

31 October 2018

Ms Josine Wynberg  
Director, Legal Policy  
Department of the Attorney-General and Justice  
GPO Box 1722  
DARWIN NT 0801

E: Policy.AGD@nt.gov.au

Dear Ms Wynberg,

**Options Paper: Options for the implementation in the Northern Territory of the civil litigation reforms recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse**

CREATE Foundation welcomes the opportunity to provide feedback to the Department of the Attorney-General and Justice on the current Options Paper. CREATE acts as key advocate for the more than 48 000 children and young people with an out-of-home care experience and draws the attention to the need for individual and systemic responses to improve their life outcomes.

CREATE's mission is to create a better life for children and young people in care. To do this we:

- **Connect** children and young people to each other, CREATE and their community to
- **Empower** children and young people to build self-confidence, self-esteem, and skills that enable them to have a voice and be heard to
- **Change** the care system, in consultation with children and young people, through advocacy to improve policies, practices and services, and increase community awareness.

CREATE has previously submitted a response to the *Royal Commission into Institutional Responses to Child Sexual Abuse Consultation Paper: Redress and Civil Litigation* whereby we detailed our views towards identifying a proper defendant and approaches to accessing civil litigation. These remain largely unchanged. CREATE acknowledges the difficulties in pursuing civil litigation in relation to abuse while in care and maintains the view that vulnerable children and young people should be entitled to civil litigation if they have been abused while in care. More importantly however, legislative changes should ensure not only the accessibility of civil litigation mechanisms, but that children and young people are adequately supported to access the schemes developed.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Jacqui Reed".

Jacqui Reed  
**Chief Executive Officer**  
**CREATE Foundation**

30 October 2018

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Dear Mr Bradshaw

### **Civil Litigation Reforms – Royal Commission into Institutional Responses to Child Sex Abuse**

Law Society Northern Territory (Society) welcomes the opportunity to provide comments on the Options for implementation of the civil litigation reforms recommended by the Royal Commission into Institutional Responses to Child Sex Abuse (Royal Commission).

The Society notes the fundamental importance of ensuring that survivors of institutional child abuse are afforded meaningful opportunities to access justice and, most importantly, choice in how to pursue outcomes that are appropriate and important to them. Implementation of the reforms recommended by the Royal Commission regarding the liability of institutions; the identification of a proper defendant; and requiring institutions to have relevant insurance cover will significantly assist survivors who are seeking to establish civil claims against institutions and their officials, and will facilitate the disposition of those claims on their merits.

The Society supports reforms that seek to remove barriers currently preventing survivors of child abuse from receiving justice by way of legal redress. The Society's preferred approach would be for the Northern Territory to opt into the national redress scheme.

#### **Non-delegable duty**

1. What are your views on adopting a statutory duty of care that incorporates a non-delegable element and a reverse onus provision, as opposed to the two distinct duties recommended by the Royal Commission?

In this respect, the Society considers the NSW approach to be preferable as it provides for not only a non-delegable duty but also extends the provisions for vicariously liability. The recently passed *Civil Liability (Organisational Child Abuse Liability) Act 2018* (the NSW Act) imposes a statutory duty on

organisations that exercise care, supervision or authority over children to prevent child abuse being perpetrated by individuals associated with the organisation. As recommended by the Royal Commission, the onus of proof is reversed so that the organisation must establish that it took reasonable precautions to prevent abuse. Secondly, the NSW Act codifies the common law approach to vicarious liability of organisations for child abuse perpetrated by employees. It extends this vicarious liability to include child abuse perpetrated by non-employees whose relationship with the organisation is akin to employment. This implements the intent of the Royal Commission's recommendation to impose a non-delegable duty on certain institutions. Thirdly, the NSW Act implements the Royal Commission's recommendation to enable survivors to identify a proper defendant to sue.

The Society is of the view that the Proposed Duty should extend to any institution that exercises care, control, authority or supervision over children in any capacity whatsoever. The Proposed Duty should be imposed on high risk institutions (whether for profit or not), for example, churches and residential care as outlined by the Royal Commission on page 492. Further, the Society is of the view that the Proposed Duty be applied to all institutions that are responsible for children regardless of their size and regardless of whether that is their primary function. The Society bases this view on the variety of not for profit organisations that provide services to children – this includes very large organisations as well as the smaller organisations. Further organisations may provide a variety of services, that include but are not limited to services for children for example private doctor's surgeries.

