Suite G02, Ground Floor,
233 Castlereagh St, Sydney NSW 2000
PO Box 20319, World Square NSW 2002

t 02 8267 7400
e info@knowmore.org.au
www.knowmore.org.au

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4 September 2013

The Hon. P McClellan AM
Chair
Royal Commission into Institutional Responses to Child Sexual Abuse
GPO Box 5283
Sydney NSW 2001

By email: solicitor@childabuseroyalcommission.gov.au

Dear Judge,

RE: Royal Commission into Institutional Responses to Child Sexual Abuse – Submission about Issues Paper 2: Towards Healing

This submission is provided on behalf of **knowmore** legal advisory service. As you know, **knowmore** is a free legal service set up to help people navigate the Royal Commission. Advice is provided through a national telephone service and at face to face meetings, including at outreach locations. **knowmore** has been established by the National Association of Community Legal Centres Inc, with funding from the Australian Government, represented by the Attorney-General's Department.

Since the launch of our service in July this year, we have spoken to many clients who have participated in the *Towards Healing* process. We understand that some of those clients will be making individual submissions responding to the Issues Paper. Others have indicated their intention to relate their views, about the process as they experienced it, when attending private sessions with the Commission. Our work with these clients has provided us with useful insights as to how the *Towards Healing* process operates from the survivors' perspective and how it has impacted upon participants. On the basis of these insights, we make this submission in response to the Royal Commission's Issues Paper 2: Towards Healing.

Our submission addresses those points identified in the Issues Paper where a 'common' theme has emerged from our client work. As such, our submission will not address every point in the Paper.

1. The experience of victims who have engaged in the *Towards Healing* process.

Many of the points covered later in this submission are relevant to the general experience of our clients with the *Towards Healing* process.

The experience of most **knowmore** clients who have engaged in *Towards Healing* has been that it was, at least to an extent, a re-traumatising process. Clients have expressed concern that they have had to provide precise details of what happened, where it happened and who was involved to meet the evidentiary test (on the balance of probabilities) set out in the procedures of the *Towards Healing* document. Many clients, who were young children at the time the abuse occurred, have advised they could not accurately remember names of perpetrators and witnesses, dates etc. In some cases this is understandably due to the passage of time. Others obviously just wanted to block all such details out. Many of our clients have expressed concern that *Towards Healing,* which is stated to be a pastoral approach to healing, was in their experience unduly legalistic in its implementation.

Many clients advised they were distressed that a representative from Catholic Church Insurance was present at their facilitation/mediation session. A number of clients expressed concern that this representative actively sought to reduce the amount of the settlement the church would have to pay. Their experience was that it also contributed to making the process appear more legalistic and adversarial.

Clients were also concerned that the process, while being held out as having elements 'independent' of the Church, was not independent in practice. For example, some clients have reported that assessors in their cases were from the Catholic Church (which if it was the case, is contrary to the requirement set out in clause 40.1.1 of the process). Similarly, clients have expressed concerns about facilitators being aligned with the Church. In one instance a client said the facilitator met with the representatives of the Church and Catholic Church Insurance leaving the client by herself, without explanation, which caused the client concern about the facilitator's role and independence.

2. The principles and procedures of *Towards Healing* as instructions for Catholic Church authorities dealing with complaints and redress regarding victims of child sexual abuse.

The most constant complaint from our client group is that while there are principles and procedures set out in the *Towards Healing* process, they are not uniformly applied.

We note that the principles and procedures make no reference to a maximum amount of compensation payable, hence lending the process to differential application. By contrast, the Melbourne Response refers to a maximum limit of $75,000. Whether such a limit is adequate is one question, but at least the publication of it makes important information available to survivors.

It has been our experience that there is a wide variation in the amounts of compensation being paid under *Towards Healing* – from as low as around $2,500 to more than $100,000. This creates a level of uncertainty for people wanting to engage in *Towards Healing* and is likely to be viewed by some potential participants as showing a lack of transparency or accountability on the part of the Church. Monetary settlements toward the lower end of the above range are also viewed by at least some recipients as suggesting that the abuse they experienced was not severe, or was trivial.

Many participants in the process are people who have experienced, and/or remain experiencing, severe disadvantage. Many of our clients were institutionalised in Church administered homes, such as orphanages, from a very young age and at a time when it appears that little emphasis was placed on their formal education. Consequently many have low literacy levels. Many have intellectual or other disabilities. By definition, they have experienced complex trauma as a result of the abuse they endured,

which continues to impact on their lives in multiple and severe ways. As such, there is a clear and very significant power imbalance inherent in the process. This reality, coupled with a lack of information and transparency around likely financial outcomes, places vulnerable complainants in a position where they may have little informed understanding about the process and their proper entitlements.

