

Taking the Church to Court

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Over the past week there has been much media coverage and discussion about the 'Ellis defence' and whether dioceses and congregations are still using or threatening it to force abuse survivors away from taking their claims to Court.

I have spoken often about the Ellis defence which was at the centre of a Royal Commission public hearing last year and is the subject of a major law reform recommendation the TJHC has made to the Royal Commission with the endorsement of the Church leadership.

Just by way of background, what has become known as the Ellis defence involves a Church relying on the legal proposition that an unincorporated association cannot be sued in its own name because it does not exist as a legal entity.

In the case of John Ellis, who was an altar boy who suffered sexual abuse during the 1970s, when he tried to sue the church over the abuse, the courts rejected the claim, ruling that the Church wasn't a legal entity, and it wasn't liable for abuse committed by a priest.

This has led to the headline grabbing claim 'the Church can't be sued'.

The facts are that Church entities can be sued, often are, but what needs to be identified is the correct entity to respond to the proceedings.

This will often require the willingness on the part of the church authority in the frame letting the lawyers for the victim know who to file their claim against.

This is where the TJHC recommendation on reforms of the civil litigation comes in.

Last year, in two submissions to the Royal Commission, we made the recommendation that legislation should be introduced to require any unincorporated institutions such as a dioceses, congregation, sports or swimming clubs being sued for child sexual abuse identify an entity, what's known as a Proper Defendant, to be sued.

Some congregations and diocese, not all, are on the record, acknowledging the difficulties victims face in in taking a sex abuse claim to Court. Some are also on the record supporting the policy position that a victim of child sexual abuse by a Church official ought to be able to bring a claim against the Church. The Archdioceses of Melbourne, Sydney and Brisbane included.

When we made our recommendation on a proper defendant we also said legislation should be introduced to ensure all unincorporated associations toe the line. This provides equal opportunity for all survivors of child sexual regardless of who abused them or where it happened.