ex 8-3 at Tab B; Ex 8-14 at paragraph [22]; Ex 8-12 at paragraph [172]

²⁶³ TJHC Civil Litigation Submissions, section 2 at paragraph [5]

²⁶⁴ Ex 8-3 at Tab A, section 7.2

- (c) there are risks in bringing legal proceedings and the uncertainties surrounding the outcome of formal court proceedings inevitably impose stress upon those involved in such proceedings, and
- (d) since many, if not most, claims of sexual abuse involve events alleged to have taken place many years ago, often decades in the past, most civil claims are likely to be barred by the operation of statutory limitation periods. As a result, victims will generally need to seek from the Court an extension of time in which to bring proceedings, which involves additional cost and delay.

325 There are tensions between attributing responsibility for the actions of the perpetrator and ensuring a just and compassionate response to victims' needs. In his statement to the Royal Commission, Cardinal Pell said.²⁶⁵

"On the one hand, all victims of child sexual abuse must be treated with compassion and justice. On the other, when litigation is commenced against the Church there can be legitimate positions to defend, such as whether the events occurred as alleged, whether the amounts of compensation sought are reasonable and appropriate, and who it is that should be liable to compensate the victim. The litigation process does not well accommodate these tensions, and with the benefit of hindsight the Church may better manage them so as to respect the proper needs of victims."

10.2 The current approach of the Archdiocese towards managing litigation

- 326 Since the conclusion of the Ellis litigation, the Archdiocese has reflected upon the manner in which it approaches claims brought by victims and has made significant changes to its practices and procedures.
- 327 The Archdiocese now does everything possible to resolve complaints without recourse to litigation, including by exhausting the possibilities of negotiation and mediation before proceeding to defend a matter in court.²⁶⁶ As stated in the Archdiocese's publicly-available document setting out its response to sexual abuse (emphasis in original):²⁶⁷

"The Archdiocese of Sydney works to resolve legal action out of court rather than litigate."

*When it is clear that the supervision of a person accused of sexual abuse was the responsibility of an official or an entity of the Archdiocese, **our strong preference is to resolve claims pastorally and in a non-adversarial manner so victims can avoid the costs and stress of litigation.** If proceedings have been commenced in the civil courts and the Archdiocese is responsible or potentially responsible, we seek to settle the case rather than requiring victims to litigate to final judgment."*

²⁶⁵ Ex 8-14 at paragraph [39]

²⁶⁶ Ex 8-14 at paragraph [173]; Ex 8-12 at paragraph [172], [174]

²⁶⁷ Ex 8-3 at Tab B, page 9

- 328 Throughout its dealings with victims and their lawyers, even after the commencement of litigation, the Archdiocese keeps at the forefront of its mind the pastoral needs of the victims. Examples of this approach include:
- (a) Monsignor Usher's attendance at the beginning of mediations between a victim and the Archdiocese. It is his usual practice to speak to the victim in the presence of their lawyer, offer an apology and say *"We'll see what we can do to help through this mediation process"*,²⁶⁸
 - (b) the Archdiocese is careful to ensure that correspondence with victims and their lawyers is sensitive and not inflammatory. The Archdiocese keeps the pastoral dimension in mind when it comes to responding in the usual legal forms to notices and statements about the facts of a case or other issues,²⁶⁹ and
 - (c) the Archdiocese offers counselling, drug rehabilitation and other services to victims who are contemplating or have commenced litigation.
- 329 When victims' lawyers write to the Archdiocese, the first response of the Archdiocese is to invite the victim to join *Towards Healing*.²⁷⁰ The Church parties consider that *Towards Healing* is far more suited to addressing a victim's pastoral needs and inherently a far simpler process than, and one which avoids the many risks and complexities of, civil action.²⁷¹
- 330 In 2009, the Archdiocese appointed a General Counsel who takes an active role in the management of all litigation concerning the Archdiocese and attends hearings to observe the progress of significant cases.²⁷² This ensures that the Archdiocese is more directly involved in the implementation of legal strategy and communications with victims and their lawyers.

10.3 Identifying the proper defendant

- 331 It is the current practice of the Archdiocese to ensure that victims do not labour under any uncertainty as to the identity of the defendant against whom proceedings should be commenced. The Archdiocese responds to questions about the proper defendant by providing:²⁷³

"whatever factual information it can about which entity or person was responsible at the relevant time for the appointment and supervision of a person accused of sexual abuse."

- 332 Whether or not the particular entity or person has insurance or funds to meet the claim is irrelevant. The Archdiocese's publicly-stated position on the issue is as follows (emphasis in original):²⁷⁴

²⁶⁸ T6376:44-T6377:20

²⁶⁹ Ex 8-12 at paragraph [174]

²⁷⁰ T6377:13-16

²⁷¹ Ex 8-3 at Tab A, section 7 at paragraph [33]

²⁷² Ex 8-14 at paragraph [37]; T6351:19-30; T6564:2-5

²⁷³ Ex 8-12 at paragraph [174]; T6518:7-38

²⁷⁴ Ex 8-3 at Tab B, page 9

*“The Archdiocese does not shield those responsible for supervising priests or other church workers behind a corporate structure. **It is untrue that church entities cannot be sued, as some claim. Those responsible for supervising someone accused of abuse can be sued (and have been sued), and any damages awarded against them are determined by the standards that prevail in Australian society. Any award of damages will always be paid, and insurance policies and the assets of the Archdiocese are drawn on to do so.**”*

- 333 That said, if a victim chooses to bring and maintain civil proceedings against a person or entity within the Church who had no responsibility for or involvement in supervision of the perpetrator, it is the intention of the Archdiocese to continue to defend proceedings on the basis that an incorrect party has been sued.²⁷⁵ However, this situation is unlikely to arise, having regard to the Archdiocese's practice of assisting victims and their lawyers to identify the correct defendant(s) and its efforts to resolve sexual abuse claims for which the Archdiocese has moral and pastoral responsibility as quickly as possible through negotiation and mediation.
- 334 The Church parties also refer to section 2.1 of the Submission of the Council dated 15 April 2014 in relation to Issues Paper 5, Civil Litigation for a summary of the issues that may be involved when a victim seeks to identify a responsible party against whom to bring proceedings. The Church parties wholeheartedly endorse the legislative reforms proposed in that Submission that would require institutions to ensure that there is a properly funded entity available to be sued should a child be abused while in their care.²⁷⁶

10.4 The need to act fairly

- 335 In Proposed Finding 8, CA lists thirteen instances in which it is asserted that the Archdiocese, on the instructions of Cardinal Pell, failed to conduct the litigation with Mr Ellis “fairly”.
- 336 However, CA's submission does not expressly articulate how fairness is to be defined or understood or judged.
- 337 As outlined earlier, in terms of compliance with the law, with the rules of Court, and with professional obligations, the conduct of the litigation on behalf of the Archdiocese was orthodox and unremarkable, and therefore, in that sense, necessarily “fair”.
- 338 If some other sense, or standard, is to be introduced, and the Archdiocese is accused of not meeting that standard, its content needs to be identified and spelt out. That has not been done.
- 339 To the extent that is suggested that the content of an obligation to act “fairly” could be derived from the terms of the *Legal Services Direction 2005* (Cth) (the **Model Litigant Rules**) applicable to governments and their agencies, for the reasons stated in section 10.5 below, it is inappropriate that those Rules should be applied to entities within the Church in Australia.

²⁷⁵ T6517:36-T6518:5

²⁷⁶ TJHC Civil Litigation Submissions, section 3.2 at paragraphs [9] - [13]

- 340 Cardinal Pell and Dr Michael Casey readily acknowledged that their objective was to act *“honestly and fairly”* in the Archdiocese’s defence of Mr Ellis’ litigation.²⁷⁷ Cardinal Pell also said candidly that several steps taken in the litigation now *“caused him concern”*,²⁷⁸ and that *“In a legal sense, we always acted honestly,”* but that *“from a Christian point of view, leaving aside the legal dimension, I don’t think we did deal fairly”*.²⁷⁹
- 341 Cardinal Pell’s concerns that the Archdiocese did not deal fairly with Mr Ellis during the course of the litigation were *“from a Christian point of view”*,²⁸⁰ and his concerns about the manner in which the litigation was conducted arose from his perspective *“as a priest”*.²⁸¹ With the benefit of hindsight, Cardinal Pell concluded that the Archdiocese allowed legal measures to be employed that were *“disproportionate to the objective and to the psychological state of Mr Ellis”* and that Mr Ellis ought to have been treated *“in a manner which took greater account of the injury he suffered”*.²⁸²
- 342 Consistently with that view, the Archdiocese recognises that it failed to conduct the litigation with Mr Ellis in a manner that adequately took account of his pastoral and other needs as a victim of abuse. The Church parties acknowledge that it is appropriate for a finding to be made to that effect, and have proposed such an alternative finding: see paragraph [547] below.
- 343 Indeed, an important consequence of the litigation with Mr Ellis was the considered and deliberate decision of the Archdiocese to make significant changes to its practices and procedures when engaging in litigation with victims of abuse. These changes constituted a recognition by the Archdiocese that, whatever its rights in the litigation, the exercise of those rights caused further hurt and distress to Mr Ellis.
- 344 However, no finding should be made that the Archdiocese failed to conduct the litigation with Mr Ellis *“fairly”*. First, to the extent that this standard is taken by CA from the model litigant context, it is a standard that did not and does not apply to the Archdiocese and of which the Archdiocese was unaware at the time. In many material aspects, it is a standard that would not have affected specific instances that CA points to as unfair (for example, the failure to draw Mrs Penton’s potential evidence to Mr Ellis’ attention: see paragraphs [558] - [563] below).
- 345 Secondly, to the extent that CA is using the word *“fairly”* in some unspecified broader sense, untethered to the common law or statutory obligations of a model litigant, it is a standard that has no content, or at least is not sufficiently defined for it to be the subject of a finding of the Royal Commission.

²⁷⁷ T6092:25-47; T6494:21-25

²⁷⁸ Ex 8-14 at paragraph [155]

²⁷⁹ T6494:28-34

²⁸⁰ T6494:32-34

²⁸¹ Ex 8-14 at paragraphs [38] and [155]

²⁸² Ex 8-14 at paragraphs [36] and [41]; T6352:14-17

10.5 The Model Litigant Rules

- 346 The Submissions proceed on the basis that it is appropriate to judge the manner in which the Archdiocese conducted the defence of the Ellis litigation by reference to Appendix B of Model Litigant Rules which sets out the Commonwealth's obligation to act as a model litigant.²⁸³
- 347 For the following reasons, the Church parties submit that this is not so.
- 348 First, the Model Litigant Rules were not binding on the Archdiocese, the Trustees, Cardinal Pell or any other party to the litigation. They are, rather, principles voluntarily adopted by the Commonwealth of Australia.
- 349 As outlined in section 2 of the TJHC September 2013 Submission, the Catholic Church in Australia is not a single or discrete entity. A standard voluntarily assumed by the well-resourced and (ultimately) centrally governed Commonwealth of Australia is not an appropriate standard to apply to a community of faith made up of many different groups and individuals. There are 34 dioceses and over 180 religious institutes and societies of apostolic life within the Church in Australia, each of which is substantially independent and autonomous.²⁸⁴ There is very significant divergence between these Church groups with respect to factors such as financial resources, access to advice and expertise, and experience in litigation and abuse claims and, accordingly, it would be unrealistic and inappropriate to impose model litigant obligations on Church groups.
- 350 For example, clause 2(c) of the Model Litigant Rules requires the Commonwealth to act "*consistently in the handling of claims and litigation*". This obligation assumes (appropriately in the case of the Commonwealth) that there is a central repository of knowledge and decision-making authority in relation to claims and litigation, whereas that does not exist in relation to the Church as a whole within Australia.
- 351 Secondly, even as to the Commonwealth itself, the Model Litigant Rules are not binding on it:
- (a) the Model Litigant Rules do not create obligations owed "*to others, especially other litigants*" by the persons and bodies said to be bound by them;²⁸⁵
 - (b) compliance with the Model Litigant Rules is "*not enforceable except by, or upon the application of, the Attorney-General*" and the issue of non-compliance with the Rules "*may not be raised in any proceeding . . . except by, or on behalf of, the Commonwealth*";²⁸⁶
 - (c) there have been many instances in which a government department or agency has failed to comply with the Model Litigant Rules or their State equivalent.²⁸⁷
- 352 Thirdly, at no time during the Ellis litigation did any of the Church parties understand that they, or any party to the litigation, were bound by the Model Litigant Rules:

²⁸³ Submissions, Proposed Finding 8 at pages 123-24. See also paragraphs [392]- [399], [472]

²⁸⁴ Ex 8-3 at Tab A, section 2

²⁸⁵ *Caporale v Deputy Commissioner of Taxation* (2013) 212 FCR 220 at paragraphs [37]-[39] and [44] (Robertson J)

²⁸⁶ *Judiciary Act 1903* (Cth), sub-ss 55ZG(2) and (3)

²⁸⁷ See, eg, *Deputy Commissioner of Taxation v Clear Blue Developments Pty Ltd (No. 2)* [2010] FCA 1224; *Phillips, in the matter of Starrs & Co Pty Limited (In Liquidation) v Commissioner of Taxation* [2011] FCA 532; *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Limited ACN 005 357 522 (No. 2)* [2010] FCA 567

- (a) aside from Cardinal Pell, Dr Casey and Mr McCann, no other witness gave evidence, or was asked about, their knowledge or understanding of the Model Litigant Rules;
- (b) Cardinal Pell could not recall ever discussing the Model Litigant Rules in connection with the litigation and did not think he was aware of them in 2004;²⁸⁸
- (c) Dr Casey's evidence was that he had only a "very vague" understanding of what a model litigant policy entailed;²⁸⁹
- (d) Mr McCann had never discussed with the Archdiocese whether it might consider behaving as a model litigant²⁹⁰ and Mr Dalzell was not asked whether he had ever discussed the Model Litigant Rules (whether in general terms or otherwise) with the Church parties.

353 In these circumstances, the Model Litigant Rules cannot and should not be treated as an appropriate framework against which to assess the conduct of the Ellis litigation by the Church parties. That Cardinal Pell and Dr Casey both accepted in general terms that the Archdiocese of Sydney aspired to conduct itself honestly and fairly in litigation²⁹¹ falls well short of an appropriate or sufficient basis on which to elevate the Model Litigant Rules such that they act as a standard against which the Church parties should be judged.

354 Fourthly, it is important to note, with respect, that the Model Litigant Rules do not prevent the Commonwealth and its agencies from "*acting firmly and properly to protect their interests*". The notes to the Model Litigant Rules relevantly provide that the obligation to act as a model litigant:

- (a) "*does not preclude all legitimate steps being taken to pursue claims by the Commonwealth and its agencies and testing or defending claims against them*";
- (b) "*does not preclude pursuing litigation in order to clarify a significant point of law even if the other party wishes to settle the dispute*"; and
- (c) "*does not prevent the Commonwealth from enforcing costs orders or seeking to recover its costs.*"

355 The reservation in (a) of the right to take "*all legitimate steps*" obviously accepts that the taking of such steps will not amount to a failure to act "*fairly*". The question would be, rather, whether the step in question is "*legitimate*". In the Ellis litigation, the legal advice which the Archdiocese received was to the effect that every step which was taken on its behalf was legally legitimate.

356 The reservation in (b) also has direct relevance to the Ellis litigation, where the Archdiocese and Cardinal Pell did indeed wish "*to clarify a significant point of law*", namely whether the Trustees were legally liable in such matters.

²⁸⁸ T6493:34-T6495:19; T6566:11-46

²⁸⁹ T6092:2-T6095:21

²⁹⁰ T5977:10-22

²⁹¹ T6092:25-47; T6494:21-25

357 The responsibility of the Commonwealth to act firmly in respect of claims has been explained as follows:²⁹²

“... the Commonwealth should not cave in to spurious or vexatious claims; or take a ‘soft’ approach. Instead, it should appropriately test all claims; rely on legal professional privilege where appropriate; make public interest privilege claims objecting to disclosure of information; seek security for costs where appropriate . . . ; oppose oppressive subpoenas/ discovery; seek to strike out untenable claims; and act properly to protect the Commonwealth’s interests.”

358 A model litigant is not precluded from taking steps to protect its interests. Acting “*honestly and fairly*” in relation to one’s opponent in litigation does not require an entity to forego its substantive or procedural rights.

359 Moreover, in several instances, it would appear that CA has sought to apply the standard of acting “*fairly*” to conduct of the Archdiocese which would not be or have been the subject of any proscription under the Model Litigant Rules. For example, in Proposed Finding 8(f), CA proposes a finding that the Archdiocese failed to act fairly by “*not instructing its lawyers to bring Mrs Penton’s evidence to the attention of the Court.*” But the Model Litigant Rules do not refer to any obligation upon the Commonwealth to bring evidence to the attention of the other party to civil litigation. The recent decision of the High Court in *ASIC v Hellicar*²⁹³ demonstrates that a model litigant has no such obligation in the civil context.

360 For these reasons, the Church parties respectfully submit that it would be inappropriate for the Archdiocese to be held to any different standard than that applicable in relation to the Commonwealth or any other defendant in relation to the enforcement of their substantive rights.²⁹⁴ Cardinal Pell’s view is a reasonable one:²⁹⁵

“As a general principle, I consider that where Church bodies are sued, they should be entitled to avail themselves of all of the processes that are available to defendants generally in the community.”

Each individual Church entity is entitled to, and must, determine the extent to which it will enforce its substantive rights – whether as they presently exist, or in such form as they may exist following any law reform – having regard to its own assessment of the most appropriate manner in which to meet each victim’s needs and to respond to that victim’s claims.

361 The Archdiocese has frequently decided to make substantial payments to victims who have commenced or are intending to commence legal proceedings despite, for example, the absence of any negligence on the part of those responsible for supervising the perpetrator or the availability of a limitations defence.²⁹⁶ Such payments have been guided by the Archdiocese’s

²⁹² Barry Leader, “The model litigant principle: can the AGS stay competitive?” (1998) 73 *Australian Law Reform Commission Reform Journal* 52, 53

²⁹³ (2012) 247 CLR 345 at paragraphs [147], [152] - [155] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ)

²⁹⁴ T6358:24-35

²⁹⁵ Ex 8-14 at paragraph [153]

²⁹⁶ T6356:25-34; T6379:21-36; Ex 8-13 at paragraph [28]; T6410:7-T6411:11; T6450:11-18; T6547:13-20

desire to attend to the pastoral needs of victims, rather than by reference to legal standards (under which its position in those circumstances would have been strong).