The Society supports the recommendation to reverse the onus of proof on all institutions.

2. What are your views on the proposal to extend the Proposed Duty to related physical and psychological abuse?

The Society support the extension of the Proposed Duty to physical and psychological abuse. It is evident that sexual abuse often results in psychological harm as well as physical harm. These terms should be broadly defined and the legislation should not provide for exhaustive examples.

The World Health Organization defines child abuse and neglect as:

All forms of physical and/or emotional ill-treatment, sexual abuse, neglect or negligent treatment or commercial or other exploitation, resulting in actual or potential harm to the child's health, survival, development or dignity in the context of a relationship of responsibility, trust or power<sup>1</sup>.

Definitions of child abuse and neglect can include adults, young people and older children as the perpetrators of the abuse. It is commonly stated in legislation that the term 'child abuse and neglect' refers to behaviours and treatment that result in the *actual* and/or *likelihood* of harm to the child or young person.

3. What financial or associated impacts would the Proposed Duty have on Territory institutions, such as the cost and availability of insurance and the ability to provide services to children?

The Society cannot specifically comment on these potential impacts on institutions or unincorporated associations. Implementing the Royal Commission's recommendations will obviously impose higher standards on institutions providing services to children. Resourcing demands around the adoption of improved practices and accountability, and higher insurance premiums will likely follow. There is an opportunity for the government to support this additional cost burden of organisations through the

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<sup>1</sup> Preventing Child Maltreatment: A guide to taking action and generating evidence, p 9 accessed [http://apps.who.int/iris/bitstream/handle/10665/43499/9241594365\\_eng.pdf;jsessionid=1BBC1D43AE662FE8CF47528A616CCC6C?sequence=1](http://apps.who.int/iris/bitstream/handle/10665/43499/9241594365_eng.pdf;jsessionid=1BBC1D43AE662FE8CF47528A616CCC6C?sequence=1)

funding it provides to the NGO sector. This would be appropriate as a recognition that improved practices and accountability of organisations working with children are beneficial for the community as a whole as a measure to reduce the risk of abuse of children. However weight needs to be given to the to the significant benefits of the legislation - as the Royal Commission noted, '*legal duties are important for prescribing the standard that the community requires of institutions.*'<sup>2</sup>

4. Are there any organisations to which the Proposed Duty should not apply? If so, why?

The Society supports the Proposed Duty applying to all institutions.

#### **Association between perpetrator and institution**

5. Should there be any limitation on who may be considered an associate of an institution?

The Society agrees with the recommendation of the Royal Commission to all persons associated with an institution should be included. This should include officer holders, agents, employees, volunteers, contractors and subcontractors. The Society submits that the definition of association should not be prescriptively defined in the legislation.

The extent of the scope as to how far this would extend could be based on a reasonable person test. Would a reasonable person assume that the person was part of, or associated with the institution?

The Canadian case of *Doe v Bennett*<sup>3</sup> recognised the liability absent of an employment relationship where the relationship was *akin* to employment. This is also the approach adopted in the NSW Act.

6. Should liability extend to acts of abuse committed by children under the care, control or supervision of institutions? Why or why not?

The Society considers that liability should extend to acts of abuse committed by children under the care, control or supervision of an institution. Institutions have a duty of care to protect all children and provide a safe environment for the placement and management of children. This includes a positive duty to effectively manage children with complex behaviours. Institutions would still have a defence if the court found they took all reasonable steps to prevent the abuse.

#### **Association between abuse and institution**

7. How closely associated should an institution and a perpetrator need to be to result in potential liability? For example, should an institution be liable for abuse committed by an employee or volunteer in their own home, against a child met through the institution?

The common law in Wales, England and Canada gives rise to vicarious liability where the 'close connection' test is met even if the act in question is a criminal offence. In England, Canada, Ireland, Wales and the United States, the Roman Catholic Church has been found liable through its trustees for criminal misconduct of priests or teachers.

The Society does not consider the location of the offending to be the relevant test. Employers can already be held vicariously liable for out-of-hours conduct of their employees, if the employer created the conditions allowing the conduct to occur<sup>4</sup>.

