



Full Day Hansard Transcript (Legislative Council, 27 March 2014, Corrected Copy)

Extract from NSW Legislative Council Hansard and Papers Thursday, 27 March 2014.

Second Reading

Mr DAVID SHOEBRIDGE [10.04 a.m.]: I move:

That this bill be now read a second time.

I note at the outset that we have present in the President's gallery both Anthony and Chrissie Foster, who are campaigners in this area and who themselves have a long personal history with the failings of this aspect of the law, and indeed the failure of the church. I also pay my respects to the campaigners in the public gallery, survivors of abuse and campaigners for justice in this area of the law. A core principle of any modern, responsible democracy is that no individual or organisation is to be beyond the law. Tragically, this principle has not been applied when victims of sexual abuse by Catholic clergy, or other officials of that church, have pursued civil claims. This means that victims of abuse by members of the Catholic clergy are barred from an important means of obtaining justice; and the organisation responsible for their pain and suffering, and their losses, escapes accountability.

Given the historical failure of the church to address claims of abuse, and the mounting evidence of mismanagement within the organisation, it is essential that lawmakers close the legal loopholes that enable the church to escape accountability on technicalities. In consultation with victims and survivors—support groups, lawyers, and other stakeholders—The Greens have drafted the Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2014. This will allow victims to sue the church's property trust. This will mean that civil claims against the church by victims of sexual abuse will be decided on their merits and not on a legal technicality.

The provisions of the Roman Catholic Church Property Trust Act date back to 1936, and are such that victims of abuse are barred from an important means of obtaining justice. This is done by placing the church's assets in statutory trusts, which are effectively immune from claims by victims of abuse. This has particular importance for the Catholic Church, which as an unincorporated association is not a legal entity and cannot be sued in its own name. With the perpetrators, often priests, having no assets, the church unable to be sued, and the trust's assets protected from claims, the end result is that many victims have no recourse to justice. This is a matter of justice that extends beyond those who were abused and the families and friends of those who suffered abuse. There are people of goodwill within the church, as well as a growing support base outside the church, who are demanding change. I urge all members of the House to closely review and then support this legislation. It will force the church out of the shadows and into the light, where it can face real justice and genuine accountability.

I turn now to a brief discussion of the case that has highlighted these concerns. It is called the case of Ellis. In a 2007 decision of the New South Wales Court of Appeal, which was affirmed on appeal to the High Court, John Ellis was denied compensation for sexual abuse he suffered at the hands of an assistant priest at Bass Hill Parish between 1974 and 1979. Mr Ellis could not sue the deceased assistant priest, and neither could he sue the church. Mr Ellis therefore sued the current church leadership in the form of Cardinal Pell and the property trust, which at all times had held the church's assets. I pause here to note that Mr Ellis is in the visitors' gallery today. In court the church did not base its defence on denying that Mr Ellis had been abused. We now know that the church was in possession of evidence that overwhelmingly supported Mr Ellis's claims. Instead, it persuaded the court that the present leaders of the Catholic Church could not be held responsible for breaches of care by former members of the unincorporated association that is otherwise known as the Catholic Church.

The church also argued, and the court agreed, that the property trust could not be sued by victims of abuse because the trust was solely responsible for property matters and therefore not liable for any sexual abuse by members or officials of the church. Had Mr Ellis been injured by a falling rafter in a church hall then the trust would have been responsible, but because his injury was caused by a sexual assault by an assistant priest the trust was said not to be responsible. The result was that Mr Ellis's case was dismissed—not only that; he was ordered to pay the legal costs of the Cardinal and the trust. Mr Ellis was left with no legal remedy. Victims and the church now simply refer to this case as the Ellis defence.

I turn now to the more specific provisions of the bill. The justice for victims bill aims to do a very simple thing; that is, to allow victims of sexual abuse to sue the property trusts as though they were the church. It aims to force the

church to defend the sexual abuse claims on their merits, not on legal technicalities. In doing so, the bill attempts to level the playing field and to give those victims a real and viable legal remedy. The long title of the bill describes its intentions and functions:

An Act to amend the Roman Catholic Church Trust Property Act 1936 to provide for the ability of victims of sexual abuse where the abuser is found to be a member of the Catholic clergy and or another official and or officer in the Church to satisfy judgments awarded against such abusers as a judgment debt payable from the assets of the Trust and for other related purposes.