- 362 The Church parties are hopeful that the work of the Royal Commission will result in reforms that improve the ability of all victims of sexual abuse to access redress or compensation, preferably through an independent national redress scheme that is designed with appropriate consideration as to what will bring claimants some measure of healing or restoration, acknowledging that many have suffered great harm.²⁹⁷

²⁹⁷ See the TJHC response to Issues Paper 6: Redress Schemes lodged on 12 August 2014

11 Overview

- 364 The Church parties generally accept the summary of evidence set out at paragraphs [298] - [302], [304] - [316], [318], [320] - [339], [341] - [361], [363] - [375], [377] - [387] and [389] - [391].
- 365 For the reasons given in the next section of these submissions, the Church parties say that the following paragraphs of the Submissions do not contain a full or fair summary of the evidence:
- (a) the second sentence of paragraph [303];
 - (b) the third sentence of paragraph [317];
 - (c) paragraph [319];
 - (d) paragraph [340];
 - (e) paragraph [362];
 - (f) paragraph [376]; and
 - (g) the third sentence of paragraph [388].
- 366 The Church parties also say the evidence discussed in the following paragraphs is relevant to the proposed findings.

11.2 Chronology

[CA Submissions paras 298 - 374]

- 367 The Church parties say that the second sentence of paragraph [303] of the Submissions is not a fair summary of Dr Michael Casey's evidence regarding the extent of his authority to make decisions regarding the conduct of Mr Ellis' litigation. They refer to paragraphs [418] - [419] below for a complete summary of Dr Michael Casey's evidence on this topic. The Church parties respectfully submit that the evidence does not support a finding that all instructions provided by Dr Michael Casey were the instructions of the Cardinal, and that no such finding of fact should be made.
- 368 In relation to the third sentence of paragraph [314] of the Submissions, the Church parties refer to paragraphs [107] - [117] above for a full statement of their position with respect to Monsignor Rayner's claim never to have doubted Mr Ellis' truthfulness.
- 369 The Church parties do not accept that the third sentence of paragraph [317] is a fair characterisation of the evidence. As CA's own submissions at paragraphs [436] to [439] make clear, there is simply no evidence before the Commission that would allow it to make a finding

that the Archdiocese, or Cardinal Pell, provided instructions to serve the Notice Disputing Facts and Authenticity of Documents of 20 December 2004.²⁹⁸

370 In relation to the second sentence of paragraph [319] of the Submissions, the Church parties do not accept that the Archdiocese was aware that Mrs Penton's evidence "*corroborated Mr Ellis' allegations*". As explained in section 15.3 below, the evidence does not establish that Dr Michael Casey was provided with anything other than limited information regarding Mrs Penton's evidence, which was insufficient for him to know or conclude that the evidence was supportive of Mr Ellis' allegations.

371 In relation to paragraph [337] of the Submissions and the offer to forego costs if Mr Ellis agreed not to apply for special leave to the High Court, the offer was stated in the following terms:²⁹⁹

"Should he accept this offer, your client would also be invited to re-enter Towards Healing. For obvious reasons, this re-entry would be on the basis that the pastoral and counselling aspects of the process would be available to your client but there would be no possibility of a monetary settlement. Our client's offer will lapse on 21 June 2007".

372 Cardinal Pell gave evidence that he had always contemplated some form of monetary settlement with Mr Ellis once the legal situation was resolved, and that he would not have agreed to exclude this possibility if he had been fully apprised of the instructions given.³⁰⁰ Cardinal Pell also explained that he may have mistakenly believed "*monetary settlement*" meant a court determined payment.³⁰¹ He also indicated he would have supported Mr Ellis re-entering *Towards Healing*.³⁰²

373 While Monsignor Usher discussed the letter of 8 June 2007 with Cardinal Pell,³⁰³ he believed that the proposed condition "*without the possibility of a monetary settlement*" did not exclude the possibility of financial assistance for Mr Ellis.³⁰⁴ He understood that payments could be made through *Towards Healing* to assist with Mr Ellis' immediate needs, including medical expenses, therapy, and mortgage payments.³⁰⁵

374 The Church parties submit that paragraph [340] does not contain a full statement of the legal position in relation to the liability of the Archdiocese for claims made by victims. The Church parties refer to the written submissions by the Council in relation to Issues Paper 5, Civil Litigation, lodged on 15 April 2014 for a full and accurate statement in that regard. The Church parties also refer to section 10.3 above which sets out the commitment given by the Archdiocese to pay any award of damages made by a court.

375 In relation to paragraph [342] of the Submissions, Mr Daniel Casey gave evidence that his reference to an "*enormous benefit to the Church*" in his email of 17 November 2007 was a

²⁹⁸ Ex 8-2 at Tab 245

²⁹⁹ Ex 8-2 at Tab 340

³⁰⁰ T6553:3-45

³⁰¹ T6553:3-12

³⁰² T6553:39-45

³⁰³ Ex 8-13 at paragraph [89]

³⁰⁴ Ex 8-13 at paragraph [88]

³⁰⁵ Ex 8-13 at paragraph [88]

reference to the Trustees not being liable for things they were not involved in. On this point he gave the following evidence:³⁰⁶

“Your Honour, I thought that what might happen from here is that I was worried that the trustees would effectively be deemed as a nominal defendant, held liable and responsible where they were not involved. I wondered what that might mean for corporate risk generally across the country if entities were able to be sued even if they weren’t involved. What flowed from this and what needed to happen from this were many things, one of which was that we needed to move ahead with making sure that we did identify who responsible parties were, made sure that they were indemnified and insured, and that work proceeded perhaps after World Youth Day was concluded to make sure that the insurance policies, indemnities and documentation were up to date.

There was never an intention, in my mind, to make the Church, the Archdiocese, immune from suit, but there was an intention and relief that a body that had no involvement would not be held liable”.

- 376 Mr Daniel Casey also pointed out that if the Trustees were to become a nominal defendant in circumstances where there was no involvement, it would be difficult to appropriately insure relevant entities of the Church.³⁰⁷
- 377 In relation to paragraph [351] of the Submissions, the CCI letter also proposed that Mr Ellis be asked to disclose his financial position, supported where appropriate by relevant confirming documentation, to establish his capacity (or otherwise) to pay costs.³⁰⁸
- 378 In relation to paragraph [354] of the Submissions, the Church parties acknowledge that Monsignor Usher gave evidence that the effect of Cardinal Pell’s instructions to leave the issue of costs recovery for a few months was that *“Mr Ellis was left hanging for another few months not knowing whether he would have to pay the costs”*. However, when asked why the costs issue took so long to resolve, Monsignor Usher gave evidence that CCI were keen to find out whether Mr Ellis was in a position to meet some of the costs himself and what their liability was for those costs.³⁰⁹ He also explained that Cardinal Pell was *“very sympathetic”* to Monsignor Usher’s concerns about Mr Ellis’ well-being, but that Cardinal Pell was receiving legal advice to the effect that he should not confirm at that time that costs would be waived.³¹⁰
- 379 In this regard, on 18 February 2008, Mr Begg wrote to Corrs and indicated that in his view, the decision of the High Court to refuse special leave and the decision of the Court of Appeal, did not bring an end to the *whole* of the proceedings, but only those parts of the proceedings which required an extension of time under the *Limitation Act 1969* (NSW). Mr Begg flagged that whilst he had been unable to obtain instructions from Mr Ellis, it may be that Mr Ellis would want to amend his Statement of Claim and pursue the *“balance”* of his claim.³¹¹ This further complicated

³⁰⁶ T6455:5-23

³⁰⁷ T6455:35-T6456:8

³⁰⁸ Ex 8-2 at Tab 357

³⁰⁹ T6228:42-T6229:2

³¹⁰ T6229:10-27

³¹¹ Ex 8-2 at Tab 367

any decision to be made as to whether legal costs could be waived. As explained by Cardinal Pell:³¹²

“...I was aware that there were efforts being made to see that the case would not be continued in some other way and I thought it was reasonable for that to be clarified before we signed off completely.”

380 This reflected the legal advice being given by Corrs to the Archdiocese. On 14 May 2008, Mr Dalzell advised Monsignor Usher that it was *“important that we consider the costs position without the spectre of Ellis reviving his claim again”*.³¹³

381 In relation to paragraph [357] of the Submissions, on 26 February 2008, in a meeting between Mr Dalzell and Marita Wright of CCI, CCI again expressed the need to be *“extremely mindful of Mr Ellis state of health”*.³¹⁴ A CCI file note of the meeting noted:³¹⁵

“We do not want to proceed with a formal summons for oral examination.”

382 In relation to paragraph [360] of the Submissions, it was Monsignor Usher who discussed Dr Funnell’s report with Cardinal Pell, not Monsignor Rayner.³¹⁶ Monsignor Usher gave evidence that Cardinal Pell agreed that the letter supported Monsignor Usher’s view that costs should not be pursued against Mr Ellis.³¹⁷

383 The Church parties do not accept that paragraph [362] is a fair summary of the evidence as to whether the email sent by Dr Michael Casey on 8 May 2008 accurately reflected the position of Cardinal Pell as to his views on the costs issue. Cardinal Pell’s evidence was that his first concern was to avoid exacerbating Mr Ellis’s psychiatric condition, and that the matter of negative publicity was of a secondary concern.³¹⁸ This concurs with Monsignor Usher’s recollection that he explained at the meeting that:³¹⁹

“I had discussed the costs enforcement issue with Cardinal Pell and that the Cardinal was most concerned not to exacerbate Mr Ellis’ mental condition.”

384 Monsignor Usher gave evidence that the two dot points in the email did not quite express what Cardinal Pell had said to him:³²⁰

“I think the Cardinal’s opinion was, sure, he didn’t want negative publicity and he didn’t want to cause John an exacerbation of his psychiatric condition. I’m sorry it says: “or”, but I don’t think that quite expresses what the Cardinal said...”

385 In relation to paragraph [363] of the Submissions, Cardinal Pell explained his understanding of the nature of an Examination Notice as follows:³²¹

³¹² T6549:30-33

³¹³ Ex 8-2 at Tab 388

³¹⁴ Ex 8-2 at Tab 369

³¹⁵ Ex 8-2 at Tab 369

³¹⁶ Ex 8-13 at paragraph [110]

³¹⁷ Ex 8-13 at paragraph [110]

³¹⁸ T6557:9-13

³¹⁹ Ex 8-13 at paragraph [113]

³²⁰ T6235:31-42

“As set out above, my understanding at the time was that this was a way of finding out the nature and extent of someone’s assets. I did not know or appreciate that practical ramifications for the recipient of such a notice and, in particular, that it was a step which would or might cause a recipient to have to engage in an onerous or stressful process of assembling financial records and documents or to be subjected to examination in a Court in relation to those documents. If I had known that, I would not have agreed to it being issued”.

386 In relation to paragraph [364] of the Submissions, the Cardinal said he had no recollection of having seen the letter or being informed of its contents at the time.³²²

387 In relation to paragraph [366] of the Submissions, the instructions were given by Monsignor Usher in consultation with Cardinal Pell.³²³ Cardinal Pell said that his recollection was that about this time he did convey, probably to Monsignor Usher, his wish not to pursue the costs orders, that is in May 2008.³²⁴

388 In relation to paragraph [367] of the Submissions, Cardinal Pell said he did not recall being made aware of the correspondence at the time.³²⁵

389 In relation to paragraph [370], Mr Ellis also set out in his letter:³²⁶

“Our meeting with you has given us some heart that the perseverance has been to some avail. It was encouraging to hear your frank acknowledgement of the mistakes of the past and a commitment that you would not like to see some aspects of the manner in which I have been responded to be the Archdiocese repeated”.

390 The Church parties submit that the letter sent by Monsignor Usher on behalf of Cardinal Pell on 11 March 2009 responding to Mr Ellis’s letter of 24 February 2009 is also of relevance. That letter states, amongst other things.³²⁷

“He has asked me to thank you for your very kind remarks and, he too, found the meeting a rewarding experience.

The Cardinal’s comments during the meeting were genuine. His frank acknowledgment of the mistakes of the past and his commitment that he would not like to see some aspects of the manner in which you have been responded to by the Archdiocese of Sydney [are] repeated.”

391 In relation to paragraph [371], Cardinal Pell informed Mr Ellis at the meeting of 18 February 2009 that the Archdiocese had no intention of pursuing legal costs.³²⁸ This is reflected in the wording of Monsignor Usher’s letter of 6 August 2009 which states:³²⁹

³²¹ Ex 8-14 at paragraph [147]

³²² Ex 8-14 at paragraph [148]

³²³ Usher Ex 8-13 at paragraph [121]

³²⁴ Pell Ex 8-14 at paragraph [149]

³²⁵ Pell Ex 8-14 at paragraph [151]

³²⁶ Ex 8-1 at Tab 159

³²⁷ Ex 8-1 at Tab 160

³²⁸ Usher Ex 8-13 at paragraph [133]

“It is important for me to confirm the assurance given to you by Cardinal Pell during his meeting with you that the Archdiocese of Sydney has no intention of pursuing any legal or other costs from you or your estate now or at any time in the future. The Church’s insurance company has been informed of the Cardinal’s determination in this regard and they have been instructed accordingly. The Cardinal has also asked me to continue to negotiate with you about the reimbursement of ongoing medical costs”.

11.3 Mr Ellis’ application to extend time

[CA Submissions paras 375 - 385]

392 In relation to paragraph [376] of the Submissions, s 58(2) of the *Limitation Act* 1969 (NSW) (the Act) states:

“Where, on application to a court by a person claiming to have a cause of action to which this section applies, it appears to the court that:

- (a) any of the material facts of a decisive character relating to the cause of action was not within the means of knowledge of the applicant until a date after the commencement of the year preceding the expiration of the limitation period for the cause of action, and*
- (b) there is evidence to establish the cause of action, apart from any defence founded on the expiration of a limitation period,*

the court may order that the limitation period for the cause of action be extended so that it expires at the end of one year after that date and thereupon, for the purposes of an action on that cause of action brought by the applicant in that court, and for the purposes of paragraph (b) of subsection (1) of section 26, the limitation period is extended accordingly.”

393 There are therefore two requirements that a person must satisfy in order to obtain an extension of time under s 58(2) of the Act:

- (a) the plaintiff must be able to establish that there were one or more *“material facts of a decisive character”* relating to the cause of action that were *“not within their means of knowledge”* until after the date set out in that subsection, and
- (b) there must be evidence to establish the cause of action.

The summary of s 58(2) contained in paragraph [376] is therefore not complete, to the extent that it fails to mention the second requirement.

³²⁹ Ex 8-1 at Tab 164A

- 394 The Church parties otherwise accept the summary of legal principles and evidence contained in paragraphs [375] to [385] of the Submissions.

11.4 The proper defendant issue

[CA Submissions paras 386 - 391]

- 395 As stated in section 10.3 above of these submissions, the current practice of the Archdiocese is to provide to victims, proactively, whatever factual information it can about which entity or person was responsible at the relevant time for the appointment and supervision of a person accused of sexual abuse.³³⁰ This includes pointing the victim, where appropriate, to the relevant officials or estate of a deceased official.³³¹ It also includes ensuring that the Archdiocesan entity or person who was responsible is appropriately indemnified.
- 396 The Church parties also refer to the TJHC Civil Litigation Submission. In that paper, the TJHC proposes that all unincorporated entities which engage with children should be under an obligation to establish an incorporated entity as a person against whom any victim of alleged abuse who wishes to take civil proceedings against the association may proceed.³³²
- 397 The position which was taken by the Archdiocese in the Ellis litigation does not reflect the current practices of the Archdiocese (changes implemented largely as a result of the Archdiocese's learnings from the experience of the Ellis litigation), nor the proposals put forward by the Church parties to ensure that a suitable defendant is available to be sued.
- 398 The Church parties make the following additional observations.
- 399 In relation to the first sentence of paragraph [388] of the Submissions, the further advice dated 5 July 2004 was provided at the request of Mr Danny Casey, not Dr Michael Casey.³³³
- 400 The Church parties submit that the third sentence of paragraph [388] of the Submissions is not a fair characterisation of the evidence given by Cardinal Pell as to whether he adopted the advice given by Corrs to *"let potential plaintiffs work out for themselves who they think they should sue"*. Cardinal Pell's evidence was as follows:³³⁴

"I believe the lawyers did not help Mr Ellis's team identify a suitable defendant. I was aware of that general position. I was in agreement with it. We have subsequently changed that view, and I would welcome further clarification on it. But at that stage, I accepted that that was the approach in that particular case."

- 401 It is clear that while Cardinal Pell accepted Corrs advice in 2004, he has since changed his views on this issue and has ensured that the Archdiocese implement policies, as set out in section 10.3 above, that assist victims to identify a suitable defendant.