The common law continues to evolve in this area. In a recent decision from the United Kingdom<sup>5</sup>, the Court of Appeal found the close connection test was satisfied and that the employer was vicariously liable for the tortious acts committed by an employee at home as the act was within the field of

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<sup>2</sup> Royal Commission, *Redress and Civil Litigation Report* (2015), p.56

<sup>3</sup> *Doe v Bennett & Ors* [2004] ISCR 436

<sup>4</sup> *South Pacific Resort Hotels Pty Ltd v Trainor* [2005] FCAFC 130

<sup>5</sup> *Wm Morrisons Supermarkets Plc v Various Claimants* [2018] EWCA Civ 2339

activities assigned to him. The act was deemed to be 'a seamless and continuing series of events' and there was a sufficient connection between the position in which he was employed and his wrongful conduct. The employer was found vicariously liable even though the employer had done as much as it reasonably could to prevent the act occurring.

Institutions should have a positive duty to prevent grooming which may lead to a scenario such as the one mentioned in question seven above. Institutions that create or enhance the risk of wrongful conduct should be held responsible.

In *Prince Alfred College Incorporated v ADC* [2016] HCA 37 their Honours French CJ, Kiefel, Bell, Keane and Nettle JJ stated the relevant approach as:

*Consequently, in cases of this kind, the relevant approach is to consider any special role that the employer has assigned to the employee and the position which the employee is placed vis-à-vis the victim. In determining whether the apparent performance of such a role may be said to give the 'occasion' for the wrongful act, particular features may be taken into account. They include authority, power, trust, control and the ability to achieve intimacy with the victim. The latter feature may be especially important. Where, in such circumstances, the employee takes advantage of his or her position with respect to the victim, that may suffice to determine that the wrongful act should be regarded in the course or scope of employment and as such render the employer vicariously liable.*

Thus the test as outlined above would be whether the institution created the occasion for the wrongful act without reference to the particular relationship created by the institution between perpetrator and victim. The NSW Act broadens the common law approach by providing that an institution will be vicariously liable if the perpetrator is in a position akin to an employee. This approach is consistent with the common law in other jurisdictions, including Canada. The offence is one of strict liability.

### **Reasonable steps**

8. What would be the benefit and/or implications of defining the term 'reasonable steps' in legislation?

The Society does not support defining the term 'reasonable steps' in legislation. What is reasonable will depend on the circumstances of each case. The Society is of the view that the legislation should provide 'all reasonable steps' not just reasonable steps to make it clear that an institution must prove that it did everything in its capacity to prevent abuse. Integrating a culture of child protection in the workplace is important to deter abuse in the long term.

The Society recommends that if the government adopts the NSW approach to vicarious liability, that it adopts the Royal Commission's recommendation of strict liability.

9. If the recommendation is adopted, would it be useful to develop guidelines or industry standards about what is considered to be 'reasonable'?

The Society is of the view that it would be beneficial to have guidelines as to what reasonable steps might include. The development of guidelines will be problematic if they are used as a way to avoid liability rather than to protect children. Adherence to any guidelines or industry standards of itself should not constitute 'reasonable steps'. Guidelines should be used to improve practices and to raise awareness through training and education.

10. Would it be appropriate for a definition of reasonable steps to be graduated according to the type of service provided? If so, on what basis?

The Society does not support defining 'reasonable steps'. The court would be able to consider the relevant organisation and the type of service provided. An inflexible definition to lead to unjust

outcomes. The Society suggests it would be too difficult to develop any appropriate graduated scheme of 'reasonable steps' that could accommodate the broad range of institutions or organisations providing services.

11. How could it be ensured that 'reasonable steps' were actually effective to improve the safety of children?

The Society does not have a view on the appropriate measures to assess the effectiveness of 'reasonable steps'.

### **Proper defendant**

12. Should the Royal Commissions 'proper defendant' recommendation be adopted?

The Society supports the adoption of the Royal Commission's recommendation of requiring unincorporated organisations with associated property trusts to nominate a 'proper defendant'. In the case where no nomination is made or there aren't sufficient assets to meet the liability arising from the proceedings, the alternative would be to sue the trustees of the associated property trust. As with the recently passed legislation in NSW, the Society recommends these provision apply retrospectively<sup>6</sup>.

13. How would the proposed reforms impact your organisation?

The Society would not be impacted and cannot comment.

14. Should a different model / approach be adopted? If so, what should it look like?

The Society supports the adoption of elements of the NSW Act which provides for the court to appoint a proper defendant in certain circumstances.