The bill amends a longstanding Act passed by this Parliament—the Roman Catholic Church Trust Property Act 1936—to insert into the Act a new part 3 regarding sexual abuse claims paid from trust funds. Clause 18 provides that:

(1) The plaintiff in civil proceedings relating to sexual abuse or negligence by a member of the Church's clergy, a Church official or a Church teacher in relation to a person who was, at the time of the sexual abuse or failure to exercise reasonable care and skill, under the care of the Church, may join as a defendant in those proceedings:

(a) the body corporate established under this Act for the diocese in which the abuse or failure, or the majority of the abuse or failure, is alleged to have occurred; and

(b) the Bishop, and the Diocesan Consultors, of the diocese in which the abuse or failure, or the majority of the abuse or failure, is alleged to have occurred, in their capacity as trustees of Church trust property in that diocese.

In other words, both the trust and the trustees may be joined to the proceedings in those circumstances. Clause 18 (2) provides for liability as follows:

(2) In respect of any such proceedings, the relevant body corporate and its trustees are jointly and severally liable as if they were the member of the Church's clergy, the Church official or the Church teacher against whom the proceedings were also brought.

The corporate entity that holds the trust and the trustees stands in the shoes of the member of the clergy, of the church official, and indeed of the church. They have available to them every defence, every legal remedy that other defendants would have. But they also carry with that a genuine liability that if a breach of duty of care is proven, if a claim is made out that abuse occurred and there was a breach of duty of care by persons who are members of, or closely associated with, the church the trust is liable. It is the trust that holds the funds. The trust is the only defendant that is not a straw man in these proceedings. Clause 17 provides the following definitions. It defines an "official" to mean any person who acts as a representative of the church and includes:

(a) an official, officer or member of staff of the Church or of a diocese;

(b) a lay assistant for the Church or for a diocese of the Church; or

(c) a volunteer for the Church or for a diocese of the Church.

There is a definition of "church teacher". There is also a definition of "member of the church's clergy", which includes archbishops, bishops, priests, sisters, nuns, brothers, monks and other members of religious orders of the church. "Sexual abuse" is defined to mean:

... sexual conduct, or conduct that includes sexual conduct (whether or not there was apparent consent to that conduct and whether or not that conduct would at the time of the relevant conduct constitute a sexual offence) perpetrated by a person who was, at the time of the relevant conduct, a member of the Church's clergy, a Church official or a Church teacher, while acting in his or her capacity as such a member or official.

To overcome a serious lack in the law as to fiduciary duty in this jurisdiction—a lack, I might say, that has been overcome in other jurisdictions such as the United Kingdom and the United States—clause 17 (2) provides:

(2) For the purposes of this Part, a person was under the care of the Church if the person was owed a duty of care or fiduciary duty by the Church, a member of the Church's clergy, a Church official or a Church teacher and includes, but is not limited to, having been owed such a duty in the following capacities:

(a) as a member or parishioner of the Church,

(b) as a nun, monk or seminarian of the Church ...

It goes on to list other categories. The bill also provides that where the plaintiff intends to make use of this provision he or she must give notice of that within 28 days of the filing of any statement of claim. Proposed section 19 provides that where a person is owed money as a result of a judgement based on a finding in relation to sexual abuse by a member of the clergy, a church official or a church teacher he or she can seek to recover that debt from the Roman Catholic Church property trust or the bishop, diocesan consultors or the body corporate under the Roman Catholic Church Communities' Lands Act 1942.