³³⁰ Ex 8-12 at paragraph [174]

³³¹ T6518:7-38

³³² TJHC Civil Litigation Submissions, section 3.2 at paragraphs [9] - [12]

³³³ Ex 8-22 at DUG.051.038.0044

³³⁴ T6517:8-14

- 402 In relation to paragraph [389] of the Submissions, the Church parties note that, contrary to what is stated in that paragraph, Mr Ellis was informed that the Archdiocese intended to rely on the proper defendant defence in June 2005 rather than September 2005. On 15 June 2005 Corrs wrote to Mr Ellis' lawyers, Begg & Associates, enclosing a draft defence.³³⁵ The last line of paragraph 25 of the draft defence stated *"The defendants will also contend that they are not proper parties to this action."* On 1 July 2005 Begg & Associates responded, noting *"In paragraph 25 of the 'draft' defence, you raise for the first time a number of issues in relation to the Plaintiff's action, including ... 3. A Contention that the Defendants are not proper parties to the action."*³³⁶ Copies of this correspondence, which do not form part of Exhibit 8-2, are annexed to these submissions.
- 403 In relation to the second sentence of paragraph [391] of the Submissions, the Church parties note that, in considering whether Cardinal Pell could be liable for Mr Ellis' abuse, the Court of Appeal was concerned with the question of whether an Archbishop could be liable for conduct which took place in the Archdiocese prior to his appointment. The Court specifically left open the question of whether the person who was Archbishop at the time of the abuse could be held liable.³³⁷

³³⁵ DUG.080.119.0096 and DUG.080.119.0097 annexed to this submission

³³⁶ DUG.080.055.0349 annexed to this submission

³³⁷ Ex 8-2 at Tab 333 at paragraphs [77] - [78]

12 Model Litigant policies and the conduct of litigation

[CA Submissions paras 392 - 399]

- 404 In response to paragraphs [392] to [399] as a whole, the Church parties refer to section 10.5 above of these submissions. In summary, the Church parties do not accept that the Model Litigant Rules should apply to the Archdiocese or any other entity that forms part of the Church in Australia. It is also inappropriate that the Archdiocese should be judged against a standard to which it was not bound, and which it did not voluntarily assume or comprehend at the time of conducting its defence of the Ellis litigation.
- 405 The last sentence of paragraph [392] of the Submissions is not correct to the extent that it suggests that the *Towards Healing* processes terminate once and for all upon the commencement of litigation. As this case study demonstrates, and as the protocol itself provides, the process under *Towards Healing* can be revived after litigation has concluded. The Archdiocese was able to provide a significant response to Mr Ellis' financial and pastoral needs after the court proceedings had been finalised, as summarised in paragraph [318] above.
- 406 The Church parties otherwise accept the summary of the evidence contained in paragraphs [393] to [399] of the Submissions.

13 Approach to alternative dispute resolution

- 407 The Church parties generally accept the summary of evidence set out at paragraphs [404] - [412] and [414] - [426].
- 408 For the reasons given in the next section of these submissions, the Church parties say that the following paragraphs of the Submissions do not contain a fair summary of the evidence:
- (a) [400] - [403] in the introduction to the section entitled “*Approach to alternative dispute resolution*”,
 - (b) [413] in the section entitled “*Response to attempts to settle*”, and
 - (c) [427] - [428] in the section entitled “*Submissions in relation to the approach to alternative dispute resolution*”.
- 409 The Church parties also say the evidence referred to in the following paragraphs is relevant to the proposed findings.

13.2 Introduction

[CA Submissions paras 400 - 403]

13.2.1 Cardinal Pell’s involvement in Mr Ellis’ litigation

- 410 Cardinal Pell explained his approach towards supervising Mr Ellis’ litigation as follows:³³⁸

“... my approach overall is always to retain competent lawyers and to expect that they will conduct the litigation in an appropriate, professional manner, relying on their expertise in that field. I do not consider myself to have the experience or the knowledge to make decisions about the day-to-day running of legal claims.”

- 411 Cardinal Pell’s evidence was that he “*explicitly endorsed the major strategies of the defence*”, but that he was not “*involved in the day to day running of the case*”.³³⁹ He was therefore “*not usually involved in the various decisions made in the course of the litigation as to the procedural or tactical steps taken on behalf of the first two defendants*”, one of which was himself (in his personal capacity).³⁴⁰
- 412 There is therefore an important distinction between *strategic* decisions, of which Cardinal Pell was aware of and which he did endorse, and *tactical* decisions, of which Cardinal Pell almost always was not aware, and which he did not necessarily endorse, unless they were brought to his attention and instructions were requested.

³³⁸ Ex 8-14 at paragraph [154]

³³⁹ Ex 8-14 at paragraph [37]; T6348:1-5

³⁴⁰ Ex 8-14 at paragraph [112]

- 413 Where Cardinal Pell was asked to give instructions, his *“instinct was to follow the advice of the lawyers”*.³⁴¹
- 414 Mr McCann confirmed that, as to the process of obtaining *“instructions”*, Corrs would usually give advice or make a recommendation, as to what course ought to be followed, and that more often than not, the client accepted the recommendation.³⁴² Such acceptance of advice by the client is then treated as constituting the client’s *“instructions”* to the solicitors.
- 415 An early example of this reality, it is submitted, was Corrs’ advice, by their letter of 9 September 2004, that *“the Archdiocese should commit to vigorously defending Mr Ellis’ application to extend the limitation period”*.³⁴³ That advice was accepted.
- 416 With respect to *tactical* decisions, such as upon what topics or for how long Mr Ellis should be cross-examined, Corrs and counsel briefed for the defendants did, from time to time, simply make those decisions, without referring to the client for instructions.³⁴⁴
- 417 Cardinal Pell’s understanding was that the person within the Archdiocese who would ordinarily be the contact person for Corrs was the Chancellor (Monsignor Rayner until May 2003 and Monsignor Usher thereafter). However, Cardinal Pell acknowledged that in many cases the communications to and from Corrs were with Dr Michael Casey, rather than or as well as the Chancellor.³⁴⁵ Mr McCann and Mr Dalzell of Corrs confirmed that Dr Michael Casey was the principal instructor on behalf of the defendants, as did Dr Michael Casey himself.³⁴⁶ Mr Dalzell further explained that he could not recall *“ever receiving instructions directly from Cardinal Pell”*.³⁴⁷
- 418 Dr Michael Casey did not bring all matters to the attention of the Cardinal³⁴⁸ and nor did other members of the Chancery providing instructions to Corrs.³⁴⁹ Dr Michael Casey explained the scope of his decision-making authority in relation to the Ellis litigation as follows (emphasis added).³⁵⁰

“Q. Do I understand that you were exercising independent decision making, or were all of these decisions that you made made on instruction or with the knowledge that they would be agreed in by the cardinal?

A. As I mention in my statement, once an instruction about a course has been given, and there are steps in that process which are the ordinary steps taken to follow those instructions, those matters - **those ordinary steps may not have been taken back - probably would not have been taken back to the cardinal in every instance.**

³⁴¹ T6352:45-46

³⁴² T5985:4-24

³⁴³ Ex 8-2 at Tab 220A

³⁴⁴ T6030:39-T6031:34

³⁴⁵ Ex 8-14 at paragraph [111]; T6352:34-40

³⁴⁶ Ex 8-11 at paragraph [6]; T6001:10-25; T5943:6-T5945:30; T6083:16-20

³⁴⁷ Ex 8-11 at paragraph [6]

³⁴⁸ See for example Ex 8-2 at Tabs 220A, 247A, 310 and 328

³⁴⁹ See for example Ex 8-2 at Tabs 308 and 321

³⁵⁰ T6152:45-T6153:28

- Q. *In terms of the ordinary steps that you refer to, is the only matter that fits that description agreeing to the lawyers having served a notice disputing facts in circumstances where they had already served it?*
- A. *There may have been other matters. Once a decision had been made on a point and it was then a question of the lawyers following through the steps to implement that point, **those steps, in the ordinary course of following that, I probably wouldn't have taken back to the cardinal.***
- Q. *Are there any other matters other than the matter currently on the screen that falls within that category?*
- A. *Well, there may be. I can't recall. As a matter of general practice, **that would probably apply to most of the steps**, that once instructions were given on a substantive point and the ordinary course of things was being followed, as advised by our lawyers, to implement that point and it was all going as it was expected of me to go, **then I wouldn't take each and every one of those matters back to the cardinal.***
- Q. *The general instructions were to vigorously defend the claim and defeat the litigation; is that right?*
- A. *Yes.*
- Q. *Once those instructions were given, matters that fitted within those, in your mind, could be carried out by the lawyers with instructions from you but not necessarily the cardinal; is that what you're saying?*
- A. ***There are other substantive points too, such as we've mentioned the proper defendant point; this question about the status of discussion about Mr Eccleston's report. Those substantive matters all go to the cardinal for his direction.***

419 This extract from Dr Michael Casey's evidence is consistent with the evidence of Cardinal Pell, namely that:

- (a) Cardinal Pell was involved in the decision-making process regarding strategic issues in the litigation, which included the decisions to vigorously defend the claim, to take the "*proper defendant*" point, and whether in about June 2005 to maintain the non-admission as to whether the abuse had occurred, and
- (b) Having accepted and endorsed the major strategies to be followed, Cardinal Pell was not involved in the day-to-day running of the litigation. This meant that Dr Michael Casey did not consult the Cardinal in relation to "*most of the steps*" involved in implementing the substantive points in the litigation.

13.2.2 The Archdiocese's preference to settle litigation where possible

- 420 Paragraph [400] of the Submissions refers to the evidence of Cardinal Pell that *"The first preference of the Archdiocese is, and was, always to settle litigation where possible."*³⁵¹ CA then submits in paragraph [403] of the Submissions that the actions of the defendants in refusing all attempts by Mr Ellis to resolve the complaint were inconsistent with this evidence.
- 421 Paragraph [400] of the Submissions does not contain a fair summary of the evidence of Cardinal Pell on this topic. Cardinal Pell gave evidence that while the Archdiocese's first preference is always to settle, there were factors present in the Ellis litigation which were unusual, including the amounts of money that Cardinal Pell believed that Mr Ellis was claiming and advice the Archdiocese had received from Corrs that there was no chance that the case would be successful.³⁵²
- 422 The evidence given by Dr Michael Casey was to the same effect, namely that he understood that the Archdiocese should *"work to settle and resolve matters wherever possible without litigation"*,³⁵³ but that decisions were made not to mediate and negotiate with Mr Ellis as a result of accepting advice given by Corrs that this was the appropriate course to take.³⁵⁴
- 423 As set out in further detail below, Mr McCann of Corrs gave evidence on the other hand that it was his firm view that it would have been against the interests of the defendants to mediate with Mr Ellis in circumstances where the defendants had very good prospects of defeating the application made by Mr Ellis, and where the parties were so far apart that it was *"close to fanciful"* to think mediation could produce an outcome.³⁵⁵ The Archdiocese relied heavily upon this advice in determining that it would not mediate.³⁵⁶
- 424 In a detailed three-page letter sent to the Archdiocese in December 2004, Corrs again gave firm advice not to accept Mr Ellis' offer of \$750,000 and not to put a counter-offer.³⁵⁷ In March 2006, Mr Dalzell advised that a further request from Mr Ellis to enter into mediation should be rejected on the grounds that it was *"premature at least until the resolution of our appeal"*, and that upon instructions being given to refuse that request Corrs would *"inform Begg that we intend to appeal and therefore mediation is inappropriate at this stage"*.³⁵⁸ In each instance, Dr Michael Casey informed Corrs that the defendants accepted Corrs' advice.³⁵⁹
- 425 The Church parties respectfully submit that there is no identifiable inconsistency between having a general preference to settle litigation where possible including by mediation where appropriate, and decisions made by the Archdiocese not to mediate or negotiate with a specific victim, in specific circumstances, after accepting emphatic and considered legal advice on the issue in that specific case.

³⁵¹ Ex 8-14 at paragraph [152]

³⁵² Ex 8-14 at paragraphs [43] - [44]; T6348:30-34

³⁵³ T6093:34-36; T6094:8-16; T6108:11-12; Ex 8-12 at paragraph [172]

³⁵⁴ Ex 8-12 at paragraphs [115], [145]

³⁵⁵ Ex 8-10 at paragraphs [110] - [111]; T5976:7-21

³⁵⁶ T6349:5-15

³⁵⁷ Ex 8-2 at Tab 242

³⁵⁸ Ex 8-2 at Tab 314

³⁵⁹ Ex 8-12 at paragraphs [115], [144]

13.2.3 Cardinal Pell did not make a strategic decision never to mediate Mr Ellis' claim

- 426 In paragraphs [400] and [403] of the Submissions, CA submits that there is an inconsistency between Cardinal Pell's evidence that he *"never made a strategic decision in terms of generally not to mediate"*, and instructions that Corrs received from the Archdiocese to *"reject the possibility of mediation"* and *"retain [the] integrity"* of the Towards Healing process.
- 427 The summary of Mr McCann's evidence in paragraph [402] of the Submissions is incomplete. Mr McCann said in his statement (emphasis added):³⁶⁰

*"I do not agree that it was a mistake to not enter into mediation at the start of the legal process commenced by Mr Ellis. The instructions which were provided by Michael Casey were very clear that as a non-court based approach through Towards Healing had been attempted and failed to reach a satisfactory conclusion, mediation was not to be tried **at that time**.*

*Additionally, as the decisions of the Court of Appeal and High Court showed, the defendants had very good prospects of defeating the application made by Mr Ellis. In such a situation, where the aim of the litigation was to defend it and defeat the application, a finding in the defendants' favour would have extinguished whatever claim (if any) which Mr Ellis had against the defendants. On the other hand the potential damages exposure was in the millions of dollars. **Entering into a mediation in those circumstances made no forensic sense. In the context of the goals the defendants had expressed - to defeat the litigation - the concept of a mediation would have no attraction, and would be against their interests to embark upon.***

*I did not perceive this as a situation where I should actively push for the client to engage in an alternate dispute resolution process once proceedings had been commenced, in light of the fact that a negotiated outcome had already been pursued. The parties were so far apart it was close to fanciful to think mediation could produce an outcome. **I had also been informed by Mgr Rayner (I cannot recall the precise occasion), that he held a belief that Mr Ellis had been using the Towards Healing process as a means to obtain a significant sum from the Archdiocese, which he could then use to fund a damages action against the Archdiocese – which Mgr Rayner characterised as a fighting fund.** Mgr Rayner told me that he held this belief because of the refusal of Mr Ellis to sign a Deed of Release when various resolutions including payment proposals had been made to Mr Ellis. I have a clear recollection, although I have not been able to find any notes or documents which record this, that **Mgr Rayner told me that the final settlement proposal made to Mr Ellis before he commenced the litigation was for \$100,000, and that at that time, Mr Ellis indicated a willingness to accept the payment, but not provide a deed of release.**"*

³⁶⁰ Ex 8-10 at paragraphs [109], -[111]

- 428 It is apparent from Mr McCann's evidence that:
- (a) his instructions from Dr Michael Casey were that "*mediation was not to be tried at that time*" (emphasis added), not that mediation should never take place,
 - (b) his own opinion was that mediation made no forensic sense, as the defendants had "*very good prospects*" of extinguishing Mr Ellis' claim altogether,
 - (c) he believed that a negotiated outcome had already been pursued through the *Towards Healing* process, and
 - (d) he understood, rightly or wrongly, from discussions with Monsignor Rayner that there were particular features of Mr Ellis' previous dealings with the Archdiocese which militated against mediation taking place (although conceded that, in relation to the last sentence of the above extract, his recollection was wrong).³⁶¹
- 429 Mr McCann's evidence demonstrates that the initial decision not to mediate was not part of some general strategy of the Archdiocese never to negotiate with a victim, or Mr Ellis, after legal proceedings had been commenced, but rather a particular decision that was made at a particular juncture, based upon legal considerations raised by Corrs and matters raised by Monsignor Rayner that were particular to the circumstances at that time
- 430 Mr McCann did not suggest that Cardinal Pell was involved in a general strategic decision not to negotiate or engage in mediation while the litigation was on foot. In fact, Mr McCann said that he had "*no recollection of speaking or communicating directly with Cardinal George Pell in relation to the Ellis litigation*" whatsoever.³⁶² His only interactions in relation to the initial decision not to mediate were with Dr Michael Casey and Monsignor Rayner.
- 431 Neither Dr Michael Casey nor Monsignor Rayner gave evidence that they had discussions with Cardinal Pell during which the Cardinal instructed them of some general strategic decision not to negotiate or engage in mediation with Mr Ellis. Indeed, to the contrary, Monsignor Rayner gave evidence that he would not have spoken directly with Cardinal Pell regarding his opinion that Mr Monahan should have been allowed to settle the matter to Mr Ellis' satisfaction.³⁶³
- 432 Dr Michael Casey had no recollection of any discussions that took place in September 2004 concerning the topic of mediation.³⁶⁴ Nor did he have any recollection of discussions with Cardinal Pell or any views that Cardinal Pell may have expressed about mediation at this time, although he agreed that it was very likely that he did have discussions with Cardinal Pell on the topic.³⁶⁵ Dr Michael Casey also confirmed that the initial decision not to mediate was not part of some general strategy, but rather a decision that was made *at that stage* of the litigation, contrary to what is suggested in paragraph [401] of the Submissions.³⁶⁶

³⁶¹ T5963:34-T5964:43

³⁶² Ex 8-10 at paragraph [23]; T5993:47-T5994:6

³⁶³ T5840:47-T5841:20

³⁶⁴ Ex 8-10 at paragraph [112]

³⁶⁵ T6105:4-9; T6105:34-45; T6106:8-10; T6108:6-T6109:2

³⁶⁶ T6105:19-39

- 433 Cardinal Pell's evidence on the topic could not have been clearer. He confirmed that he did *"endorse the decision not to enter mediation at the **start of the legal proceedings**"* (emphasis added) and that he now considered it was a mistake to have done so, but firmly stated on a number of occasions that he *"never made a strategic decision in terms of generally not to mediate."*³⁶⁷
- 434 In summary, the evidence establishes that:
- (a) the decision in September 2004 not to mediate was made on the instructions of Dr Michael Casey, was informed by matters raised by Monsignor Rayner and by the emphatic advice of Corrs, and was endorsed by Cardinal Pell,
 - (b) there is no evidence that Cardinal Pell had any discussion with Dr Michael Casey, Monsignor Rayner or any solicitor from Corrs to the effect that he had made or would make a strategic decision generally not to mediate with Mr Ellis. Nor is there any other evidence that would suggest that Cardinal Pell held such a view, and
 - (c) the decision of the defendants in September 2004 not to mediate was a decision made at the very commencement of the proceedings, in response to the advice received from Corrs in light of the particular circumstances in existence at that time. It was not part of some inflexible strategy of the defendants that they would never consider negotiating or mediating with Mr Ellis.
- 435 For these reasons, the Church parties do not accept that paragraphs [400] to [403] of the Submissions are a fair summary of the evidence and instead submit that if any findings are made, those finding should reflect the evidence summarised at paragraphs [426] - [434] above.