### **Controls for defendant nomination**

15. Should the consent of the nominee be required before it can be named a proper defendant?

The Society does not support the recommendation that consent of the nominee be required without a further safeguard such as allowing for the appointment of a proper defendant by the court regardless of consent or a process such as that outlined in the Western Australian legislation referred to in question 24 below.

16. Should nomination be limited by the nature of association between the institution and the nominee?

Not in the case of nominee giving consent, if appointment by court then there should be a requirement that the Court should be satisfied of a sufficient nexus in accordance with the requirements under the WA model in order for the Governor to make the regulation.

17. How can victims obtain access to justice where consent of a nominee is not provided to name an alternative proper defendant?

This is a concern for the Society and the reason that it doesn't support this requirement without further safeguards as detailed in the response to question 15 above.

18. Are there any other controls that you think are necessary?

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<sup>6</sup> *Civil Liability (Organisational Child Abuse Liability) Act 2018*

Again refer to question 15 above.

### **All Institutions**

19. Should recommendation 94 apply to all property trusts (including private trusts), or to statutory trusts only?

The Society supports the application to all property trusts. Institutions with perpetual succession and property ownership should bear the burden of succession to meet claims of child abuse. The Society recommends this recommendation should also apply retrospectively.

20. Do the difficulties in identifying a proper defendant arise in respect of non-religious organisations?

The Society suggests that these difficulties may arise in respect of non-religious organisations such as some independent schools or other unincorporated organisations providing services without any connection to a religious institution.

21. Should the recommendation apply only to religious organisations?

The Society would not support the recommendation only applying to religious organisations. The Society considers that it is important that a victim shouldn't have to face these issues just because the abuse occurred through a non-religious institution.

### **Association with property trust**

22. What limits, if any, should there be on the association between an institution and an associated trust?

None other than the general nexus of ownership/control discussed above. Organisations routinely take advantage of different legal structures such as incorporation, trust, etc. to manage their affairs, particularly in relation to asset protection and taxation consequences. A family trust that provides services for children is no different in that regard to a religious institution financially supported by a trust.

### **Incorporation**

23. Would it be reasonable to require every institution working with children to incorporate, or to have an incorporated 'proper defendant'? What would the impacts of this be?

The Society broadly supports the idea of mandating that institutions which exercise care, control or authority over children be incorporated. However, consideration would be needed to ensure that any historic liability could transfer when organisations or agencies change hands or simply transfer accreditation to another agency. Further consideration would need to be given to the consequences that ordinarily flow if an incorporated organisation fails to meet its obligations under the *Associations Act* and steps are taken to de-register the incorporated association.

Religious organisations are typically unincorporated associations which cannot sue or be sued<sup>7</sup>. Statutory corporations are created for the express purpose of holding property on trust for such religious entities. Historically the development of such corporations to hold the Church's assets and to have perpetual succession was to avoid the problem that arose with title to goods and land when Bishops and Archbishops passed away. This approach now appears archaic and there is no reason why the church could not be incorporated.

24. Should legislation similar to that proposed by Western Australia be adopted in the Territory? If so, what modifications, if any would you suggest and why?

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<sup>7</sup> See for example, *J Ellis v Pell and the Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (2006) NSWSC 109

The adoption of the WA provisions including a provision allowing for the Governor, on recommendation of the relevant minister, to make regulations naming a current institution as the relevant successor of an earlier institution where there is no current institution that is substantially the same as the institution at the time of the accrual of the cause of action would, if applied retrospectively assist in overcoming some of the burdens faced by victims unable to identify a proper defendant.

The NSW Act has a similar provision regarding the nomination of a proper defendant only it leaves that role to the court. Further, if it is not the case to seek to mandate incorporation of unincorporated institutions, being able to commence proceedings in the name of a current office holder would be beneficial and prevent unincorporated institutions defeating the purpose of the proper defendant mechanism by simply refusing to respond to proceedings relying on their inability to be sued.

Yours faithfully



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2 November 2018

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By email

Dear Director

**Options Paper, September 2018: Options for the implementation in the NT of the civil litigation reforms recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse (the 'Royal Commission')**

The Central Australian Women's Legal Service (**CAWLS**) is a trauma informed community legal service for all women in Central Australia and Barkly regions. CAWLS provides advice, representation and community legal education to all women with a strong focus on family law and family violence matters, and, related or stand-alone civil law issues that include sexual assault, child protection, housing and tenancy, debt and compensation for victims. Under the Women's Safety Package, CAWLS has established a Specialised Domestic Violence Unit to provide specialised support services for those women at risk of or experiencing domestic and family violence.

