

# Legislating to end the Ellis defence

By Attorney General Mark Speakman SC

On a rainy June Sunday in Queens Square, I announced that the NSW Government would be overhauling civil litigation laws in response to the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.

Co-announcing this set of reforms with me was an inspirational advocate, John Ellis. For years, John had been championing the cause of those who, like him, had been scarred by childhood sexual abuse. His advocacy before, during and after the royal commission was instrumental in bringing to light the changes that needed to be made – and in moving governments to implement them.

John understood all too well the legal barriers confronting survivors seeking compensation and accountability for their trauma. He himself had brought proceedings with that objective.

In his proceedings, John contended that legal responsibility for his sexual abuse by a priest (who was deceased by the time proceedings were brought) extended to the archbishop of Sydney, among other things as ‘head of the unincorporated association known as the Catholic Archdiocese of Sydney’.<sup>1</sup> Chief among the barriers to a successful claim was a formidable argument that the limitation period should not be extended because the archbishop could not be held liable for torts that, loosely speaking, were said to have been committed by an unincorporated association. If this aspect of John’s claim were to succeed, he needed to overcome this argument.

He did not. A Supreme Court judge held that the Catholic Archdiocese of Sydney was not a sufficiently identified class of persons for whose torts the archbishop could be found liable and refused to extend the limitation period in respect of the claim against the archbishop.<sup>2</sup>

Nor was John able to convince the Court



of Appeal otherwise. In a seminal judgment, published on 24 May 2007, the Court of Appeal sided with the first instance judge on this point. The court held that the Archdiocese of Sydney, being an unincorporated association, could not be sued and that a representative order was unavailable to remedy this problem.<sup>3</sup>

The Court of Appeal also allowed an appeal against orders of the first instance judge allowing John’s case to proceed against the trustees of the church for the Archdiocese of Sydney.<sup>4</sup> In the Court of Appeal’s view, the mere fact that the trustees held property for and on behalf of the church did not mean that the trustees could be held liable for the tortious conduct of John’s abuser, especially because the trustees had no power of appointment or oversight of priests.<sup>5</sup>

John’s claim was dismissed.

For years, the ‘Ellis defence’ – a somewhat protean term later given to describe variously some or all of the Court of Appeal’s reasons for dismissing John’s claims against both the Archdiocese of Sydney and the trustees – cast its shadow over potential claims of child sexual abuse survivors against the Catholic Church.

That is, until the Royal Commission into Institutional Responses to Child Sexual Abuse was convened.

The Royal Commission shone a coruscating spotlight on shameful truths that for

too long had lived in the dark. It brought to light the incredible courage and perseverance of child sexual abuse survivors. It drew attention to the individual and institutional failures that had contributed to those survivors’ of trauma. And it showed how the law – ostensibly a protector of the vulnerable – had undermined attempts to remedy the effects of the abuse.

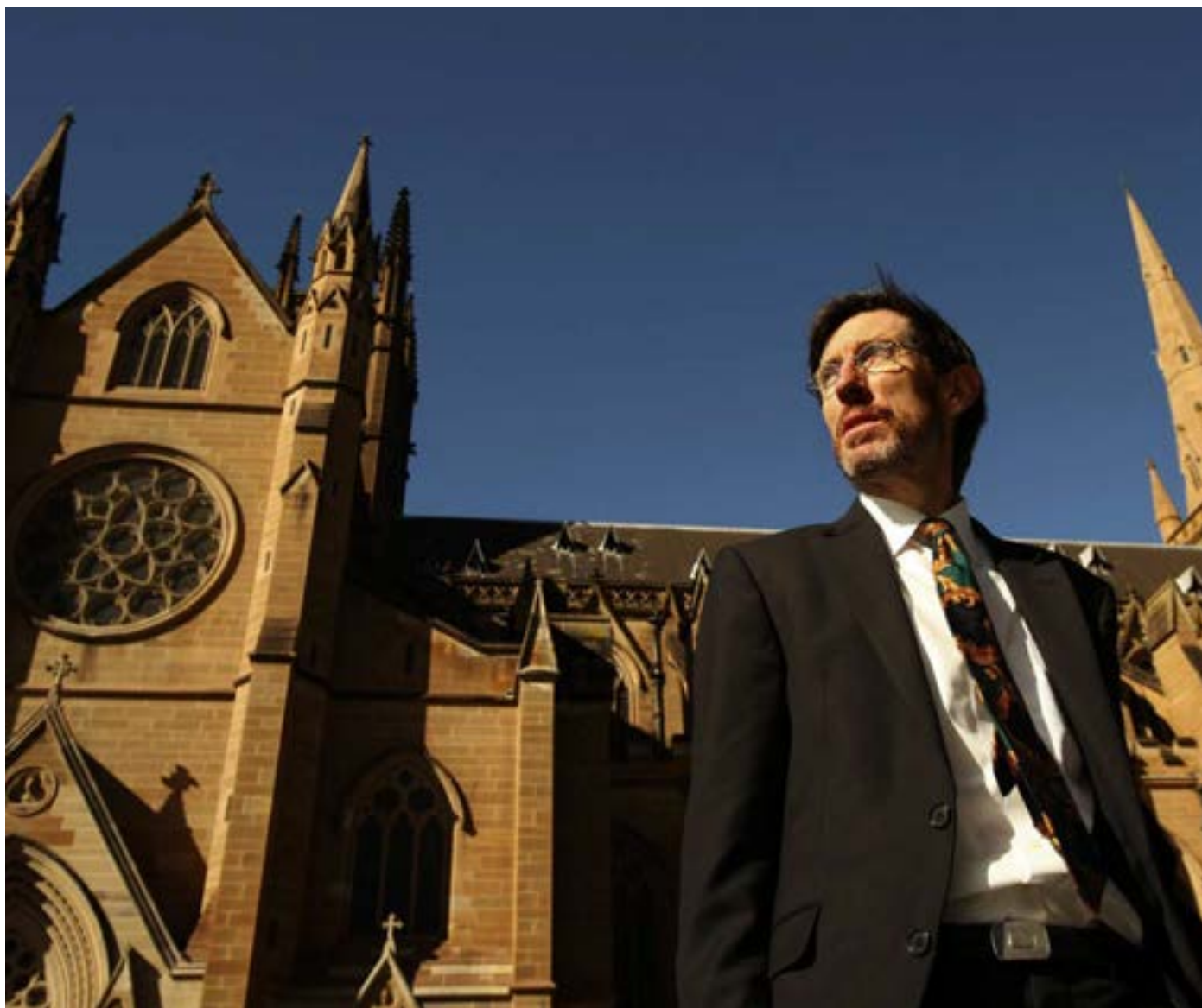
Notably, the Ellis defence was identified by the royal commission as being one legal outcome in need of change. According to the royal commission, ‘the difficulties for survivors in identifying a correct defendant when they are commencing litigation against unincorporated religious bodies, or other bodies where the assets are held in trust, should be addressed’.<sup>6</sup> But the law giving rise to this set of difficulties was by no means the only example of a civil law that was recognised as discordant with the realities of child sexual abuse.