13.3 Response to attempts to settle

[CA Submissions paras 404 - 421]

- 436 The Church parties refer to paragraphs [426] - [434] above for a full analysis of the circumstances in which the decision in September 2004 not to mediate with Mr Ellis was made.
- 437 The Church parties do not accept that there is any inconsistency, as submitted in paragraph [413] of the Submissions, between Cardinal Pell's evidence that he endorsed the decision not to enter mediation at the start of the legal proceedings and his evidence in paragraph [105] of his statement, which states (emphasis added):

*"I refer to a letter from Mr Monahan to Msgr Rayner and Mr Cudmore dated 16 September 2004 (DUG.080.040.0518). I had not seen this letter prior to preparing this statement. In that letter, Mr Monahan notes that "in ordinary circumstances" he would strongly recommend attempting to mediate and settle the matter, but then says that he is **"very conscious of the fact that Cardinal Pell has his own views about the matter"**, and that he might wish Corrs to be involved". I do not know*

³⁶⁷ T6499:20-T6501:10; T6511:34-35; T6540:38-41

what "views" Mr Monahan may have been referring to. Had I been consulted as to whether attempts should be made at this time to negotiate or mediate with a view to settling Mr Ellis' Supreme Court claim, I would have been willing to do so subject to any legal advice that I may have been given."

- 438 Read in context, it is apparent that Cardinal Pell was not suggesting that he had never been consulted about whether or not to mediate with Mr Ellis, but rather was seeking to assist the Royal Commission about what views Mr Monahan might have been referring to, having regard to the Cardinal's absence of any specific recollection on the topic. In this instance, the evidence being given by the Cardinal was not about views he had expressed following consideration of advice given by Corrs, but rather the views he would have expressed in response to the advice of Mr Monahan.
- 439 In any event, Cardinal Pell's evidence that he would have been willing to negotiate or mediate "*subject to any legal advice*" that he may have been given is entirely consistent with the position that was later adopted, namely to decline the particular invitation to mediate in September 2004 having regard to the strong advice from Corrs that it was not in the defendants' interests to do so.
- 440 In relation to paragraph [416] of the Submissions, there is no evidence before the Royal Commission that either Cardinal Pell or Dr Michael Casey actually took into account any suggestion that the Archdiocese had been "*forced*" to outlay a significant amount of money in deciding not to make a counter-offer to Mr Ellis. Dr Michael Casey gave evidence that he could not remember taking that factor into account when accepting the advice of Corrs.³⁶⁸
- 441 The last sentence of paragraph [417] of the submissions refers to Cardinal Pell's evidence that the defendants "*should have made a counter-offer, even if it was some considerable distance from \$750,000*". Cardinal Pell went on to say that he understood that "*now very clearly*", demonstrating that it was not something that was apparent to him at that time. This is unsurprising, having regard to the detailed and definite advice given by Corrs that a counter-offer should not be made.³⁶⁹
- 442 In relation to the decision not to mediate made on 8 March 2006, referred to in paragraphs [418] - [421] of the Submissions, Cardinal Pell gave the following evidence as to why the offer was rejected:³⁷⁰

"Possibly because the whole issue of the trustees was still at issue. In retrospect, it wasn't a wise decision not to enter the mediation. Probably the issue there was not so much the mediation but as to whether we would appeal, but they were intimately linked."

³⁶⁸ T6113:30-32

³⁶⁹ Ex 8-2 at Tab 242

³⁷⁰ T6540:14-18

13.4 Catholic Church Insurances raises concerns

[CA Submissions paras 422 - 426]

- 443 The Church parties generally accept the summary of evidence contained in paragraphs [422] to [426] of the Submissions.

13.5 Submissions in relation to the approach to alternative dispute resolution

[CA Submissions paras 427 - 428]

- 444 For the reasons set out above, the summary of evidence contained in paragraphs [427] and [428] of the Submissions is incorrect to the extent that it suggests that the defendants to the Ellis litigation had, from the outset, a conscious strategy in place that they would not negotiate or mediate with Mr Ellis at every stage in the litigation.
- 445 Rather, each time the defendants determined that they would not enter into mediation or negotiate with Mr Ellis, they were acting on advice from their legal advisers and gave instructions to proceed in a manner that was consistent with that advice, as explained in section 13 above.
- 446 The Church parties therefore do not accept that the defendants to the Ellis litigation had an “*approach*” which carried through from the beginning to the conclusion of litigation, as is suggested by paragraphs [427] and [428] of the Submissions.
- 447 For the reasons explained in paragraphs [436] - [442] above, the Church parties also do not accept that there is any inconsistency between any decisions made by the defendants in relation to alternative dispute resolution in this instance and any evidence given by Cardinal Pell, as asserted in paragraph [428] of the Submissions.

14 Decision to dispute the fact of Mr Ellis' abuse

448 The Church parties generally accept the summary of evidence set out at paragraphs [429] - [430], [434], [436] - [438], [440] - [449], [451] - [464] and [466] - [468].

449 For the reasons given in the next section of these submissions, the Church parties say that the following paragraphs of the Submissions do not contain a fair summary of the evidence:

- (a) paragraphs [431] - [433];
- (b) paragraph [435];
- (c) paragraph [439];
- (d) paragraph [450];
- (e) the second sentence of paragraph [469];
- (f) the implied assertion at paragraph [470] that the Archbishop and the Trustees were aware of the matters set out in the paragraph; and
- (g) paragraphs [471] - [472].

450 The Church parties also say the following evidence is relevant to the proposed findings.

14.1 Introduction

[CA Submissions paras 429 - 435]

451 In the litigation, Mr Ellis sought damages for abuse that commenced when he was about 13 in 1974 and continued until he was about 26 in 1987. Temporally, therefore, of that 12 to 13 year period, he was an adult for some 8 years. The admissions sought by Mr Ellis in the Notice to Admit Facts³⁷¹ were expressed in a rolled-up way, by reference to particular parts of the Statement of Claim³⁷² which covered different periods with different features.

452 The non-admission made by the Archdiocese was thus more complex, legally and factually, than simply "*disputing the fact of the abuse*" as described by CA.

453 Nevertheless these submissions proceed to address this issue on the basis advanced by CA, namely that there was a non-admission of "*the fact of the abuse*".

454 In relation to this non-admission, Cardinal Pell said (emphasis added):³⁷³

"I was made aware at some time during the proceedings that the effect of "disputing" such a fact is to "put the plaintiff to proof" of that fact, rather than to deny the fact. I understood that the advice given by the lawyers was to adopt that

³⁷¹ Ex 8-2 at Tab 241A

³⁷² Ex 8-2 at Tab 205

³⁷³ Ex 8-14 at paragraph [115]

*approach. I concurred, somewhat reluctantly, as I could not condone denying the abuse occurred. **Reflecting now on the decision to "dispute" the fact of the abuse, I am troubled by it, given both the terms of the Eccleston report and that Msgr Rayner had evidently told Mr Ellis at the facilitation in July 2004 that he had never had any reason to doubt what Mr Ellis had said.***"

- 455 With the benefit of hindsight, the Church parties accept that the initial decision on behalf of the Archdiocese (in about December 2004) not to admit the abuse, and the subsequent decision (in about June to July 2005) to maintain the non-admission, did not have sufficient regard to the likely effects of those decisions upon Mr Ellis.³⁷⁴ As is now apparent, the non-admission caused Mr Ellis to form the view that the Archdiocese no longer believed that he had suffered sexual abuse, in circumstances where Mr Ellis had previously been informed by Monsignor Rayner that he never had any reason to doubt what Mr Ellis had said (**Rayner Statement**).³⁷⁵ The Church parties further accept, with regret and apology, that the decision to maintain the non-admission resulted in Mr Ellis being cross-examined for longer than was necessary, in circumstances which were hurtful and painful to him.³⁷⁶
- 456 However, the Church parties submit that it is not appropriate for any findings in the terms proposed to be made in relation to this aspect of the litigation.
- 457 First, for the reasons set out above, findings in terms of fairness should not be made.
- 458 Secondly, the Church parties do not accept that any personal findings should be made attributing responsibility for these failures to instructions given by Cardinal Pell or Dr Michael Casey.
- 459 There is no evidence to suggest that either Cardinal Pell or Dr Michael Casey was aware that the Rayner Statement had been made to Mr Ellis during the facilitation.³⁷⁷ Moreover, as set out at paragraphs [107] - [117] above, the weight of the evidence suggests that Monsignor Rayner actually had reservations regarding the findings of Mr Eccleston. Given these reservations, had his opinion been sought by the Archdiocese or Corrs (whether in December 2004 or June or July 2005), Monsignor Rayner may well have made those reservations known.³⁷⁸
- 460 Further, while both Cardinal Pell and Dr Michael Casey were made aware of the evidence of Mr SA in about July 2005, it is likely that Dr Casey had only limited knowledge of the account given by Mrs Penton, and even more likely that Cardinal Pell had none.³⁷⁹
- 461 The ultimate decision by the Archdiocese, in about June to July 2005, to maintain the non-admissions regarding the abuse was therefore a decision made on the basis of incomplete information, for which the process, rather than any one individual, is to blame. If a finding is to be made on this issue, it should be solely in relation to the conduct of the Archdiocese.

³⁷⁴ Ex 8-14 at paragraphs [115], [132] and [155(c)]

³⁷⁵ Ex 8-4 at paragraph [267]

³⁷⁶ T6567:25-30

³⁷⁷ T6600:18-42; T6133:11-13

³⁷⁸ Ex 8-2 at Tab 243; Ex 8-2 at Tab 204, CCI.0030.00003.0102; See also paragraphs 107-117 of these Submissions

³⁷⁹ See Section 15.3 below.

462 In deciding to maintain the non-admissions, the Archdiocese was following advice to adopt a position which its legal advisers had taken for various procedural or tactical reasons.³⁸⁰ The procedural or tactical approach was explained by Mr McCann in paragraphs [54] to [56] of his statement.³⁸¹ Paragraphs [431] and [435] of the Submissions do not accurately reflect Mr McCann's evidence on this issue. Mr McCann relevantly said at paragraphs [54] to [56] (emphasis added):

*"54. **The question of whether Mr Ellis was abused was not in issue on his application to extend the limitation period.** However, the questions of what and when he knew of that abuse and its consequences were the central questions on that application. In that context I considered that it was in the first and second defendants' interests that Mr Ellis give evidence describing in his own words and based upon his own understanding and perceptions what had happened to him, so that **he could be cross-examined on when he came to know those things and when he obtained the means of knowing those things.***

55. If Mr Ellis could show that he did not know of and did not have the means of knowing of the abuse and its consequences before the relevant dates I have referred to above, the onus then shifted to the defendants to show that by extending the time to allow Mr Ellis to bring his claim they would suffer prejudice. One of the ways that Cardinal Pell and the Trustees would suffer prejudice by the long delay in Mr Ellis bringing his claim is that Fr Duggan was no longer alive to contradict Mr Ellis' allegations.

*56. It followed from each of the matters mentioned in paragraphs 54 and 55 that it was in the interests of both the first and second defendants to not admit that Mr Ellis had been abused as he alleged, at least until the end of his application to extend time. **However that non admission did not result in the fact of Mr Ellis being abused being in issue on his motion to extend time** which, as events transpired, is the only matter which was heard in the proceeding."*

463 This passage demonstrates that in Mr McCann's mind the fact of whether or not the abuse actually occurred would not be an issue in the limitations hearing, and that the aim of this procedural or tactical approach was to provide a platform from which questions could be asked of Mr Ellis that were relevant to the limitations argument, in particular as to when Mr Ellis became aware that he had suffered damage as a result of the abuse.³⁸²

464 Although Mr McCann was "*almost certain*" that this procedural or tactical approach "*would have been*" explained to the client, he did not have a recollection of doing so.³⁸³ Similarly Mr Dalzell had no recollection of ever describing or explaining this procedural or tactical approach to anyone

³⁸⁰ T6594:25-33

³⁸¹ Ex 8-10

³⁸² T5990:13-30; T5991:21-31; T5957:36-39

³⁸³ T5992:36-37

at the Archdiocese.³⁸⁴ Neither Cardinal Pell nor Dr Michael Casey recalled being so informed. No document exists which contains any such explanation or description.

465 When formulating this procedural or tactical approach, the Archdiocese's legal advisers were not aware of the Rayner Statement or that the Archdiocese had previously accepted that the abuse had occurred.³⁸⁵ Nor did they ask anyone from the Archdiocese whether there had been any prior acceptance by it of the fact.³⁸⁶

466 For the reasons set out above and in further detail below, it is submitted that the appropriate construction of the evidence is that the decision in December 2004 to dispute the fact of the abuse:

- (a) was a procedural or tactical decision made initially by the defendants' legal representatives,
- (b) did not sit comfortably with Cardinal Pell when he later became aware of it, and Cardinal Pell raised concerns about disputing the abuse in June 2005 precisely because he was concerned not to deny the abuse,
- (c) was only agreed to by Cardinal Pell after he was informed - on the basis of what can now clearly be seen to have been flawed analysis - that the history of the matter was such that it was appropriate for the Archdiocese to "*put the plaintiff to proof*" and after he was convinced that there was a significant legal distinction between "*dispute*" and "*deny*", which Cardinal Pell was advised was a distinction commonly relied upon, and
- (d) should have been reviewed in light of the SA affidavits and the Penton information.

467 Moreover, Mr McCann's procedural or tactical approach did not necessitate, and should not have led to the questioning of Mr Ellis in cross-examination as to whether or not the abuse actually occurred. That was a matter conceded by Mr McCann himself.³⁸⁷ (However, in fairness to Mr McCann, it may be noted that the transcript of that cross-examination appears to indicate that the questions referred to sexual behaviour when Mr Ellis was an adult).³⁸⁸

14.2 Did the Archdiocese instruct Corrs to serve the December 2004 Notice Disputing Facts?

[CA Submissions paras 436 - 439]

468 The Church parties agree with the submission of CA in paragraph [439] of the Submissions that the evidence does not indicate that Corrs sought specific instructions from the Archdiocese before serving the Notice Disputing Facts and Authenticity of Documents on 20 December 2004 (**December 2004 Notice**), although it is clear that (some six months later in June to July 2005)

³⁸⁴ T6025:22-28

³⁸⁵ T5988:11-31; Ex 8-11 at paragraph [11]; T6026:25-28

³⁸⁶ T5988:5-9; T5988:28-31; T6026:8-23

³⁸⁷ T5990:32-44

³⁸⁸ Ex 8-10 at paragraph [102]

instructions were expressly given to maintain the non-admission prior to the limitations hearing which commenced on 25 July 2005.

- 469 On 10 December 2004, Mr David Begg, on behalf of Mr Ellis, served a Notice to Admit Facts on the defendants.³⁸⁹ The facts that Mr Ellis sought to be admitted included that Duggan had sexually abused Mr Ellis and that Duggan was a priest in the service of the Archdiocese. The December 2004 Notice was served ten days later, on 20 December 2004.³⁹⁰
- 470 Prior to serving upon Mr Ellis the December 2004 Notice, there is no record of Corrs sending the Notice to Admit Facts to the Archdiocese and no record of Corrs providing advice or seeking instructions from the Archdiocese regarding the appropriate response to the Notice to Admit Facts dated 10 December 2004. While Mr Dalzell gave evidence that he would be “*very surprised*” if the December 2004 Notice had been served without express instructions, he had no recollection of any conversation during which he obtained those instructions.³⁹¹
- 471 An email sent by Mr Dalzell to Dr Michael Casey demonstrates that the first time Mr Dalzell informed Dr Michael Casey in writing of the existence of the Notice to Admit Facts was one month after the December 2004 Notice was served, on 25 January 2005. The email relevantly states (emphasis added).³⁹²

*“As discussed this afternoon, **we have received a notice from Ellis’ solicitor to admit certain facts in the Ellis v Duggan matter. This is a standard Court Notice and is designed to save the parties and the Court time in deciding issues that are not in dispute.***

One of the facts that Ellis wants us to admit is that at “all relevant times, Duggan was engaged as a priest in the service of the Archdiocese of Sydney”. . . .

In response to Ellis’ notice to admit facts we replied to his solicitors on 20 December 2004 in the following terms”

- 472 Mr Dalzell agreed that upon reading this email, it appeared as though the discussion “*this afternoon*”, that is, on 25 January 2005, was the first time that he had discussed with Dr Michael Casey the fact that a Notice to Admit Facts had been received, which he found “*quite surprising*”.³⁹³
- 473 There is no evidence of Corrs providing any written advice to the Archdiocese, and no recollection by any witness, regarding whether or not the defendants should admit the fact of the abuse, at any time prior to June 2005, and in particular, no advice as to what the consequences would be if the facts referred to in the Notice to Admit were ultimately proven, either generally or in that particular regard.

³⁸⁹ Ex 8-2 at Tabs 241 and 241A

³⁹⁰ Ex 8-2 at Tab 245

³⁹¹ T6003:32-46; T6021:6-22; Ex 8-11 at paragraph [10]

³⁹² Ex 8-2 at Tab 247

³⁹³ T6022:18-24

- 474 It was not put to any witness, in particular Dr Michael Casey or Cardinal Pell, that by accepting Corrs' advice that the Archdiocese should "*vigorously defend*" the application, they impliedly gave instructions to serve the Notice. The most that was suggested to Dr Michael Casey was that service of the Notice was "*consistent*" with the instructions to vigorously defend.³⁹⁴
- 475 Nevertheless, the Church parties accept that its officers and Cardinal Pell did give specific consideration to the non-admission in June 2005, and determined to maintain the non-admission.