CAWLS is highly supportive of the NT introducing reforms to strengthen the position of survivors of child abuse to bring claims against institutions and correspondingly promote more robust institutional standards to prevent child abuse from occurring. As CAWLS does not work in the area of institutional child abuse claims, personal injury or negligence, CAWLS comments in response to the Option Paper are general in nature.

***Proposed duty of care***

CAWLS supports the adoption of the Victorian approach which:

- establishes a duty of care enabling certain organisations to be held liable in negligence for child abuse committed by individuals associated with the organisation;
- incorporates aspects of a non-delegable duty of care by providing that organisations will not be able to avoid liability by delegating their care, supervision or authority of children to other organisations; and

- which presumes a breach of duty unless the relevant organisation proves it took reasonable precautions to prevent the abuse.

CAWLS supports the extension of the proposed duty to related physical and psychological abuse. CAWLS agrees with the Department of the Attorney-General and Justice's (the **Department**) position that there is no sound policy reason to confine the proposed reforms to sexual abuse only given that physical abuse of children can be highly damaging and is often coupled with sexual abuse, and psychological abuse arising from sexual or physical abuse is also generally inseparable from the other forms of abuse.

CAWLS is not in a position to comment on the financial implications for organisations, such as the cost and availability of insurance and capacity to continue to provide services to children. However, it is important that such implications are carefully assessed particularly in relation to volunteer and other not-for-profit organisations that provide services to children and whether such insurance costs are likely to be prohibitive.

#### ***Reasonable steps***

CAWLS supports the development of a non-exhaustive definition of 'reasonable steps' in order to provide guidance to organisations in meeting the requisite standards. The definitions should be non-exhaustive in order to take into account the evolving nature of this area and the diversity of organisations that such standards will apply to. There could be broad definitions in the legislation alongside more detailed guidelines/standards which could be graduated according to the type of service provided. This should be complemented by subsidised training for organisations and staff on child safe organisational practice.

#### ***Identifying a proper defendant***

CAWLS supports the adoption of the Royal Commission's recommendations in relation to identifying a 'proper defendant'. That is, unless the institution nominates a proper defendant to sue that has sufficient assets to meet any liability arising from a claim:

- the property trust is a proper defendant to the litigation;
- any liability of the institution with which the property trust is associated that arises from the proceedings can be met from the assets of the trust.

CAWLS considers that this is a very important reform in order to overcome the decision in *Trustees of the Roman Catholic Church v Ellis and Anor* [2007] NSWCA 117 which enabled religious organisations to circumvent liability leading to profound injustice for survivors of child sexual abuse.

While incorporation of institutions working with children enhances the ability of claimants to bring legal action against those incorporated entities and reduces complexity in this area, the Department should assess whether this would hinder the capacity of organisations to continue to provide services to children, particularly for small, volunteer and not for profit organisations.

CAWLS thanks you for the opportunity to comment on this important topic and we would be willing to be involved in any further consultations with respect to its development.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'Janet Taylor', with a large, stylized initial 'J' and a long, sweeping underline.

**Janet Taylor**

Managing Principal Solicitor



**North Australian Aboriginal Justice Agency**

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Options for the implementation in the Northern Territory of civil litigation reforms recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse.

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**North Australian Aboriginal Justice Agency  
submission**

**November 2018**

## **About NAAJA**

NAAJA provides high quality, culturally appropriate legal aid services to Aboriginal people in the Northern Territory. NAAJA was formed in February 2006, bringing together the Aboriginal Legal Services in Darwin (North Australian Aboriginal Legal Aid Service), Katherine (Katherine Regional Aboriginal Legal Aid Service) and Nhulunbuy (Miwatj Aboriginal Legal Service). In 2018 NAAJA commenced legal and justice agency services for Central Australia (Central Australian Aboriginal Legal Aid Services Inc). NAAJA and its earlier bodies have been advocating for the rights of Aboriginal people in the Northern Territory since 1974.

NAAJA serves a positive role contributing to policy and law reform in areas impacting on Aboriginal peoples' legal rights and access to justice. NAAJA travels to remote communities across the Northern Territory to provide legal advice and consult with relevant groups to inform submissions.