The process establishes 'balance of probabilities' as the standard of proof to be met. Many clients have advised us that their claims were rejected because they could not reach this standard of proof. For example, they could not fully identify the perpetrator as he might only have been known as Father X who was a visiting priest at the orphanage. Another recounted being interviewed by a 'private investigator' and then told that he did not have sufficient evidence. Some clients have said that such processes and responses have made them feel like liars and have made them question their own memories of events.

The insistence on proving the abuse on the 'balance of probabilities' and the apparent emphasis on fact-finding for the determination of claims appears to be at odds with the stated emphasis in *Towards Healing* on pastoral care and the well-being of victims. It also means that many genuine survivors of abuse may not be compensated.

If *Towards Healing* continues to maintain this standard of proof and approach into the future, we would submit that at the very least participants should be given access to all records relevant to their matter that are held by the Church. This suggestion is developed further in our response to points 7 and 9 below.

3. **The principles and procedures of *Towards Healing* relating to the accused and particularly the responses and outcomes available.**

No submissions are made on this point.

4. **The engagement and accountability of institutions and responsible authorities of the Catholic Church in the *Towards Healing* process.**

The *Towards Healing* process involves the complainant notifying the relevant state Professional Standards Office ('PSO') of the claim. The PSO then refers the claim to the Church Authority where the child sexual abuse allegedly occurred. Some of our clients are indicating that from this point there are varying degrees of uptake in the process by the Church Authorities. It would appear there is no-one or no organisation with the authority to compel Church Authorities to comply with the process.

Because of the varying levels of engagement and accountability our clients are complaining that there is no certainty in the process for them and no consistency among decisions, that has then resulted in outcomes that vary dramatically. The inconsistency and ambiguity does not aid transparency and survivors' trust in the process.

5. **The selection criteria, if any, which should be used to employ or engage personnel including assessors and facilitators involved in *Towards Healing*, and their selection, appointment and engagement and manner in which conflicts of interest are dealt with.**

As noted in the response to point 1 above, there have been consistent complaints from our clients of the perceived lack of independence of the personnel engaged in the process. Some clients are saying

that the personnel in the *Towards Healing* process have been involved with the Catholic Church and are therefore part of the organisation which abused them, concluding that by implication these people are not to be trusted.

Many clients have referred to their view that a partisan approach was adopted by the facilitator/mediator, which has left them feeling that they are seen as the guilty party and not to be believed.

Concerns have also been raised by clients about counsellors being nominated by the Catholic Church in the *Towards Healing* process. Some clients have explained that they were not comfortable seeing a counsellor nominated by the Church – there was a feeling that the counsellor will be on the side of the Catholic Church and that the counsellor will not be supportive.

The overwhelming view of clients has been that all assessors and facilitators should be completely independent of the Catholic Church, to ensure fair treatment of parties and independence of decisions.

6. The relationship between participation in the *Towards Healing* process and the rights of victims to access the civil and criminal justice systems in Australia.

The *Towards Healing* procedure clearly sets out at clause 37.1 that *"the Church has a strong preference that the allegation be referred to the police so that the case can be dealt with appropriately through the justice system."* This clause goes on to advise that the complainant can be assisted with this process of reporting to police, if desired. The support of the *Towards Healing* process for survivors engaging with the criminal justice system is to be commended.

Clause 36.5 sets out that the process of following a civil claim to resolve the complaint will be respected and that the well-being of the client will still be considered by the Church Authority. In relation to the rights of survivors to access civil remedies, we would recommend that the following be put in place:

i. That during the process of the interview between the claimant and the assessor, that the claimant be able to receive independent legal advice by a legal practitioner of their choice, paid for by the Catholic Church. While it is acknowledged that independent legal advice is provided for in relation to the terms of the Deed of Release, it is our submission (arising from a suggestion made by one of clients) that independent legal advice should also be provided during the period of negotiation. We have referred above, in the response to point 2, to the inherent imbalance in the negotiating relationship, which is exacerbated by the lack of transparency around possible financial outcomes. This imbalance was powerfully described by one client's account of the negotiation process – *"as soon as I walked into that room with the people from the Church, I was that little boy in the home again."*

ii. Alternatively, that the Deed of Release not contain clauses which prohibit the claimant from also pursuing their rights through the civil justice system.