14.3 Why did the Archdiocese decide to dispute the fact of Mr Ellis' abuse?

[CA Submissions paras 440 - 454]

- 476 The Church parties submit that the following findings ought to be made regarding the preparation by Dr Michael Casey of the email dated 24 June 2005 (**June 2005 email**) and the circumstances in which the Archdiocese determined that it would continue to maintain the non-admissions regarding the abuse of Mr Ellis in June 2005:
- (a) Cardinal Pell had a concern that the Archdiocese should not deny that Mr Ellis' abuse had occurred, in circumstances where the Archdiocese had previously accepted that this was the case during the *Towards Healing* process,³⁹⁵
 - (b) Cardinal Pell asked Dr Michael Casey to "*check that the Towards Healing assessment had in fact found in favour of Ellis's allegations*",³⁹⁶
 - (c) there was a miscommunication between Mr Salmon and Dr Michael Casey, which resulted in Dr Michael Casey recording that "*the Archdiocese has never accepted that Fr Duggan was responsible for the abuse Ellis alleges he suffered*", which was contrary to the true state of affairs, namely that the Archdiocese had accepted just that, both in deciding to proceed to a facilitation and in what Monsignor Rayner said at that facilitation,
 - (d) Cardinal Pell was not a recipient of the June 2005 email, and had not seen the June 2005 email prior to preparing his statement.³⁹⁷ At all relevant times, he understood that the Archdiocese had accepted that the abuse had occurred.³⁹⁸ Cardinal Pell made the decision to maintain the non-admission, not on the inaccurate basis set out in the June 2005 email but instead on the basis of advice to him that "*the effect of 'disputing' such a fact is to 'put the plaintiff to proof' of that fact, rather than to deny the fact*"³⁹⁹ and that that was a legally legitimate step to take,⁴⁰⁰ and
 - (e) there is no evidence to suggest that either Cardinal Pell or Dr Michael Casey was aware of the Rayner Statement. Cardinal Pell's decision to maintain the non-admission was made without any knowledge that the Rayner Statement had been made. On the evidence, it

³⁹⁴ T6115:5-7

³⁹⁵ T6496:31-38; T6519:45-T6520:8; T6528:14-19; T6696:12-23; Ex 8-14 at paragraphs [42] and [115]

³⁹⁶ Ex 8-2 at Tab 259

³⁹⁷ Ex 8-14 at paragraph [123]

³⁹⁸ Ex 8-14 at paragraph [124]; T6519:45-T6520:8; T6522:20-24

³⁹⁹ Ex 8-14 at paragraph [115]; T6521:1-34; T6522:1-9

⁴⁰⁰ T6523:20-30; T6531:8-13

seems likely that in July 2005, Mr Dalzell spoke with Mr Brazil and Monsignor Rayner, but this did not result in Rayner Statement coming to light.⁴⁰¹

- 477 In summary, the Archdiocese quite properly engaged in an inquiry as to whether it was appropriate to continue not to admit the fact of Mr Ellis' abuse, including whether there had been any acceptance of Mr Ellis' complaint during the *Towards Healing* process, but this inquiry miscarried, as it did not uncover all information that was relevant to the decision-making process.
- 478 The Church parties submit that paragraph [450] of the Submissions is not a fair summary of the evidence of Dr Michael Casey on this topic. Dr Michael Casey stated that when he drafted the June 2005 email he "*believed it was the true answer based on the advice that Mr Salmon gave me*", and that he "*tried to report faithfully and accurately*" what had been said to him by Mr Salmon.⁴⁰²
- 479 In relation to paragraph [454] of the Submissions, Cardinal Pell also gave evidence that he made it quite clear, in instructing Corrs, that the Archdiocese could not deny that the abuse occurred.⁴⁰³

14.4 The decision to "put Mr Ellis to proof"

[CA Submissions paras 455 - 459]

- 480 The Church parties generally accept the accuracy of paragraphs [455] to [459] of the Submissions.

14.5 Cross examination of Mr Ellis

[CA Submissions paras 460 - 468]

- 481 The Church parties generally accept the accuracy of paragraphs [460] to [464] and [466] to [468] of the Submissions.

14.6 Submissions as to the decision to dispute the fact of Mr Ellis' abuse

[CA Submissions paras 469 – 472]

- 482 In relation to paragraph [470] of the Submissions, the Church parties accept each of the factual substrata set out in [470(a)] to [470(d)] but do not accept the implied assertion that those responsible for giving the instructions were aware of each of these matters or had turned their mind to the relevance of each of these matters at the time the decision whether or not to admit the fact of the abuse was made. In particular:

⁴⁰¹ Ex 8-2 at Tabs 260, 264; T6008:3-T6009:3; Ex 8-11 at paragraph [11]

⁴⁰² T6129:43-45; T6130:37-38

⁴⁰³ T6528:14-19; T6496:31-35; T6519:45-T6520:8

- (a) neither Cardinal Pell nor Dr Michael Casey was aware that Monsignor Rayner had said that he accepted the truth of Mr Ellis' complaint at the facilitation,⁴⁰⁴
- (b) there is no evidence to suggest that Cardinal Pell was aware that Monsignor Rayner's advice had not been sought as to what had occurred during the facilitation,
- (c) there is no evidence to suggest that either Cardinal Pell or Dr Michael Casey was aware that notes were taken of Mr Ellis' facilitation, or that there was a process by which notes were routinely taken during facilitations, and
- (d) neither Cardinal Pell nor Dr Michael Casey was given an opportunity to comment upon the reasonableness of whether they ought to have made inquiries as to whether notes of Mr Ellis' facilitation existed.

483 In relation to paragraph [470(e)] of the Submissions, the Church parties submit that Cardinal Pell's evidence establishes that he did not rely upon the views attributed to Mr Salmon by Dr Michael Casey in the June 2005 email. Rather, Cardinal Pell proceeded on the basis of his own understanding that Mr Ellis' complaint had been accepted, but understood and accepted that it was still appropriate to maintain the non-admission for reasons which were independent of the conclusions reached in the June 2005 email, as explained in section 14.3 above.

484 The Church parties accept the submission made in paragraph [471] of the Submissions, but for the reasons stated above submit that no instructions were initially sought or obtained as to whether or not to admit the abuse, and that when the issue subsequently arose, the decision to maintain the non-admission was made on legal advice that this was a legally legitimate and not unusual course to take.

485 Finally, in relation to paragraph [472] of the Submissions, for the reasons stated in section 10.5 above, the Church parties do not accept that the Archdiocese should be judged by reference to the Model Litigant Rules. It is inappropriate that the Archdiocese should be judged against a standard to which it was not bound, which it did not voluntarily assume, and of which it had no awareness or understanding at the time of conducting its defence of the Ellis litigation.

⁴⁰⁴ T6600:18-42; T6133:11-13

15 New evidence emerges

- 486 The Church parties generally accept the summary of evidence set out at paragraphs [473] - [482], [484] and [488] - [489].
- 487 For the reasons given in the next section of these submissions, the Church parties say that the following paragraphs of the Submissions do not contain a fair summary of the evidence:
- (a) the second sentence of paragraph [483], and
 - (b) paragraphs [485] - [487].
- 488 The Church parties also say the evidence referred to in the following paragraphs is relevant to the proposed findings.

15.2 Evidence of SA

[CA Submissions paras 473 - 480]

- 489 The Church parties generally accept the summary of evidence set out at paragraphs [473] to [480].

15.3 Evidence of Judith Penton

[CA Submissions paras 481 - 489]

- 490 The Church parties submit that the conclusion stated in the second sentence of paragraph [483] of the Submissions in respect of the email dated 8 August 2005 sent by Ms Hanna Vozzo of Corrs to counsel for the defendants is speculative. Ms Vozzo was not asked to give evidence to the Royal Commission. Mr McCann and Mr Dalzell did not receive Ms Vozzo's email (which was sent to counsel) and were not asked about the conclusion expressed in the email, namely that no affidavit should be deposed from Mrs Penton.
- 491 The Church parties also do not accept the summary of evidence and submissions contained in paragraphs [485] to [487] of the Submissions and submit that the following findings should be made in their place:
- (a) in July 2005, Mr Dalzell informed Dr Michael Casey that a witness had come forward saying that he or she had seen Mr Ellis and Duggan together and that further inquiries were going to be made of the witness. Dr Michael Casey had no specific recollection of informing Cardinal Pell of this development although he was "*sure I did*".⁴⁰⁵ Cardinal Pell had no recollection of ever being informed of the substance of the Penton information prior to preparing for the Royal Commission,⁴⁰⁶ and

⁴⁰⁵ T6141:12-17.

⁴⁰⁶ T6533:35-6535:40; 6701:22-6702:7

- (b) there is not sufficient evidence to determine whether any solicitor from Corrs provided any further report to Dr Michael Casey as to the results of those inquiries or informed Dr Michael Casey of the contents of the 8 August 2005 email. There is also no or insufficient evidence to establish that, even if he had been informed by Corrs of these developments, that Dr Michael Casey informed Cardinal Pell of the results of any inquiries.
- 492 Neither Dr Michael Casey nor Cardinal Pell was the recipient of emails sent by Mr Dalzell to counsel on 28 July 2005 (**July 2005 email**) and Ms Vozzo to counsel on 8 August 2005 (**August 2005 email**). Both Dr Michael Casey and Cardinal Pell said that they had not seen or read the contents of either of the July or August 2005 emails prior to giving evidence at the Royal Commission.⁴⁰⁷
- 493 Dr Michael Casey's recollection of the information he was provided about Mrs Penton is as follows:⁴⁰⁸
- "I do have a recollection that at some stage Mr Dalzell mentioned to me in a telephone conversation that someone had come forward saying that he or she had seen Mr Ellis and Fr Duggan together. I do not recall being told whether any further steps were taken about this information."*
- 494 Dr Michael Casey further explained during the hearing that he remembered Mr Dalzell mentioning "something along the lines of the second-last paragraph" in the July 2005 email.⁴⁰⁹ That paragraph of the July 2005 email states that Mrs Penton was witness who was "*in support of Father Duggan*" and that she had informed Mr Dalzell that "*Ellis used to bash Duggan . . . and force himself upon the aging priest*" (emphasis added). The information and advice that was provided to Dr Michael Casey at this stage was that Mrs Penton might be able to provide evidence that could be "*helpful*" to the Archdiocese.
- 495 The July 2005 email further states that Mr Dalzell had an appointment to interview Mrs Penton the next week. However, Dr Michael Casey could not recall being informed of the outcome of those further inquiries⁴¹⁰ or otherwise being informed of the content of the August 2005 email.
- 496 There is no record of Dr Casey having been informed by Corrs of the content of the August 2005 email, or of any request being made to Dr Casey for specific instructions in relation to whether or not Mrs Penton should be asked to depose an affidavit or for her evidence to otherwise be brought to the attention of the Court. Further, there is no record of Dr Casey's instructions being sought as to whether or not the decision to file the Notice to Dispute Facts should be revisited in light of the information provided by Mrs Penton. Dr Casey's evidence was that he did not recall turning his mind to the issue of whether or not the dispute should be maintained in light of the information provided by Mrs Penton.⁴¹¹

⁴⁰⁷ Ex 8-14 at paragraphs [129] - [130]; Ex 8-12 at paragraph [137]

⁴⁰⁸ Ex 8-12 at paragraph [137]

⁴⁰⁹ T6141:12-14

⁴¹⁰ T6141:46-T6142:7

⁴¹¹ T6150: 25-39; T6151:40-44; T6152: 17-25

- 497 Mr Dalzell stated that he did not recall informing the Archdiocese himself of Mrs Penton's account. He said he believed it "*almost certainly would have been*" reported,⁴¹² although there is no document or file note that records that this occurred. Mr McCann's evidence on this issue was similar to that of Mr Dalzell's.⁴¹³
- 498 Mr Dalzell accepted it was likely that Mrs Penton's account would have caused him to consider that the Notice to Dispute Facts might need to be reconsidered, but he could not recall whether he had raised that issue with Dr Casey.⁴¹⁴ Similarly Mr McCann said that he did not have any specific recollection of Corrs raising the need to revisit the Notice to Dispute Facts with "*the client*".⁴¹⁵
- 499 Dr Michael Casey did not believe that he was asked for instructions as to whether an affidavit from Mrs Penton should be deposed and did not himself give instructions not to obtain such an affidavit.⁴¹⁶ It is submitted that this evidence tends to increase the probability that Dr Casey was not informed of the contents of the August 2005 email, since if there had been a discussion with him regarding those contents, the issue of whether an affidavit should be obtained from Mrs Penton would have inevitably arisen, having regard to the conclusion reached in the last sentence of the email.
- 500 Neither Mr McCann nor Mr Dalzell gave any evidence (nor were they asked any questions) with respect to whether or not Corrs had sought Dr Casey's instructions about having Mrs Penton depose an affidavit, or whether her evidence should otherwise be brought to the attention of the Court. Further, neither Mr McCann nor Mr Dalzell gave any evidence (nor were they asked any questions) regarding Cardinal Pell's knowledge of the information regarding Mrs Penton contained in the August 2005 email.
- 501 In summary, while it has been established that Dr Michael Casey was aware in general terms that a witness then thought to be favourable to the Archdiocese's defence had come forward who had seen Mr Ellis and Duggan together, there is no evidence to establish what (if anything) he was told of the results of a further interview between Corrs and Mrs Penton that occurred in August 2005. Similarly, it has not been established that Dr Michael Casey informed Cardinal Pell of the substance of the Penton information. Cardinal Pell was not in Sydney at the time of the August 2005 email and did not return to Sydney until some weeks later.⁴¹⁷
- 502 In relation to paragraph [489] of the Submissions, Dr Michael Casey's evidence on the issue of whether Mrs Penton's evidence should be brought to the attention of the Court was as follows (emphasis added):⁴¹⁸

"Q. *It would have been consistent with acting in terms of the obligations imposed on model litigants to depose an affidavit from Mrs Penton, wouldn't it?*

⁴¹² T6010:15-21

⁴¹³ Ex 8-10 at paragraph [67]

⁴¹⁴ T6028: 29-43

⁴¹⁵ T5993:30-36

⁴¹⁶ T6142:22-47

⁴¹⁷ T6535:37

⁴¹⁸ T6143:13-28

A. ***I'm not sufficiently familiar with - I know you took me to those yesterday, the obligations of a model litigant.***

Q. *Would you like me to take you to them again, Dr Casey?*

A. ***I accept that it would have - perhaps it would have been better to bring this evidence to light.***

Q. *When you say it would have been better to, what standard are you referring to when you say it would have been better to do that?*

A. ***I suppose to the standard which would normally – you would normally - you would bring all relevant facts to the attention of the court.”***

503 As explained in paragraph [560] below, the Model Litigant Rules do not impose an obligation on the Commonwealth to bring all relevant facts to the attention of the court. Dr Michael Casey's evidence therefore proceeded on a mistaken basis (not corrected by the questioner) as to the nature of the obligations of a model litigant in civil litigation. Moreover, Dr Michael Casey had initially indicated that he did not have sufficient familiarity with the obligations of a model litigant to respond to the questions of CA, as is apparent from his use of the words “perhaps”, and “I suppose”. Having regard to the way in which the evidence was elicited in this part of the examination of Dr Michael Casey it is inappropriate for any finding to be made which relies upon Dr Michael Casey's evidence extracted in the preceding paragraph.

16 The dispute of the fact of Mr Ellis' abuse continues

- 504 The Church parties generally accept the summary of evidence set out at paragraphs [490] - [500] and [502] - [505].
- 505 For the reasons given in the next section of these submissions, the Church parties say that the following paragraphs of the Submissions do not contain a fair summary of the evidence:
- (a) paragraph [501],
 - (b) paragraph [506(b)], and
 - (c) paragraph [507].
- 506 The Church parties also say the evidence referred to in the following paragraphs is relevant to the proposed findings.

16.2 Introduction

[CA Submissions paras 490 – 493]

- 507 The Church parties generally accept the summary of evidence set out in this section of the Submissions.

16.3 Did Corrs obtain specific instructions from the Archdiocese before serving the second Notice Disputing Facts in March 2006?

[CA Submissions paras 494 - 500]

- 508 The Church parties generally accept the summary of evidence set out in this section of the Submissions.

16.4 Why was the dispute of the fact of Mr Ellis' abuse maintained (in the light of the Penton information)?

[CA Submissions paras 501 - 505]

- 509 For the reasons set out in section 15.3 above, the evidence in relation to the information provided by Mrs Penton is insufficient to make a finding regarding the knowledge held within the Archdiocese (relevantly, the knowledge of Dr Casey and Cardinal Pell) in relation to the information provided by Mrs Penton to Corrs on 8 August 2005. The evidence does not establish to a satisfactory standard that the Archdiocese was asked for, or gave, specific instructions on the maintenance of the non-admission after the receipt of the information from Mrs Penton. To the contrary, the evidence points to the probability that the Archdiocese (in particular Cardinal Pell) was not asked.

16.5 Submissions as to the maintenance of the dispute of the fact of Mr Ellis' abuse

[CA Submissions paras 506 - 507]

- 510 In relation to paragraph [506(b)] of the Submissions, the Church parties say that no finding ought to be made that *"the information from Judith Penton"* was information known to the Archdiocese or the Archbishop in July 2005. As set out above in section 15.3, the evidence does not establish to a satisfactory standard that Cardinal Pell and Dr Michael Casey (or anyone else in the Archdiocese) was aware of the account given by Mrs Penton as summarised in the August 2005 email, and the weight of the evidence points to the probability that the Archdiocese was not so aware. The evidence does establish that Dr Michael Casey was aware that someone had come forward whose evidence might support the Archdiocese and that further inquiries were to be made, but does not support a finding that the Archdiocese was informed of the results of those further inquiries.
- 511 In relation to paragraph [507] of the Submissions, the Church parties refer to their response to component 8(g) in paragraphs [564] - [566] below.

17 The decision to vigorously defend Mr Ellis' claim

- 512 The Church parties generally accept the summary of evidence set out at paragraphs [512] - [519], [521] - [522], [524] - [528] and [529] - [534].
- 513 For the reasons given in the next section of these submissions, the Church parties say that the following paragraphs of the Submissions do not contain a fair summary of the evidence:
- (a) paragraphs [508] to [511],
 - (b) the last sentence in paragraph [520],
 - (c) paragraph [523], and
 - (d) paragraphs [535] to [539].
- 514 The Church parties also say the evidence referred to in the following paragraphs is relevant to the proposed findings.