## **Background to the submission**

As a legal and justice agency service in the Northern Territory our people are familiar with the extent, breadth and impact of sexual abuse including historic acts and the connection to the roles of institutions. This knowledge is from across our people and at all levels. It is the experiences of individuals, families and social networks and also the experience of many clients. The impact extends across generations. The sources of information are the stories that are told and also information from court proceedings and services in the prison environment. The Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) was an important proceeding to explore at a Royal Commission level these stories as evidence and as part of a formal process of exploration and inquiry.

In the NT, the Royal Commission referred to 'Case Study 17: the response of the Australian Indigenous Ministries, the Australian and Northern Territory governments and The Northern Territory Police force and prosecuting authorities to allegations of child sexual abuse which occurred at the Retta Dixon Home,' the Commission heard evidence from 10 former residents about the sexual and physical abuse they suffered while living at the home between 1946 and 1980. In 1947 the Australian Government granted the Retta Dixon Home a licence to operate as an 'institution' for the 'maintenance, custody and care of aboriginal and half-caste children.' The Commission heard evidence of the impact the abuse had on the children's loss of culture and Aboriginal identity. Many children who lived at the home during that time now identify as members of the Stolen Generations.

Many of the Commission's case studies revealed that institutions did not listen to children or engage with them about their safety. In the Retta Dixon case study it was found that the superintendent of the home did not believe victims, did nothing, or caned them for 'lying' if they did complain about abuse. It was found that children were powerless in these institutions and many children did not disclose abuse at the time it occurred because they did not understand it was wrong or were too ashamed or frightened to tell.

This is an example of one of the references of the Northern Territory experience identified in the Royal Commission.

## Discussion questions

**1. What are your views on adopting a statutory duty of care that incorporates a non-delegable element and a reverse onus provision, as opposed to the two distinct duties recommended by the Royal Commission?**

We recommend adopting a statutory duty of care that incorporates a non-delegable element and a reverse onus provision, in line with the approach adopted within the Victorian legislation.

Section 91(2) of the *Wrongs Act 1958* (Vic) imposes a duty of care on organisations to take the care that is reasonable to prevent the abuse of a child by an individual associated with the relevant organisation. Sections 90(1)(c) and (d) have the effect that this duty cannot be delegated, and section 90(3) provides for a reverse onus of proof. We support analogous provisions being introduced in NT law and consider such an approach would be consistent with the Royal Commission recommendations.

**2. What are your views on the proposal to extend the Proposed Duty to related physical and psychological abuse?**

We agree that the Proposed Duty should be extended to related physical and psychological abuse. Both physical and psychological abuse are closely connected to sexual abuse.

Evidence of this is clearly outlined on the Australian Government Institute of Family Studies website, in the paper titled 'The impact of sexual abuse on mental health.'<sup>1</sup> This paper provides that there is a strong relationship between sexual abuse and adverse mental health consequences for many victims of child sexual abuse. The paper refers to a variety of twin studies completed over the last decade 'which have consistently revealed a link between child sexual abuse and adverse mental health and related outcomes for survivors.' One study of 1,411 twin pairs concluded 'significant odds ratios for a range of psychiatric disorders in sexually abused women,' and an Australian twin study with 5,995 pairs also found 'significant odds ratios for child sexual abuse and major depression, panic disorder, and alcohol dependence.' In another Australian study involving 1,991 pairs it was found that 'in twin pairs where one had been sexually abused and the other not, the abused twins had significantly higher rates of major depression, attempted suicide, conduct disorder, alcohol dependence, nicotine dependence, social anxiety, rape as an adult

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<sup>1</sup> See <https://aifs.gov.au/cfca/publications/long-term-effects-child-sexual-abuse/impact-child-sexual-abuse-mental-health>

and divorce.’ Negative mental health effects have been consistently associated in research into child sexual abuse.

Any legal test reflecting the concept of ‘related’ insofar as the connection between physical/psychological abuse and the abuse committed against the child ought to be broad and clearly stated (such as establishing the onus of proof). Without clear, broad provisions, there is the potential for legal proceedings not to give due recognition to the physical/psychological abuse experienced and this will lead to ongoing harm including intergenerational harm amongst families (which has adverse effects across a range of social indicators).