7. **The conduct of investigations, including the engagement with the victim, the accused and the institution or responsible authority.**

Clients have expressed concern that the burden of proof rests with them as claimants – they need to establish on the balance of probabilities that the abuse occurred (clause 40.9). For many survivors who do not have access to their records and/or files, or information held by the Church that may assist a claim, it is difficult, if not often impossible, to compile evidence to meet this standard. As noted above, many are told there is nothing to support what they are saying, that files have been destroyed or that they do not have sufficient information. One client advised they could only provide the first name of the priest who sexually abused them. The client could name the institution and the year but the client was told that was not sufficient information to found a claim. Another client stated that as there were no others who reported the abuse, the client was unable to prove the abuse occurred.

Given the nature of the abuse upon which the claim is made, and its lasting and traumatic impacts upon survivors, this legalistic approach significantly advantages the Church Authority over the claimant and is at odds with the stated emphasis in the process upon pastoral care and support for survivors.

8. **The application of confidentiality to any aspect of the *Towards Healing* process and the persons subject to any applicable confidentiality.**

We welcome the Church's advice that the confidentiality provisions of Deeds of Release are to be waived for the purposes of parties engaging with the Royal Commission. However, many of our clients have requested that these confidentiality provisions be waived unconditionally. We also note that the Church's current stated position on such issues might be easily changed at some point in the future, in the absence of some specific and legally enforceable waiver of rights under existing deeds.

We draw your attention to the perceived internal conflict in the 2010 edition of *Towards Healing*. Clause 40.13 refers to all material and documents associated with the assessment "to be treated as confidential" which can be contrasted with clause 41.5 which states "complainants shall not be required to give an undertaking which imposes upon them an obligation of silence concerning the circumstances which led them to make a complaint, as a condition of an agreement with the Church Authority." While a person with legal qualifications may be able to distinguish the meanings of the confidentiality wording in the two clauses, for most people, and especially many survivors who have experienced multiple circumstances of disadvantage throughout their lives, it is confusing. We would submit that either confidentiality be waived entirely or the wording of the clauses be re-visited to ensure the meaning is clear.

9. **The standard of proof applied during the *Towards Healing* process.**

At clause 17 of the *Towards Healing* document it states *"A sensitive and compassionate response to the complainant must be the first priority in all cases of abuse."* The concern expressed by many clients is that this is at odds with the overly legalistic approach adopted by *Towards Healing* to establish whether or not the complaint is to be accepted.

Clause 40.9 states *"The assessor shall review the evidence for the complaint, examine the areas of dispute and make findings about whether they consider the complaint to be true on the balance of probabilities, based upon the evidence available at that time."* The survivor needs to put the complaint before the

Director of Professional Standards and assessors are then appointed to investigate the facts of the case. The onus is on the claimant to provide evidence to the Director of Professional Standards and the assessors, who will establish on the balance of probabilities whether or not the abuse occurred. As noted, this is very difficult when the claimants often do not have access to their files (as the files may have been destroyed or are inaccessible for other reasons), have either very little additional corroborative information given the nature of the abuse and the time that has lapsed, or little or no capacity to independently gather such information, and may not have clear memories of all details of what happened.

It is our submission that a simpler test should be applied for the acceptance or otherwise of claims. The present balance of probabilities test[1] is a difficult standard of proof for many to achieve, given the nature of the claims, as discussed above. A less complex and more beneficial standard should be established for the purposes of accepting claims. For example, for some clients proving that they were at the institution during the time of a known perpetrator has been sufficient to establish a claim, accepted by church authorities for the purposes of compensating them.

10. <u>The role and participation of lawyers, insurers and other third parties in the *Towards Healing* procedure and whether such involvement assists or hinders the process.</u>

Some observations on this point have been made above. Some clients have expressed their concern to us that a representative of Catholic Church Insurance has been present at facilitation/mediation meetings. Clients have also reported feeling that they were bullied by these representatives into accepting inadequate compensation payments.

Clients have also expressed concern about the notice given about the presence of lawyers representing the Catholic Church at facilitations/mediations. Many clients have said that they were given minimal or no notice that there would be a lawyer in attendance representing the Church. If this has happened, any such practice is in direct contradiction of footnote 3 to clause 41.4.1 of the *Towards Healing* document. The practice entrenches the client's view of the process being one geared towards benefiting the Church as its primary aim.

There is also concern on the part of clients that the Catholic Church has access to legal advice during the *Towards Healing* process. The facilitator is often a lawyer. The complainants are encouraged to have a support person present during the facilitation/mediation, but if they want a lawyer present they must pay for that person themselves. One of the suggestions made to our service, already noted above, is that the Catholic Church should pay not only for independent legal advice to review the terms of any Deed of Release, but given that the Catholic Church is adopting a legalistic approach and framework for *Towards Healing,* that it should also pay for legal advice and representation from the time the complaint is lodged.