Rather, the royal commission identified a number of ways the law had operated against child sexual abuse survivors seeking compensation, including through an overly narrow conception of vicarious liability that did not clearly extend to torts committed by volunteers or religious officers, and through the absence of an appropriately strict duty of care to prevent child abuse.

In its proposed legislative response to the royal commission, the NSW Government has been determined to implement reforms directed at excising this tendency from the law.

These reforms include:

- codifying and extending the prospective vicarious liability of institutions for employees to cover non-employees, like volunteers or religious officers, who have taken advantage of their position to perpetrate child abuse;
- imposing a new statutory duty of care on



John Ellis, who championed the cause of those who had been scarred by childhood sexual abuse. Photo: Steven Siewert / Fairfaxphotos

all institutions that exercise care, supervision or authority over children, to prevent child abuse (such that an institution will be liable for child abuse, prospectively, unless the institution can prove it took reasonable precautions to prevent the abuse); and perhaps most notably,

- introducing a ‘proper defendant’ law to prevent institutions relying on the Ellis defence. This law will mean that courts will have the power to appoint trustees to be sued if the sued institution fails to nominate an entity with assets as a proper defendant and to allow the assets of an associated trust to be used to satisfy the claim. Importantly, this law will apply retrospectively and prospectively.

The National Redress Scheme sits alongside these reforms, as a less onerous means for survivors to seek justice without the stress and costs of navigating the courts. NSW was the first state to enact legislation referring powers to the Commonwealth to implement

the scheme. The scheme, which began on 1 July 2018, includes a payment of up to \$150,000 in recognition of a survivor’s hurt and injury, a direct personal response from the institution involved and, in NSW, access to unlimited counselling and psychological support.

These reforms can never undo the hurt and suffering of survivors. Nor do they relieve the government – an institution that itself failed to protect children in its care – of the need to do significantly more work in this area. But these laws will improve access to recognition, or even justice, for those who have been scarred by sexual abuse.

In the words of John Ellis himself, in a letter to the *Newcastle Herald*:<sup>7</sup>

As the Ellis defence is confined to the annals of legal history, we can look forward to a society in which child protection and accountability of those who take the sacred trust of caring for children are given their rightful prominence.

## END NOTES

- <sup>1</sup> *Ellis v Pell* [2006] NSWSC 109 at [5].
- <sup>2</sup> *Ibid* [55]–[56].
- <sup>3</sup> *Trustees of the Roman Catholic Church v Ellis* [2007] NSWCA 117 at [47], [61], [93].
- <sup>4</sup> *Ibid* [151].
- <sup>5</sup> *Ibid* [140]–[141], [149].
- <sup>6</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report*, 2015, p 58, available at [https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final\\_report\\_-\\_redress\\_and\\_civil\\_litigation.pdf](https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final_report_-_redress_and_civil_litigation.pdf).
- <sup>7</sup> *Newcastle Herald*, Letters to the editor June 11 2018, 2018, available online at <https://www.theherald.com.au/story/5457205/train-between-cities-is-anything-but-pretty/>.