17.2 Introduction

[CA Submissions paras 508 - 509]

- 515 The Church parties submit that paragraph [508] of the Submissions does not contain a fair summary of the evidence for the following reasons.
- 516 In relation to paragraph [508(a)], for the reasons stated in section 13 above, the Archdiocese did not approach Mr Ellis' litigation on the basis that the defendants would "*refuse all offers to settle or mediate Mr Ellis' claim*". Rather, the Archdiocese considered each offer at the time it was made and gave instructions whether or not to accept the offer based upon the very definite legal advice provided in each instance.
- 517 In relation to paragraph [508(c)], for the reasons stated in section 15.3 above, the evidence does not establish that Dr Michael Casey had any more than a limited understanding of Mrs Penton's account. Dr Casey could only have communicated with Cardinal Pell, if he did at all, on the basis of that limited understanding.
- 518 There was no relevant detriment suffered by Mr Ellis from any decision to maintain the non-admission after Patten AJ's decision was handed down, as the defendants accepted, for the purposes of the appeal, that the plaintiff had filed evidence that established an arguable case.⁴¹⁹
- 519 In relation to paragraph [508(d)], it appears that the reference to "*the view that costs would not be enforced against Mr Ellis*", is a reference to a view expressed by Monsignor Usher to Cardinal Pell in July 2007 that "*Mr Ellis should not be required to pay any costs*".⁴²⁰ There is no evidence

⁴¹⁹ Ex 8-2 at Tab 333, paragraph [4]

⁴²⁰ Ex 8-13 at paragraph [94]

to suggest that this was a view that was shared by Cardinal Pell at this time. Rather, it would seem that no common position on this issue had yet been reached within the Archdiocese.

- 520 Moreover, Mr Ellis was first informed that the order for costs would not be enforced in a meeting held between Mr and Mrs Ellis and Monsignor Usher on 21 August 2008, which was only three months after the proceedings were finalised⁴²¹ and only thirteen months after Monsignor Usher first expressed the view that Mr Ellis should not be required to pay any costs. In summary, to suggest that the Archdiocese formed a view that it would not pursue costs and then took twenty months to inform Mr Ellis of this view is plainly wrong and ought not form part of any finding made by the Royal Commission.
- 521 The Church parties also do not accept that paragraph [509] of the Submissions is a fair summary of the evidence. For the reasons explained further below:
- (a) Cardinal Pell did not give evidence that he adopted a different approach towards Mr Ellis based upon the fact that Mr Ellis was a highly intelligent lawyer. Rather, Cardinal Pell gave evidence that he had not realised how wounded Mr Ellis was, and that if he had seen the report of Dr Phillips in 2005, he would have insisted that Mr Ellis be treated in a manner which took greater account of his injuries. However, this would not have resulted in Cardinal Pell *“interven[ing] to change the major strategy of the legal case”*,⁴²²
 - (b) Cardinal Pell did give evidence that his understanding that Mr Ellis was seeking *“exorbitant damages”* had influenced his decision to defend the claim, but did not give evidence that the nature of Mr Ellis’ damages claim affected his reasoning at all in respect of any other decision he made in relation to the conduct of the litigation,
 - (c) Cardinal Pell did give evidence that he believed at the time of the litigation that Mr Ellis was being unreasonable in attempting to bring a civil action *against the Trustees*, and that this influenced his view that there was no serious possibility that a mediation would be successful,⁴²³ but once again, did not give evidence that this factor affected his reasoning in respect of any other instructions he gave, and
 - (d) Cardinal Pell did give evidence that his instructions to Corrs to vigorously defend the litigation was part of *“an attempt to encourage people not to go into litigation”*. However, the Church parties do not accept that there is any evidence to establish that Cardinal Pell understood or supposed at the time of giving that instruction that the elements of that vigorous defence included the matters set out in paragraph [508] of the Submissions.
- 522 The Church parties further submit that a finding should be made that the Archdiocese decided to accept Corrs’ advice to vigorously defend Mr Ellis’ litigation because of its concern that responsibility for the sexual abuse suffered by Mr Ellis should not be attributed to the Trustees, who did not appoint or supervise Duggan. Cardinal Pell said:⁴²⁴

⁴²¹ Ex 8-2 at Tab 391

⁴²² Ex 8-14 at paragraph [41]

⁴²³ T6512:3-16

⁴²⁴ Ex 8-14 at paragraph [44]; see also T6495:31-44; T6517:46-T6518:3. See also[375] - [376]above.

“The Archdiocese appealed to a general principle of law, namely that a body cannot be forced to take legal responsibility for those matters which it did not authorise or oversee. This commonsense axiom when applied to the Trustees was eventually and unanimously upheld by the Appeal Court of New South Wales, and the High Court refused leave to appeal this decision. The Trustees did not appoint or supervise the priest who grossly violated Mr Ellis.”

17.3 Mr Ellis as a highly intelligent lawyer

[CA Submissions paras 510 - 513]

523 The Church parties do not accept that paragraph [510] of the Submissions is a fair summary of Cardinal Pell’s evidence on this issue. Cardinal Pell’s evidence was given in the following context (emphasis added).⁴²⁵

“Q. And the effect of disputing that Mr Ellis was abused meant that your lawyers were able to cross-examine him, as they did, and challenge him on whether the abuse did, in fact, occur; you understand that?”

A. Yes, that is correct, they challenged him on a number of points.

Q. The effect of disputing that the abuse occurred was precisely the same on Mr Ellis, was it not, as denying that the abuse occurred?

A. I would not draw that conclusion. We were dealing with Mr Ellis as a senior and brilliant lawyer, with other lawyers. I believe that the putting to the proof is still used in many cases. I think he, as a lawyer, would have understood the distinction.”

524 It is apparent from this extract that Cardinal Pell’s reference to Mr Ellis’ qualifications as a lawyer was prompted by the question asked as to the effect that disputing the fact of the abuse would have had on Mr Ellis. Cardinal Pell did not give evidence that Mr Ellis’ qualifications as a lawyer were taken into account in any way, shape or form when deciding whether to dispute the fact of the abuse. As set out in greater detail in paragraph [466] above, Cardinal Pell made the decision to maintain the non-admission of the abuse based upon advice given by the lawyers that it was *“an appropriate and permissible and sometimes regular way of dealing with this”*.⁴²⁶

525 In relation to paragraph [511] of the Submissions, Cardinal Pell’s evidence on this issue was as follows (emphasis added).⁴²⁷

“In this vein I regret that I did not see the psychiatrist’s report (Dr Phillips) during the hearing in 2005, which detailed the woundedness of Mr Ellis. I would not have intervened to change the major strategy of the legal case (because I believe that when a person or group, such as expert lawyers, is given a task they should be

⁴²⁵ T6521:20-34

⁴²⁶ T6521:43-46

⁴²⁷ Ex 8-14 at paragraph [41]

*allowed to get on with the job without inexperienced interference), **but** I would have requested, indeed insisted, that Mr Ellis be treated in a manner which took greater account of the injury he had suffered."*

The summary in paragraph [511] of the Submissions is therefore quite incomplete, as it does not explain that any difference in the manner in which the Archdiocese would have treated Mr Ellis (had Cardinal Pell had been aware of the psychiatrist's report) would not have extended to the major strategy of the case.

- 526 In relation to paragraph [513] of the Submissions, it is important to note that the comparison made by Cardinal Pell between Mr Ellis and other victims was invited by the question that had been asked of him.⁴²⁸ During this exchange, Cardinal Pell did not suggest, and nor was it put to him, that he treated Mr Ellis differently as a result of the positive attributes of Mr Ellis that Cardinal Pell had described.
- 527 In summary, none of the evidence set out in paragraphs [510] to [513] of the Submissions demonstrates that Cardinal Pell treated Mr Ellis differently because he was "*a highly intelligent lawyer*". Moreover, Cardinal Pell is not the only person to have described Mr Ellis as "*intelligent*". This was a description that had also been given to him by Mr Eccleston, the assessor⁴²⁹ and by Mr Phillips, Mr Ellis' psychiatrist.⁴³⁰

17.4 Mr Ellis was seeking exorbitant and excessive damages

[CA Submissions paras 514 - 523]

- 528 In response to paragraphs [514] to [523] as a whole, Mr McCann had formed the view that "*Mr Ellis' claim was potentially in the millions, having regard to his former position as a salaried partner of the law firm Baker & McKenzie*".⁴³¹ Mr McCann also gave evidence that he conveyed that professional assessment to the Archdiocese.⁴³² Cardinal Pell's understanding that Mr Ellis was seeking millions of dollars in damages was therefore based upon advice he had received from Corrs which was precisely to that effect.⁴³³
- 529 Moreover, Cardinal Pell's evidence was that the damages sought by Mr Ellis were "*A major part in my decision to defend the legal claim*"⁴³⁴ (emphasis added). Cardinal Pell did not suggest that his understanding that Mr Ellis was seeking "*exorbitant damages*" affected any other decision made in the litigation, besides the decision to defend the claim. There is no evidence to suggest that the amount Cardinal Pell understood was being claimed by Mr Ellis influenced the Archdiocese's instructions to "*vigorously defend*" the litigation.
- 530 In relation to paragraph [518], Cardinal Pell said that his present position was that he would like to see some kind of independent government organisation to deal with retrospective cases, "*so that*

⁴²⁸ T6671:19-37

⁴²⁹ Ex 8-1 at Tab 66, CTJH.402.01001.0178_R

⁴³⁰ Ex 8-2 at Tab 297, DUG.080.033.0259

⁴³¹ Ex 8-10 at paragraphs [17], [110]; T5961:5-24; T5984:22-30.

⁴³² T5984:28-30

⁴³³ Ex 8-14 at paragraph [43]

⁴³⁴ Ex 8-14 at paragraph [43]

*across the board we could have some comparability and some better approach to justice.*⁴³⁵ He envisaged that Church funds would then be used to meet any judgement resulting from such an evaluation.⁴³⁶

- 531 In relation to paragraph [520] of the Submissions, the full extract of Cardinal Pell's evidence to the Commission is as follows (emphasis added):⁴³⁷

*"They might not have used those words, **but they certainly didn't encourage us to think that this claim was a normal one where we should settle.**"*

- 532 In relation to paragraph [523] of the Submissions, the Church parties submit that what would have been understood from the Offer of Compromise on 3 December 2004 was not that Mr Ellis was *"seeking no more than \$750,000 in damages"*, but that Mr Ellis was willing to compromise his claim (which was for much more than that) for \$750,000 plus costs. Further, the Church parties submit there is no evidence before the Commission which would allow it to make a finding with respect to what might have occurred had a counter-offer been made. In particular, Mr Ellis was not asked whether he might have entertained a counter-offer had it been made at that time.

17.5 Mr Ellis was attacking the Church by commencing litigation and unreasonably taking action against the trustees

[CA Submissions paras 524 – 528]

- 533 The Church parties generally accept the summary of evidence contained in paragraphs [524] to [528].

17.6 Not encouraging potential litigants

[CA Submissions paras 529 - 534]

- 534 In relation to paragraph [530] of the Submissions, Cardinal Pell gave evidence that the instructions to vigorously defend the proceedings were not only intended to encourage claimants to *"think clearly"*, but also that they were founded on his *"longstanding conviction that all Australian communities, institutions, individuals, have a right to use the law properly to defend themselves."*⁴³⁸
- 535 In relation to paragraph [533] of the Submissions, the Church parties refer to paragraphs [375] - [376] above which set out further Mr Daniel Casey's evidence on the sentiments expressed in his email of 17 November 2007.
- 536 In relation to paragraph [534], the Church parties further say the evidence from Cardinal Pell in relation to this memorandum referred to in paragraph [595] below is relevant.

⁴³⁵ T6565:5-9

⁴³⁶ T6565:15-17, the Church parties also refer to the TJHC response to Issues Paper 6: Redress Schemes lodged on 12 August 2014.

⁴³⁷ T6365:40-42

⁴³⁸ T6493:28-32

- 537 The Church parties also refer to paragraphs [375] - [376] and [522] above which set out in greater detail the reasons for the Archdiocese's decision to vigorously defend the Ellis litigation, principally to establish that the Trustees were not liable for the actions of priests whom they did not appoint or supervise.

17.7 Submissions in relation to the decision to vigorously defend Mr Ellis' claim

[CA Submissions paras 535 - 542]

- 538 For the reasons set out in paragraph [521] above, the Church parties do not accept that paragraph [535] of the Submissions is a fair summary of the evidence, as it suggests that the factors set out in subparagraphs (a) to (d) influenced each aspect of the approach to the litigation set out in paragraph [508] of the Submissions.
- 539 In relation to paragraph [536] of the Submissions, the Church parties consider that this is an unfair summary of the evidence, for the following reasons:
- (a) Cardinal Pell did not see Dr Phillips' report regarding Mr Ellis in 2005.⁴³⁹ Cardinal Pell's understanding of the extent of Mr Ellis' injuries was therefore incomplete and insufficient, but not due to any fault on his part,
 - (b) while Cardinal Pell's understanding that Mr Ellis was seeking exorbitant damages may have been mistaken, Mr McCann did inform him (correctly, it is submitted) that Mr Ellis was claiming millions of dollars.⁴⁴⁰ The concerns Cardinal Pell had that the claim needed to be properly defended were therefore well-justified,
 - (c) although Cardinal Pell knew by December 2004 that the amount proposed by way of compromise was no more than \$750,000, he believed that this amount was too high to accept, and he was advised not to make a counter-offer,⁴⁴¹ and
 - (d) the summary contained in paragraph [536] of the Submissions does not include any reference to the Archdiocese's views that it was appropriate to ensure that the trustees not be legally liable for the acts of priests whom they did not appoint or supervise, as set out in paragraphs [375] - [376] and [522] above.
- 540 The Church parties do not accept paragraph [537] of the Submissions for the reasons explained in paragraphs [521(a)] and [523] - [527] above.
- 541 The Church parties do not accept that paragraph [538] of the Submissions is a full or fair summary of Cardinal Pell's evidence on this issue. As explained above, the decision to vigorously defend the litigation was made only after strong advice had been received that the defendants had an "*extremely good chance of succeeding*" and that a vigorous defence was therefore warranted.⁴⁴² There is also no evidence to suggest that Cardinal Pell was aware of

⁴³⁹ Ex 8-14 at paragraph [41]

⁴⁴⁰ Ex 8-10 at paragraph [17]; T5984:22-30

⁴⁴¹ T6502:6-45

⁴⁴² Ex 8-2 at Tab 220A

what tactics might accompany a “*vigorous defence*”, or that such a defence would require the defendants to adopt tactics that might not take into account the pastoral or other needs of a victim of sexual abuse such as Mr Ellis.

- 542 Paragraph [538] also fails to refer to the many other bases upon which the decision to “*vigorously defend*” was made, including Cardinal Pell’s correct understanding that Mr Ellis’ claim was for many millions of dollars and, most importantly, his view that it was appropriate to defend the matter on the basis that the Trustees had no responsibility for appointing or supervising Duggan. Moreover, any desire on the part of Cardinal Pell to discourage victims of child sexual abuse from taking civil action was in a context where the Archdiocese was offering an alternative process under *Towards Healing* that had the potential to provide a far more suitable means of addressing the pastoral and other needs of the victim.
- 543 In relation to paragraph [539] of the Submissions, the Church parties note that *Towards Healing* payments by the Archdiocese have now significantly increased, from an average of only \$5,503 prior to 2001 to an average of \$150,038 during the period from 2008 to 28 February 2014. The Church parties refer to section 19 below, which sets out the evidence regarding that increase.
- 544 In relation to paragraph [541] of the Submissions, Cardinal Pell gave evidence that it was necessary to develop a media strategy in relation to the Ellis litigation because:⁴⁴³
- “as Archbishop, I have to be aware of the dangers of misunderstanding, the consequences publicly of what I’m doing, and compatible with principle and right practice, we would need to get our side of the story out.”*
- 545 Cardinal Pell further explained that avoiding negative publicity “*was not the first concern*”, as if it had been “*the whole matter would have been handled differently*”, by compromising the principle in relation to the Trustees’ liability.⁴⁴⁴

⁴⁴³ T6554:45-T6555:2

⁴⁴⁴ T6557:39-T6558:15

18 Proposed Findings

546 CA lists two proposed findings in relation to this topic. Those proposed findings, and the response of the Church parties to them, are as follows.