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[1] The *Towards Healing* statement of principles and procedures is silent on the precise application of this standard of proof; that is, does it import the *Briginshaw* test, given the serious nature of the allegations founding a complaint of sexual abuse, and the consequences to the complainant and subject?

11. The sufficiency of the guidelines in relation to referral of matters to police.

No submissions are made on this point.

12. The role of canon law in *Towards Healing.*

No submissions are made on this point.

13. The options for redress under *Towards Healing*, in particular:

It is of concern that clause 41.1 of the *Towards Healing* document states "Responses may include the provision of an apology on behalf of the Church, the provision of counselling services or the payment of counselling costs" (emphasis added). Many of our clients have stated they would prefer that the Church be mandated to do these things.

The lack of consistency as to amounts of compensation and support available has been identified as a major flaw in the *Towards Healing* process by many of the clients of our service. These clients have rightly identified that there is no certainty in the process. This lack of certainty has made it difficult for complainants to see any transparency or accountability in the *Towards Healing* process.

a. **the circumstances in which financial assistance may be paid**
   As stated above, there is concern as to the lack of transparency or accountability about the payment of financial assistance. It is submitted that the *Towards Healing* document should contain criteria to be met, for a financial payment to be made, and specify relevant ranges of payment, in order to better inform potential claimants and their advisors (see next point).

b. **the level of monetary payments and how they are determined**
   We are aware that several Anglican dioceses and the Melbourne Response have set $75,000 as the maximum amount for an award of compensation/redress. For many of the Anglican dioceses, there is in addition a schedule of injuries, giving a basis for the determination of the compensation amount.

   As the response to *Towards Healing* is dependent on each Church Authority there is no consistency or certainty for complainants. It is suggested the *Towards Healing* document contain at least reference to minimum amounts that will be paid as compensation when specified criteria are met; for example, if certain injuries are established/accepted as having occurred. We would also submit that there should be provision for the maximum of any range to be exceeded on the establishment of 'special or extraordinary circumstances'. To assist in the ensuring the process is consistent and transparent, the document should also contain a schedule of injuries.

   As noted above, such an approach is used by some other schemes, such as the Anglican Church's (Sydney Diocese) Pastoral Care and Assistance scheme, which specifies ranges of financial assistance against differing categories of claim/injury.

c. **other forms of financial support**
As noted above, many clients have told us stories of significant financial and other distress which they have experienced for most of their lives (having received poor education, endured homelessness, relationship breakdowns and mental health issues). It is our submission that access to financial counsellors be considered as part of the package of financial support offered, especially if significant sums of money are to be paid by way of compensation.

d. **the apologies or acknowledgements which are provided to victims**
Many of our clients have recounted how much they have appreciated receiving heartfelt apologies from the Church Authority responsible for their abuse, in addition to an amount of financial compensation. For others, no words could ever heal the enormous pain they have experienced.

However, this should never deter the Church Authority from making a personal apology to each survivor. It is noted that in one of the dioceses of the Anglican Church, the Archbishop meets with each survivor and personally apologises to them. We understand this has had an enormous impact on survivors in helping them move towards healing. Indeed, we have met clients who have expressed the healing benefits they (and family members) have derived from receiving a genuine apology from a senior representative of the Church.

e. **the conditions imposed including any confidentiality agreements.**
As noted, many of our clients have been confused by the confidentiality provisions in the *Towards Healing* document. The apparent inconsistency in the document should be clarified – refer to our response to point 8.

It is our submission that an unconditional and enforceable waiver of any operative confidentiality provisions should also be implemented.

14. <u>The nature and extent of the review process available.</u>

We note that obviously the effectiveness of any review rights, from the perspective of the complainant, depend in large part on the complainant receiving detailed advice about the nature of the decision made, the reasons for that decision, what are their options for review and what those options may involve.

Clause 44.6 of the process provides for the Reviewer to determine the procedures for the conduct of the review in each case. Again, such latitude does little to promote certainty and accountability in the process. While the procedures may involve speaking to the complainant, this is not a required action. Determination of a review without any consultation with the aggrieved party is unlikely, in our view, to promote satisfaction with the eventual outcome.

15. <u>Does *Towards Healing* assist in the prevention of child sexual abuse within institutions of the Catholic Church?</u>

No submissions are made on this point.

Thank you for the opportunity to respond to this Issues Paper. Should you require any further information on any of the matters addressed in our submission, please contact us.

Yours sincerely

WARREN STRANGE
Principal Solicitor