Importantly, the bill also provides for a suspension of the operation of the Limitation Act 1969 for a period of two years from the date of commencement of this bill. Increasingly, we are seeing in jurisdictions around the planet—common law jurisdictions in particular, such as British Columbia in Canada and an array of State jurisdictions in the United States—a move to entirely remove or suspend the statute of limitations for historical child sexual abuse claims. The purpose of the two-year suspension proposed in this bill is to allow victims of clergy abuse who might not have brought their claim due to the existence of the Ellis defence, but whose claim is not statute barred, an opportunity to seek fair compensation without having to seek leave.

We know that the average delay for victims of childhood sexual abuse to bring a claim is greater than 20 years. The standard statute of limitations for these claims is just three years from the time the victim turns 18. The practical result of this is that the great majority of claims are statute barred. Therefore, the survivor of abuse must obtain the court's leave to proceed out of time. This leave to proceed is a serious hurdle for many victims to overcome. It places unfair bargaining power in the hands of the church from the very commencement of the claim or proceedings. This bill, as a starting point, proposes a two-year suspension of the statute of limitations for historical child sexual abuse claims where the victim was under the care of the church. This is a modest but real step forward to level the playing field in this fraught area of litigation. It should be the start of a conversation and a direct move in this Parliament to entirely remove the statute of limitations for historical child sexual abuse claims.

Recently we have seen the church seeking to justify, defend and explain its actions in the matter of Ellis. From the time that John Ellis entered and then left the Towards Healing process that had been established by the church, and for the course of his subsequent civil case, George Pell was Archbishop of the Archdiocese of Sydney. Recently the archbishop, now cardinal, gave evidence before the Royal Commission into Institutional Responses to Child Sexual Abuse. Cardinal Pell was questioned about his involvement in the Ellis case, and in particular the aggressive court response that created the Ellis defence precedent in the courts of this State. Cardinal Pell acknowledged that he was archbishop at the time that Mr Ellis's complaint was received by the church. He further advised that he had a large number of discussions about the case at the time, but he maintained that he was guided by his advisers, his lawyers and church officials, rather than being the key decision-maker.

On the treatment of Mr Ellis during the church's internal process and the legal proceedings, a number of officials who appeared at the commission advised that Cardinal Pell knew about Mr Ellis's compensation request, including his offer to resolve the matter for the very modest sum of \$100,000. The cardinal claimed that he thought the figure was \$750,000, that that was too high and that there was no point in negotiating, and he refused mediation. It is worth remarking that the church spent well in excess of \$1 million in legal defence of this matter and that the case finished costing the archdiocese approximately \$1.5 million, including a significant ex gratia payment to Mr Ellis. It was rightly suggested by counsel assisting the commission, Gail Furness, that it was "inconceivable" that the cardinal was not aware of the details of Mr Ellis's claim and to that he responded:

It is not a question of what's conceivable or logically possible. The fact is that I was not. I was not informed about any of this.

But the cardinal does admit that he endorsed the decision not to enter mediation at the commencement of proceedings, claiming that he did not recognise the "wounded-ness" of Mr Ellis, despite his evidence to the commission. In his statement to the commission of just 24 February this year, the cardinal admitted that he explicitly endorsed the major strategies of the defence—that is, the aggressive defence of the civil claim from John Ellis. He testified that this defence was intended to serve as a warning to other plaintiffs who might be considering action against the church that, in the words of the cardinal, "They should think clearly."

Last week the cardinal's private secretary, Dr Michael Casey, told the royal commission that the cardinal had directly ordered the legal team to pursue an aggressive cross-examination, including bringing into question whether Mr Ellis had in fact been abused, despite the fact that they had such overwhelming evidence and that the fact of abuse had been accepted even within the church's own Towards Healing process. While Cardinal Pell admits in retrospect that the litigation went too far, he also distances himself from any responsibility for that occurrence. Given his position at the time of the litigation, that is remarkable. The cardinal also stands by the approach in the case that resulted in Mr Ellis's case failing on the legal technicality of the Ellis defence, saying, "Mr Ellis sued improper parties who defended inappropriate proceedings against them." His statement renders these callous and damaging tactics, taken against a victim of horrific abuse, as follows:

I would now say, looking back, that these legal measures, although effective, were disproportionate to the objective and to the psychological state of Mr Ellis as I now better understand it.