Proposed Finding	Response
8. The Archdiocese of Sydney, on the instructions of Cardinal Pell failed to conduct the litigation with Mr Ellis fairly by. ⁷⁸⁸	Accepted, in part, if amended as set out below at paragraph [547]
a. treating Mr Ellis less favourably because of his occupation	Factual substratum is not accepted
b. rejecting the first offer of mediation	Factual substratum is accepted, if amended as set out below at paragraph [547]
c. not making a counter offer	Factual substratum is accepted, if amended as set out below at paragraph [547]
d. by instructing its lawyers that it did not accept Mr Ellis' complaint because it suited its argument in the litigation, in circumstances where it was known that Monsignor Rayner as representative of the Archdiocese had accepted that the abuse occurred	Factual substratum is not accepted
e. by instructing its lawyers to dispute the fact of the abuse, allowing Mr Ellis to be cross-examined and challenged as to whether the abuse occurred, in circumstances which were harmful and painful to Mr Ellis	Factual substratum is accepted, if amended as set out below at paragraph [547]
f. not instructing its lawyers to bring Mrs Penton's evidence to the attention of the Court	Do not accept
g. not admitting the abuse when Cardinal Pell considered Mr Ellis to be an honest and reliable witness	Do not accept
h. not instructing the lawyers that Cardinal Pell thought SA's affidavit strengthened Mr Ellis' case and that the Archdiocese should reconsider whether to dispute the fact of Mr Ellis' abuse	Factual substratum is accepted, if amended as set out below at paragraph [547]
i. once the affidavit of SA and the account given by Mrs Penton were available, and in the light of what Msgr Rayner said to Mr Ellis at the facilitation, maintaining the non-admission of the allegation of abuse	Factual substratum is accepted, if amended as set out below at paragraph 547
j. not ensuring that Mr Ellis was able to bring forward the best evidence he could	Do not accept

Proposed Finding	Response
k. giving instructions in late 2007 that the defendants would leave the issue of costs recovery for a few months, and perhaps revisit it then, which had the effect of leaving Mr Ellis hanging for another few months not knowing whether he would have to pay costs	Do not accept
l. making a decision to vigorously defend Mr Ellis' claim, which was motivated partly by a desire to discourage victims of child sexual abuse from taking civil action against the Church	Do not accept
m. employed legal measures which were disproportionate to the objective and the psychological state of Mr Ellis.	Factual substratum is accepted, if amended as set out below at paragraph [547]
<p>9. The Archdiocese of Sydney on the instructions of Cardinal Pell provided incorrect or misleading information about Mr Ellis and/or the conduct of the litigation by:</p> <p>a. providing questions and answers to guide a spokesperson for the Archdiocese when questioned about the litigation, which:</p> <p>i. included an answer which "completely mischaracterises Mr Ellis' experience of Towards Healing", and that "was certainly not true in his case", and</p> <p>ii. stated that the delay in bringing the allegations had made it difficult for the Archdiocese against it.</p> <p>b. adopting a memorandum prepared by its lawyers after the Court of Appeal's decision and forwarding to Metropolitan Archbishops of Australia and the Bishops of NSW and the ACT in circumstances where it wrongly stated that the fact of Mr Ellis' abuse was never challenged in the litigation.</p>	Do not accept

547 For the reasons set out in sections 13-17 above and paragraphs [548] - [596] below, the Church parties submit that the findings proposed in components (a), (f), (g), (j), (k) and (l) of Proposed Finding 8, and Proposed Finding 9, should not be made. Proposed Finding 8 should be amended to read as follows:

"(8) The Archdiocese failed to conduct the litigation with Mr Ellis in a manner that adequately took account of his pastoral and other needs as a victim of sexual abuse by:

- (a) *rejecting the first offer of mediation*
- (b) *not making a counter offer,*
- (c) *instructing its lawyers in June 2005 to continue not to admit the fact of the abuse:*
 - (i) *in circumstances where Monsignor Rayner had told Mr Ellis at the facilitation in July 2004 that he had never had any reason to doubt what Mr Ellis had said, and*
 - (ii) *which allowed Mr Ellis to be cross-examined and challenged as to whether the abuse occurred, in circumstances which were harmful and painful to Mr Ellis,*
- (d) *not instructing its lawyers that Cardinal Pell thought SA's affidavit strengthened Mr Ellis' case and that the Archdiocese should reconsider whether to continue not to admit the fact of Mr Ellis' abuse,*
- (e) *maintaining the non-admission of the allegation of abuse after the affidavit of SA and the account given by Mrs Penton were available, in the light of what Monsignor Rayner said to Mr Ellis at the facilitation, and*
- (f) *employing the measures set out in paragraphs (a) to (e) above which were disproportionate to the objective and psychological state of Mr Ellis."*

Proposed Finding 8

- 548 For the reasons stated in sections 10.4 and 10.5 above, the Church parties say that no finding should be made that judges the conduct of the Archdiocese by reference to the standards applicable to the Commonwealth under the Model Litigant Rules, or any other undefined standard of "fairness".
- 549 The Church parties further respectfully submit that no finding should be made that any of the conduct attributed to the Archdiocese was "*on the instructions of Cardinal Pell*". In many instances, there is insufficient evidence to establish that Cardinal Pell did, in fact, give direct instructions on the particular matter.⁴⁴⁵ The evidence establishes that Cardinal Pell, having "*endorsed the major strategies of the defence*",⁴⁴⁶ had the understanding that "*the conduct of the defence of the proceedings would be substantially left to Corrs and counsel.*"⁴⁴⁷ Cardinal Pell himself "*was not usually involved in the various decisions made in the course of the litigation as to*

⁴⁴⁵ See paragraphs [410] to [419] above

⁴⁴⁶ Ex 8-14 at paragraph [37]

⁴⁴⁷ Ex 8-14 at paragraph [110]

the procedural or tactical steps taken on behalf of the first two defendants."⁴⁴⁸ Within the Archdiocese, he entrusted the supervision of the litigation to Monsignor Brian Rayner, Dr Michael Casey and Monsignor John Usher. Moreover, when he did give instructions himself, they were invariably to accept detailed and emphatic legal advice given on the issue.⁴⁴⁹

- 550 Any failure that occurred was not in the legal approach taken by the Archdiocese on advice from its legal representatives, but rather was as a result of the Archdiocese's failure to ensure that it managed the litigation in a manner which adequately took account of Mr Ellis' pastoral and other needs as a victim of sexual abuse. This was a failure of the process adopted by the Archdiocese as a whole, and cannot be attributed solely to any instructions given by Cardinal Pell.
- 551 For these reasons and the reasons stated below, the Church parties submit that Proposed Finding 8 should be amended as set out in paragraph [547] above.

Component 8(a)

- 552 The Church parties do not accept that a finding should be made on the terms stated in component 8(a). As explained in section 17.3 above, while Cardinal Pell understood Mr Ellis to be a highly-intelligent lawyer, there is no evidence to establish that this was a relevant factor in his decision-making process regarding any of the matters in respect of which he gave instructions to the defendants' legal representatives.
- 553 The evidence does establish that Cardinal Pell was not well-informed as to the extent of injury that had been suffered by Mr Ellis as a result of the abuse and that if he had seen the report on Mr Ellis prepared by Dr Phillips, he would have insisted that Mr Ellis be treated in a manner which took greater account of the injury he had suffered. However, even if he had seen Dr Phillips' report, Cardinal Pell gave evidence that he "*would not have intervened to change the major strategy of the legal case*",⁴⁵⁰ which was not challenged during the course of the hearing.

Components 8(b) and 8(c)

- 554 The Church parties accept the factual substrata of components 8(b) and 8(c), subject to the amendments proposed in paragraph [547] above.

Component 8(d) and (e)

- 555 The Church parties accept the factual substrata of components 8(d) and 8(e), subject to the amendments proposed in paragraph [547] above, which delete any reference to components 8(d) or 8(e) (or for that matter any of the other steps referred to in Proposed Finding 8) being taken on the instructions of Cardinal Pell.
- 556 It is entirely inappropriate that any personal finding be made against Cardinal Pell in relation to the decision not to admit the abuse in circumstances where:

⁴⁴⁸ Ex 8-14 at paragraph [112]

⁴⁴⁹ See paragraphs [410] to [419] above

⁴⁵⁰ Ex 8-14 at paragraph [41]

- (a) the initial decision in December 2004 was made by the defendants' legal representatives without seeking or obtaining any instructions from the Archdiocese,
- (b) Cardinal Pell had reservations about whether the non-admission ought to be maintained. However, the inquiries that were made as a result of these reservations miscarried, and did not uncover all information that was relevant to the decision-making process, and
- (c) Cardinal Pell only agreed to maintain the non-admissions upon being provided with advice that there was a significant legal distinction between "*dispute*" and "*deny*", which he was informed, was a legally appropriate and legitimate step to take.

557 The decisions made by the legal representatives regarding the topics upon which cross-examination would occur and the length of cross-examination were made by the lawyers and counsel for the Archdiocese, and there was no suggestion or evidence that Cardinal Pell or anyone from the Archdiocese was consulted in relation to any aspect of the cross-examination of Mr Ellis. It is therefore factually incorrect to suggest that the manner in which the cross-examination was conducted was on the instructions of Cardinal Pell.

Component 8(f)

- 558 The Church parties do not accept that any finding should be made that the Archdiocese failed to act fairly by not instructing its lawyers to bring Mrs Penton's evidence to the attention of the Court for the following reasons.
- 559 First, as demonstrated in section 15.3 above, and bearing in mind what is said in general terms regarding the making of findings against individuals earlier in these submissions at section 2, there is not sufficient evidence to be satisfied that Dr Michael Casey had anything other than limited knowledge of the evidence of Mrs Penton, and Cardinal Pell had no recollection of being told of it whatsoever. There is no record of Dr Casey having been informed by Corrs of the content of the August 2005 email, or of any request being made to him for instructions in relation to whether or not Mrs Penton should be asked to depose an affidavit or for her evidence to otherwise be brought to the attention of the Court. Neither Mr McCann nor Mr Dalzell gave any evidence (nor were they asked any questions) with respect to whether or not Corrs had sought Dr Casey's instructions about having Mrs Penton depose an affidavit, or whether her evidence should otherwise be brought to the attention of the Court. It is therefore incorrect to say that component 8(f) was on the instructions of either the Archdiocese or Cardinal Pell.
- 560 Second, the Model Litigant Rules do not require a model litigant to bring all relevant evidence to the attention of the Court in a civil litigation dispute, nor does such an obligation exist at common law. A model litigant in a civil hearing is not subject to the prosecutorial duty to call witnesses.⁴⁵¹
- 561 Thirdly, for the reasons stated in section 10 above, even if there was such an obligation upon a model litigant, the Church parties do not accept that the standards of a model litigant should be applied to the Archdiocese or any other entity within the Catholic Church in Australia. If some broader standard of "*fairness*" is being sought to be applied to the Archdiocese's conduct than is

⁴⁵¹ *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 347 at paragraphs [140], [241]

applicable to a model litigant, no sufficient explanation has been provided as to what that standard is or how or why it applied to the Archdiocese.

562 Fourthly, it was not put to any witness except Dr Michael Casey that the failure to bring Mrs Penton's evidence to the attention of the Court was unfair. As paragraphs [502] - [503] above demonstrate, any concession made by Dr Michael Casey to the effect that it would have been better to bring Mrs Penton's evidence to light was founded on a mistaken view as to the contents of the Model Litigant Rules and incomplete knowledge as to what her evidence was.

563 For these reasons, the Church parties respectfully submit that no finding should be made as proposed in component 8(f).

Component 8(g)

564 The Church parties do not accept that a finding should be made on the terms stated in component 8(g). There is no evidence to suggest that Cardinal Pell had been provided with legal advice or otherwise understood that it was inappropriate to maintain non-admissions regarding the abuse in circumstances where it was believed that the plaintiff was an honest and reliable witness. To the contrary, at the time the December 2004 Notice was filed, Corrs already knew of the Eccleston Assessment, and despite the conclusions reached by Mr Eccleston, had determined that they could not come to the same conclusion, namely that the abuse had occurred.⁴⁵²

565 As explained in paragraphs [476(d)] and [483] above, it was the understanding of Cardinal Pell, based on the legal advice that had been received, that the effect of maintaining non-admissions regarding the abuse was not to deny that it had occurred, but rather to put Mr Ellis to proof on the issue, and that to do so was legally appropriate and legitimate.

566 For these reasons, the Church parties respectfully submit that the finding proposed in component 8(g) should not be made, and certainly not in terms that attributes responsibility to Cardinal Pell having regard to the failure to provide him with an opportunity to comment on the matter.

Components 8(h) and 8(i)

567 The Church parties accept the factual substrata of components 8(h) and 8(i), subject to the amendments proposed in paragraph [547] above, which clarify that no finding should be made that the matters set out in components 8(h) and 8(i) were on the instructions of Cardinal Pell.

Component 8(j)

568 The Church parties do not accept that a finding should be made on the terms stated in component 8(j), which appears to be based upon the following statement made by Cardinal Pell (emphasis added).⁴⁵³

⁴⁵² T5948:1-9

⁴⁵³ Ex 8-14 at paragraph [155(e)]

"I have reflected on the course of the litigation and there were several steps taken in the course of the litigation which, as a priest, now cause me some concern. Some examples are:

...

- (e) *In the course of preparing this statement, I have learned that the lawyers opposed the admission into evidence of the SA affidavit, and made tactical decisions with a view to not prompting Mr Ellis to obtain stronger psychiatric evidence in support of his claim. I am troubled by this approach. I would have preferred an approach whereby Mr Ellis would be able to bring forward the best evidence he could".*

569 Three observations can be made regarding Cardinal Pell's evidence. First, it is apparent that Cardinal Pell did not know of these tactical decisions until it came to preparing his statement. In fact, there is no evidence to suggest that anyone from the Archdiocese gave instructions on these issues, or was even aware that these tactical decisions had been made.⁴⁵⁴ This is not said in criticism of the defendants' legal representatives – rather, these were the type of forensic decisions that were appropriately handled by the lawyers and did not require instructions from the Archdiocese.

570 Secondly, Cardinal Pell states that the views he expresses are from the perspective of a priest, and by necessary inference, not from the perspective of a lawyer or even a litigant. Cardinal Pell does not purport to be judging the actions of the lawyers against any legal or ethical standard imposed by statute, common law, or other rules applicable to those in the legal profession. Nor is it apparent that there is any specific obligation in the Model Litigant Rules that has been breached. Rather, Cardinal Pell is explaining a specific instance where the litigation may have been conducted differently if he had been asked for his instructions regarding particular issues that arose in the conduct of the litigation, from his perspective as a priest.

571 Thirdly, Cardinal Pell does not state that he considered the actions of the lawyers to be unfair. At no stage was Cardinal Pell given an opportunity to respond to whether he believed that the actions of the lawyers in making the tactical decisions referred to in paragraph [155(e)] of his statement were instances in which the Archdiocese *"failed to conduct the litigation with Mr Ellis fairly"*. It is also the case that neither Mr McCann nor Mr Dalzell were given an opportunity to comment on the *"fairness"* of these tactical decisions, which have not been shown or even suggested to be improper in any legal sense.

572 The Church parties submit that in these circumstances, no finding should be made on the terms proposed in component 8(j).

⁴⁵⁴ T6030:39-T6031:4; Ex 8-12 at paragraphs [134] - [135]

Component 8(k)

573 The Church parties do not accept that any finding should be made on the terms proposed in component 8(k). The email dated 21 December 2007 by which Dr Michael Casey conveyed the instructions given by Cardinal Pell stated:⁴⁵⁵

"Have shown [Cardinal Pell]; his first thought is to reply saying that we will leave it for a few months and perhaps revisit it then. We should discuss this further in January."

574 It is thus apparent that Cardinal Pell's views were tentative, as indicated by the use of the language *"first thought"*. Moreover, while that *"first thought"* may have been to *"leave it for a few months"*, it does not appear that any correspondence was sent to Mr Ellis to that effect. Nor is there any indication that the Archdiocese considered that it was precluded by Cardinal Pell's *"first thought"* from making any subsequent decisions as to whether costs should be recovered from Mr Ellis.

575 Importantly, Cardinal Pell was not given an opportunity to respond to the assertion that his decision in 21 December 2007, as clarified by the further letter of 11 January 2008, that *"any requests for costs be postponed for the time being"*, was unfair to Mr Ellis. At the time, Monsignor Usher saw this as a *"big breakthrough"*,⁴⁵⁶ that is a positive development, no doubt because it would provide Mr Ellis with some breathing space in which to allow his health to recover.

576 Moreover, to attribute any delays in dealing with the issue solely to the Archdiocese overlooks the important decision-making role of CCI, who were providing instructions directly to Corrs on the issue of recovery of costs. CCI indicated to Corrs during two meetings at around this time that they did not wish to *"take any steps which exacerbate Ellis' condition"*,⁴⁵⁷ but it is apparent that CCI still needed to make a careful and informed decision as to whether steps should be taken to recover costs, having regard to the substantial amount of costs that had been incurred.

577 The issue was further complicated by a letter sent by Mr Begg to Corrs on 18 February 2008 which stated that the decision of the Court of Appeal did not dismiss the entirety of the proceedings and that instructions were being obtained as to whether Mr Ellis *"intends to proceed with the balance of his claim"*.⁴⁵⁸ Cardinal Pell explained the impact of this development on the issue of costs as follows:⁴⁵⁹

"...I was aware that there were efforts being made to see that the case would not be continued in some other way and I thought it was reasonable for that to be clarified before we signed off completely."

578 It was not put to Cardinal Pell that this was an unreasonable position to take, in circumstances where Mr Ellis did not abandon this argument until 22 May 2008.⁴⁶⁰

⁴⁵⁵ Ex 8-2 at Tab 361

⁴⁵⁶ T6231:21-26

⁴⁵⁷ Ex 8-2 at Tabs 365 and 369

⁴⁵⁸ Ex 8-2 at Tab 367

⁴⁵⁹ T6549:30-33

⁴⁶⁰ Ex 8-2 at Tab 391

- 579 Further or in the alternative, there is no proscription in the Model Litigant Rules against the pursuit of costs. To the contrary, Note 5 to the Model Litigant Rules states that “[t]he obligation does not prevent the Commonwealth from enforcing costs orders or seeking to recover its costs.” It is therefore unclear what standard the Archdiocese’s conduct is being judged against in component 8(k), other than some undefined notion of “fairness”, to which no witness had an opportunity to respond.
- 580 For these reasons, the Church parties respectfully submit that no finding should be made on the terms stated in component 8(k).

Component 8(l)

- 581 The Church parties submit that no finding should be made on the terms proposed in component 8(l) for the following reasons.
- 582 First, component 8(l) is an incomplete and misleading statement as to the motivations of the Archdiocese when determining that it was appropriate to vigorously defend the litigation. The primary reason for the Archdiocese’s decision to “*vigorously defend*”, was its receipt of legal advice from Corrs that the defendants had “*an extremely good chance of succeeding*”, and that the Archdiocese “*should commit to vigorously defending Mr Ellis’ application*” in these circumstances.⁴⁶¹
- 583 Secondly, the evidence demonstrates that the Archdiocese’s decision to defend the litigation was motivated by a desire to ensure that civil liability for the abuse was not attributed to the Trustees, who had no responsibility for appointing or supervising Duggan, a proposition that was ultimately upheld by the Court of Appeal.⁴⁶² A further motivation was Cardinal Pell’s well-justified concern that Mr Ellis’ claim was for millions of dollars, which was confirmed by Mr McCann of Corrs.⁴⁶³ In these circumstances, it would be misleading for a finding to be made that referred to only one of a number of important and operative factors in the decision-making process.
- 584 Thirdly, for the reasons identified in the statement of Cardinal Pell and the Litigation Submission set out in section 10.1 above, civil litigation is an inherently imperfect environment in which to resolve sexual abuse claims. Cardinal Pell’s comment that he wished to discourage victims of sexual abuse from taking civil action against the Church was made in a context where the *Towards Healing* process was available and had the potential to provide a far more suitable, non-adversarial, means of addressing the pastoral and other needs of the victim.
- 585 Fourthly, it was not suggested to Cardinal Pell or Dr Michael Casey that they were aware of or understood at that time what a “*vigorous defence*” was, or how that would be manifested either in the strategic decisions recommended to the Archdiocese or in the tactical and forensic decisions that were made by the legal representatives without the Archdiocese’s knowledge.
- 586 For these reasons, the Church parties submit that no finding ought to be made on the terms stated in component 8(l) either in whole or in part.

⁴⁶¹ Ex 8-2 at Tab 220A

⁴⁶² See paragraphs [375] - [376] and [522] above

⁴⁶³ See paragraph [427] above

Component 8(m)

587 The Church parties accept the factual substratum of component 8(m), subject to the amendments proposed in paragraph [547] above.

Proposed Finding 9

588 The Church parties do not accept that Proposed Finding 9 should be made.

589 The Church parties acknowledge that the following statements were incorrect or misleading:

- (a) the statement in the document entitled “*Questions and Answers*” dated 20 July 2005 (**Q&A Document**) that “*Before Mr Ellis decided to take legal action, as is his right, the Archdiocese was working with him through the independent Towards Healing process to resolve the matter in a supportive and pastoral setting*”,⁴⁶⁴
- (b) the statement in the Q&A Document that “*The delay in bringing the allegations has made it difficult for the Archdiocese to investigate them*”, and
- (c) the statement in the memorandum prepared by Corrs dated 23 November 2007 (**Corrs Memorandum**) that “*the factual allegations in [the Ellis case] were never challenged and indeed for the purposes of the proceedings, it was conceded that the plaintiff had been exposed to the abuse as alleged.*”⁴⁶⁵

590 However, in the case of the Q&A Document, there is no evidence to suggest that any spokesperson for the Archdiocese or Corrs ever used the Q&A Document to respond to questions asked by the media or that its contents were ever made public in such a manner as to mislead any member of the community.

591 Similarly, the incorrect statement in the Corrs Memorandum was part of a larger document which was circulated, not to the community at large, but solely to Archbishops and Bishops within Australia. The incorrect statement was set out within other background information to the Ellis litigation and was not proximate to or concerned with the substantive conclusions sought to be conveyed to those reading the document.

592 In these circumstances, the Church parties submit that the statements which are the subject of Proposed Finding 9 were not of sufficient circulation nor of such importance as to warrant a finding by the Royal Commission in the terms proposed by CA or at all.

593 The Church parties also do not accept that any personal finding ought to be made against Cardinal Pell that the incorrect or misleading information was provided on his instructions. Such a finding could only be made if Cardinal Pell had consciously turned his mind to the content of the misleading or incorrect statements and had authorised their distribution with knowledge of their inaccuracy. There is no evidence whatsoever to that effect.

⁴⁶⁴ T6176:20-39

⁴⁶⁵ T5964:45-T5966:47; T5994:21-T5995:26; T6168:4-16; T6543:16-46

- 594 The Q&A Document was not drafted by Cardinal Pell.⁴⁶⁶ He was not asked any questions in relation to the Q&A Document, and in particular, was not asked whether he ever received the document, reviewed it or approved of its contents. Dr Michael Casey's first response, when asked as to the Cardinal's involvement in settling the document was that he did not recall and that the Cardinal "*probably wasn't*" involved.⁴⁶⁷ In these circumstances, no finding should be made that Cardinal Pell instructed the Archdiocese to approve the use of the Q&A Document by Corrs.
- 595 In relation to the Corrs Memorandum, Cardinal Pell gave evidence that he was "*not sure*" that the document had come to his attention (although he was aware of its basic content),⁴⁶⁸ and that it was only through preparation for the Royal Commission that he became aware that it contained a mistake.⁴⁶⁹ Once again, Cardinal Pell did not have any personal involvement in the preparation of the document, which was drafted by Corrs. Although the Corrs Memorandum was incorrect in the respect identified in Proposed Finding 9(b), Cardinal Pell was entitled to rely upon his lawyers to prepare that document accurately. Responsibility for the error should not be personally attributed to Cardinal Pell having regard to his absence of any involvement in its preparation.
- 596 It is therefore inappropriate for a personal finding to be made against Cardinal Pell that he instructed the Archdiocese to provide incorrect or misleading information in circumstances where he was not responsible for preparing or reviewing the accuracy of the documents in question and was not aware that those documents contained any incorrect or misleading information prior to their distribution.

⁴⁶⁶ Ex 8-1 at Tab 146 and 146A

⁴⁶⁷ T6177:8-10

⁴⁶⁸ T6543:11-14

⁴⁶⁹ T6549:1-10

19 Financial position of the Archdiocese of Sydney

597 The Church parties generally accept the summary of evidence set out paragraphs [544] - [547], [549] - [551], [553], [555] - [561] and [563] - [575].

598 The Church parties request that paragraphs [548], [552], [554] and [562] be amended as set out in the following table:

Submission reference	Response
<p>Paragraph [543(a)] of the Submissions states:</p> <p><i>"Prior to 2001, the Archdiocese of Sydney had made payments to 17 victims totalling \$186,000."</i></p>	<p>Paragraph [543(a)] of the Submissions should be amended to read as follows:</p> <p><i>"Prior to 2001:</i></p> <p><i>(a) 17 complainants initiated claims with the Archdiocese or PSO</i></p> <p><i>(b) there were 3 claims in respect of which the Archdiocese made a first payment,</i></p> <p><i>(c) the Archdiocese made total payments to complainants of \$16,509, and</i></p> <p><i>(d) the average payment received by the 3 complainants was \$5,503."</i></p> <p>Explanation</p> <p>Only 3 of the 17 claims initiated prior to 2001 received payments directly from the Archdiocese prior to 2001. The figure of \$186,000 given by Mr Daniel Casey in evidence was rounded down from the exact figure of \$186,708, which included not only payments made to complainants but also Archdiocesan costs.</p> <p>In relation to the calculation of the average payment made per complainant, the Church parties prefer the use of the first payment date instead of the date of when the complaint was first initiated as the Church parties recognise that complainants who initiate a claim within a given period may not necessarily receive a payment within that same period. The date of payment is a more accurate point of reference for the purpose of those calculations.</p> <p>The Church parties refer to Appendix A to these submissions, which summarises the payments made by the Archdiocese to complainants during this time period.</p>
<p>Paragraph [543(b)] of the Submissions states:</p> <p><i>"Between 2001 and the end of 2007, payments</i></p>	<p>Paragraph [543(b)] of the Submissions should be amended to read as follows:</p>

Submission reference	Response
<i>were made to 35 victims totalling \$1,281,000."</i>	<p><i>"Between 2001 and the end of 2007:</i></p> <p><i>(a) 35 complainants initiated claims with the Archdiocese or PSO</i></p> <p><i>(b) there were 32 claims in respect of which the Archdiocese made a first payment,</i></p> <p><i>(c) the Archdiocese made total payments to complainants of \$1,280,840, and</i></p> <p><i>(d) the average payment received by the 32 complainants was \$40,026."</i></p> <p>Explanation</p> <p>Not all payments made in the period between 2001 and the end of 2007 correspond to complaints that were initiated during this period. The total payments figure of \$1.281 million given by Mr Daniel Casey in evidence was rounded up from the exact figure of \$1,280,840.</p> <p>The Church parties further note that some payments have made over the course of several periods. The average payment is calculated by reference to the number of claims in respect of which a first payment has been made during that period. However, it is possible (except in respect of the period prior to 2001) that the total payment amount includes payments referable to claims initiated or in respect of which a first payment was made in the previous period.</p> <p>The Church parties refer to Appendix A to these submissions, which summarises the payments made by the Archdiocese to complainants during this time period.</p>
<p>Paragraph [543(c)] of the Submissions states:</p> <p><i>"From 2008 the Archdiocese had made payments to 47 victims totalling \$5,551,000"</i></p>	<p>Paragraph [543(c)] of the Submissions should be amended to read as follows:</p> <p><i>"Between 2008 and 28 February 2014:</i></p> <p><i>(a) 47 complainants initiated claims with the Archdiocese or PSO</i></p> <p><i>(b) there were 37 claims in respect of which the Archdiocese made a first payment</i></p> <p><i>(c) the Archdiocese made total payments to complainants of \$5,551,403, and</i></p> <p><i>(d) the average payment received by the 37 complainants was \$150,038."</i></p> <p>Explanation</p>

Submission reference	Response
	<p>Not all payments made in the period between 2008 and 28 February 2014 correspond to complaints that were initiated during this period. The total payments figure of \$5.551 million given by Mr Daniel Casey in evidence was rounded down from the exact figure of \$5,551,403.</p> <p>The Church parties refer to Appendix A to these submissions, which summarises the payments made by the Archdiocese to complainants during this time period.</p>
<p>Paragraph [548] of the Submissions states:</p> <p><i>"The Archdiocese spent a total of \$1,686,419 on legal fees that did not relate to any particular victim."</i></p>	<p>Paragraph [548] of the Submissions should be amended to read:</p> <p><i>""The Archdiocese spent a total of \$790,953 on legal fees that did not relate to any particular victim."</i></p> <p>Explanation</p> <p>"\$1,686,419" is the total amount of legal fees incurred for all Sydney matters (which includes both victim-related and not individually victim-related matters).</p> <p>The Church parties refer to Ex 8-19 and Mr Daniel Casey's evidence which is as follows:⁴⁷⁰</p> <p><i>"Q. The amount of legal fees under, if I can put it this way, "Other" - that is, not individually victim related - is \$790,000 odd; is that right?</i></p> <p><i>A. That's correct.</i></p> <p><i>Q. So that's to be added in addition to the previous legal fees to come up with a \$1.68 million figure?</i></p> <p><i>A. That's correct."</i></p>
<p>Paragraph [552] of the Submissions states:</p> <p><i>"The payments made to Mr Ellis consisted of counselling costs of \$10,424 up to a period before October 2012, an amount of about \$434,000 in relation to repairs and renovations to Mr Ellis' house which was affected by storm damage, an amount of \$28,000 in relation to a holiday to New York, and a final lump sum payment of \$50,000."</i></p>	<p>Paragraph [552] of the Submissions should be amended to read:</p> <p><i>"The Archdiocese made total cash payments to Mr Ellis of \$570,365. The payments made to Mr Ellis consisted of counselling costs of \$10,424 up to a period before October 2012, \$6,944 in respect of Medicare gap payments and surgery, an amount of about \$474,464 in relation to repairs and renovations to Mr Ellis' house which was affected by storm damage, an amount of</i></p>

⁴⁷⁰ T6406:41-T6407:1

Submission reference	Response
	<p><i>\$28,533 in relation to a holiday to New York, and a final lump sum payment of \$50,000.</i></p> <p>Explanation</p> <p>While the figure of \$434,000 for repairs and renovations to Mr Ellis' house referred to by Counsel Assisting is reflected in Mr Bailey's October 2012 email⁴⁷¹, the Archdiocese has since conducted a detailed review of its files and found that further payments were made to Mr Ellis for renovations which bring the total of renovation payments to \$474,464. This amount is reflected in the evidence given by the Archdiocese of the total payments made to Mr Ellis of \$570,365,⁴⁷² as stated in the Submissions at paragraph [551]. The amount of \$28,000 referred to in Mr Ellis' evidence⁴⁷³ as payment for his holiday in New York was rounded down from the exact figure of \$28,533. The total figure of \$570,365 also includes reimbursements to Mr Ellis of \$6,944 in respect of his out-of-pocket Medicare expenses and surgery which were not referred to in Mr Bailey's email.</p>
<p>Paragraph [554] of the Submissions states:</p> <p><i>"When the Archdiocese's own costs were excluded, the Archdiocese made the following payments:</i></p> <p><i>a) before 2001, \$186,000 was paid to 17 victims (\$10,941.18 average)</i></p> <p><i>b) between 2001 and 2007 inclusive, \$1,281,000 was paid to 35 victims (\$36,600.00 average), and</i></p> <p><i>c) from 2008, \$5.551 million has been paid to 47 victims (\$118,106.38 average)."</i></p>	<p>Paragraph [554] of the Submissions should be amended to read as follows:</p> <p><i>"When the Archdiocese's own costs were excluded, the Archdiocese made the following payments:</i></p> <p><i>a) before 2001, \$16,509 was paid to 3 complainants (\$5,503 average)</i></p> <p><i>b) between 2001 and 2007 inclusive, \$1,280,840 was paid to 32 complainants (\$40,026 average), and</i></p> <p><i>c) from 2008 to 28 February 2014, \$5,551,403 has been paid to 37 victims (\$150,038 average)."</i></p> <p>Explanation</p> <p>See explanations provided in response to paragraphs [543(a)], [543(b)] and [543(c)] above.</p>
<p>The last two sentences of paragraph [562] of the Submissions state:</p>	<p>The last two sentences of paragraph [562] of the Submissions should be amended to read as follows:</p>

⁴⁷¹ Ex 8-1 at Tab 175

⁴⁷² Ex 8-19 at EXH.008.019.0003; Ex 8-14 at paragraph [9]

⁴⁷³ T5442:19-35

Submission reference	Response
<p><i>“The value of these net assets and the annual rate of their increase far exceeds the \$1,281,000 the Archdiocese paid to victims between 2001 and 2007. The Archdiocese’s net assets have increased over every year since 2002 except 2008 and 2009.”</i></p>	<p><i>“The value of these net assets and the annual rate of their increase far exceeds the \$1,280,840 the Archdiocese paid to victims between 2001 and 2007. The Archdiocese’s net assets have increased over every year since 2002 except 2008.”</i></p> <p>Explanation</p> <p>See explanations provided in response to paragraph [543(b)] in relation to the figure of “\$1,280,840”.</p> <p>As set out in the aggregate financial schedules and paragraph [564] of the Submissions, the Archdiocese’s net assets for 2008 and 2009 are \$160,073,006 and \$166,331,442 respectively⁴⁷⁴. The net assets did increase in 2009.</p>

⁴⁷⁴ Ex 8-24_at EXH.008.024.0003 and EXH.008.024.0004

20 The way forward

[CA Submissions paras 576 - 587]

599 The Church parties generally accept the summary of evidence set out at paragraphs [576] - [577], [579] - [581] and [584] - [587]. The Church parties also refer to and rely upon the submissions filed by the Council in relation to Issues Paper 5, Civil Litigation, lodged on 14 April 2014 and Issues Paper 6, Redress Schemes, lodged on 12 August 2014 for a full statement of the position of the Church parties as to the appropriate way forward.

600 The Church parties do not accept that paragraphs [578], [582] and [583] contain a fair summary of the evidence given by Cardinal Pell.

601 In relation to paragraph [578] of the Submissions, Cardinal Pell's evidence was that he (emphasis added):

*"would prefer an independent body set up by the government to investigate these things and recommend **compensation, not damages**, independent, away from the church..."*

602 Cardinal Pell gave the following evidence in relation to the manner of calculation of damages payable to victims (emphasis added):

"Q. I'm sorry to press you, because I still don't really understand what you say the principles should be, but are you saying that if there's a separate body, moral responsibility would extend to providing appropriate compensation for income lost where it can be established that the lost income was a result of the abuse by a cleric?"

A. Yes, I think I would.

Q. That's the common law position, isn't it?

*A. **I'm not aware of that, but I presume - I simply don't know.***

Q. You're also indicating, as I understand it, that moral responsibility would extend to a sum of money for the hurt, spiritual or otherwise, that a person has suffered?

A. I would.

Q. Do you know that that's a concept also recognised by the civil law?

*A. **I'm not surprised.***

Q. Over and above that, as I understand it, you accept a need to provide the funds to meet the medical needs, mostly counselling or psychiatric care; is that right?

A. Yes.

Q. *We're pretty much where the common law would take us; do you understand that?*

A. Yes."

603 This extract from the Cardinal's evidence on this topic demonstrates that the Cardinal did not profess to have any knowledge regarding the manner in which common law damages are calculated and that while he agreed with some general propositions about the type of loss that might be compensable, Cardinal Pell did not have sufficient knowledge regarding the common law principles of assessment of loss to be in a position to agree that they should be applied in any future compensation scheme that is recommended by the Royal Commission. The statement in paragraph [578] of the Submissions to the effect that Cardinal Pell agreed that victims should be paid compensation assessed in the same way as common law damages is therefore misleading, as Cardinal Pell did not express, and was not in a position to express, a considered view on the topic.

604 Paragraph [582] of the Submissions states that since Mr Ellis' litigation, *"the Archdiocese had employed an in-house lawyer to oversee the conduct of litigation, which has allowed the Cardinal to be "much more involved . . . in following what was happening"*. This is not a fair summary of the Cardinal's evidence, which was as follows:⁴⁷⁵

"First of all, I would have some competent person oversee the conduct of the case in the court. We already do that, so when we are in court, we have a lawyer present.

With the virtue of hindsight, I would make myself much more involved, no matter what other tasks I had, in ensuring that – in following what was happening."

605 It is apparent that Cardinal Pell did not give evidence either that the employment of the in-house lawyer was for the purpose of allowing the Cardinal to be more involved or that it had that effect. The Cardinal, with the benefit of hindsight, did say that he wished that he had made himself much more involved in following what was happening, that is, had given more personal attention to the supervision of the litigation.

606 In relation to paragraph [583] of the Submissions, the Church parties rely upon the summary of the Archdiocese's position set out in sections 10.1 to 10.3 of the submissions above. The Archdiocese does not accept that the choice of defendant remains *"limited"*, as this suggests that a victim may have difficulty identifying the defendant with responsibility for supervising the perpetrator of the abuse. To the contrary, the Archdiocese considers that there *"generally will be someone for a victim of sexual abuse to sue if they wish to seek damages in the courts"*.⁴⁷⁶ It is also the position of the Archdiocese that *"the resources of the Church should be available to the*

⁴⁷⁵ T6564:2-9

⁴⁷⁶ Ex 8-12 at paragraph [173]

extent necessary to meet any judgment”,⁴⁷⁷ regardless of the fact that a particular priest or the estate of a deceased priest may not have sufficient assets to meet a judgment debt.

⁴⁷⁷ Ex 8-14 at paragraph [155(d)]; T6564:32-43; T6518:34-38