Prior to this week's hearings in the royal commission the church and Cardinal Pell robustly defended the use of this legal strategy that is widely known as the Ellis defence to the point at which they have attempted to deny the obvious truth. In a statement published on the website of the Catholic Archdiocese of Sydney, they have previously stated:

There is no such thing as the "Ellis defence". The Ellis decision did not create new law. It did not create a shield to protect church parties from legal action. Church parties can and have been sued.

After Mr Ellis lost his court case, he received several hundred thousand dollars in financial assistance from the Archdiocese. In addition, the body corporate of the Archdiocese did not require Mr Ellis to pay its costs of the case—even though the court had ordered Mr Ellis to do so.

The suggestion that the Church cannot be sued by victims of sexual abuse is incorrect.

It further states:

Church officials and Church entities responsible for abuse in the Church either directly or by their negligence can be and are sued.

Ellis stands for nothing more—

so the cardinal says—

than the commonsense proposition that you cannot be liable for wrong doing of others unless you are directly or indirectly responsible for supervising their conduct.

That statement by the church wraps a large lie around a small and irrelevant truth. Yes, it is true that the case of Ellis does not say, "You cannot bring proceedings against the trustees, the trust or the current bishop for the abuse suffered in the past." That much is true. But what the church omits to say is that the case of Ellis loudly and unambiguously states that if a victim does bring such a claim he or she inevitably will lose because none of these entities is liable at law. The use of the Ellis defence has been an extremely successful legal strategy for the church. Recent evidence given in the commission has shown that it is estimated that the Sydney Archdiocese alone has more than \$1 billion in assets. We have known since 2001 that under Cardinal Pell's management the archdiocese paid out only \$8 million to 82 separate victims' claims. To establish some perspective on the wealth of the church, reference can be made to a 2005 *Business Review Weekly* analysis, which states:

If the Catholic Church were a corporation, it would be one of the top five in the country.

According to the *Business Review Weekly*, the Catholic Church in Australia was not only the biggest religious group in the country in financial terms but also the richest non-profit organisation with an annual turnover in 2005 of some \$16.2 billion. I refer to the report of the *Business Review Weekly* because the church has no obligation to provide its accounts for scrutiny to anyone: It never has, and it never will, unless it has been ordered to do so such as we have seen in recent days in the commission. As the Australian Lawyers Alliance said in a statement just yesterday:

The most serious concern is that the church remains wedded to protecting its treasure ahead of children in its care.

The Church gives its clergy great authority over their victims, appointed and dismissed them and determined how they carried out their duties. When asked by Justice McClellan why the Church should not be liable for the consequences, Cardinal Pell simply asserted his duty to protect the Church's assets.

It is now clear that the apparent concessions emanating from Cardinal Pell from Francis Sullivan, of Truth Healing and Reconciliation, are simply empty gestures not intended to help past victims, and which will help very few future victims.

Legislation to deal with unjust limitation periods, and make the Trustees of the Church ... able to be sued, making them responsible for the priests that the church appoints, should now be recommended and pursued in all Australian states and territories.

Cardinal Pell said that it would be unfair to treat the Catholic Church different from other organisations. The Australian Lawyers Alliance agrees.

The Catholic Church is the only major organisation in Australia claiming immunity from suit and no responsibility for its clergy. It is time to end the legal abuse of victims superimposed upon sexual abuse by clergy.

I could not agree more. It is for this reason that I introduce this bill today and look to support from this Parliament. I note that this bill did not just appear as a result of last week's hearing. It is the product of years of consultation and years of careful consideration. It has broad support among survivors and victims and advocates who are demanding some form of balance and justice. We cannot simply wait years for the royal commission to finally report. At best we are likely to see recommendations fixing the matter prospectively by moves to incorporate the church or to put in place a procedure for dealing with claims in the future. However, the thousands of victims who have approached the royal commission and the thousands of victims of past sexual and historical abuse require their elected representatives to take this strong step, to establish a level playing field and to deliver justice for victims, not only in New South Wales but also in States and Territories across this country. I commend the bill to the House.