**3. *What financial or associated impacts would the Proposed Duty have on Territory institutions, such as the cost and availability of insurance and the ability to provide services to children?***

People in the NT have suffered such immense consequences as a result of institutionalised sexual abuse. The paramount objective of the proposed legislation is to protect NT children and safeguard them from harm. We do not believe it reasonable for factors such as the cost and availability of insurance to distract from achieving the objective. Any financial and insurance related issues can and should be dealt with appropriately and with leadership from within government.

With respect to historic abuse, it is possible that financial and cost-related considerations (that may adversely impact Territory institutions) be factored into statutory compensation schemes met by the Commonwealth and Territory governments. Currently, victims of crime statutory schemes provide funds administered by the Territory where the Territory seeks to recover (and in many cases does) from offenders. These same principles should be extended to institutions in civil claims.

With respect to managing the financial impact related to more recent, or future, claims, if the costs of insurance schemes increase because of changes to law that leads to increased claims, then governments ought to invest public funds to help balance any related consequences of that impact. Investments can include increased regulation to ensure the levels of abuse decreases, similar to workplace health laws and how over many decades the resources and interventions of workplace systems including training, compliance, reporting requirements, inspections and other practices for a more robust system. This is not to say that public expenditure ought to offset the whole costs, but a balance should be found, and costs to institutions should not be a factor in how governments move forward with this important issue.

**4. *Are there any organisations to which the Proposed Duty should not apply? If so, why?***

We are of the view that the scope of organisations to which the Proposed Duty should apply ought to be broad and all-encompassing, consistent with recommendation 91 of the Royal Commission.

**5. *Should there be any limitation on who may be considered an associate of an institution?***

We are of the view that there should be a reasonable connection (or similar wording drawing on legislative practice) in order to be considered an associate of an institution. This may not cover all people who have even a remote connection to an institution, but will help provide clarity to enable people with oversight in institutions to understand and exercise their responsibilities.

**6. *Should liability extend to acts of abuse committed by children under the care, control or supervision of institutions? Why or why not?***

Acts of abuse committed by children should not sit within the same legal framework as that which applies to abuse committed by adults. This extends from the established practice internationally that a separate criminal justice system should apply for youth in recognition of their inexperience and immaturity and the circumstances including stage of brain development in their adolescence (United Nations (1985:2) Standard Minimum Rules for the Administration of Juvenile Justice).

As follows, questions concerning the statutory liability of institutions where children in their care, control or supervision commit abuse should also be considered separate to the statutory liability of institutions concerning abuse committed by adults. This could be with specific provisions or in separate legislation.

If liability is to be extended in this context, then clear guidelines ought to be established to determine the reasonable steps an institution should be expected to perform to prevent abuse committed by a child. As children are at the stage of adolescence and have not matured into adulthood, and unless there are clear signals to indicate any concern to an adult with care, control or supervision of the child, it is nearly impossible to predict whether a child will commit an act of abuse. This is in contrast to the situation of adults where, for example, the past experiences or inability to obtain a working with children clearance reflects pro-active steps taken to prevent abuse.

Another factor to consider is the impact of treatment to the child.

If liability is established in this context, and unless there are clear guidelines to determine the reasonable steps to prevent abuse, there is the risk that a young person will be labelled and institutions will do what they can to discourage or place unnecessary boundaries around the young person that may adversely impact their treatment. This may include not accepting them into schools or situations where they do not have access to social and peer supports which adversely impacts their treatment.

**7. How closely associated should an institution and a perpetrator need to be to result in potential liability? For example, should an institution be liable for abuse committed by an employee or volunteer in their own home, against a child met through the institution?**

In our view, attention ought to be focused on the role and practice of an institution rather than the time and place that abuse was committed. We consider the following factors as relevant to the question of liability:

- Whether the employer had policies with respect to Codes of Conduct and expected behaviours of its employees;
- Whether the employer/institution had reporting systems in place;
- Whether the employer/institution had any knowledge of abuse occurring;
- Whether the employer/institution had knowledge of certain employees having criminal records or tendencies towards certain behaviours (such as abuse) that would place an onus on the employer/institution to take action to prevent that employee interacting with certain employees/clients/stakeholders (to prevent abuse).

**8. What would be the benefit and/or implications of defining the term 'reasonable steps' in legislation?**

The benefit of defining the term 'reasonable steps' is that it would ensure important factors are considered when determining whether or not the action in question was reasonable. However, we believe this same outcome can be achieved via the Victorian approach of not defining reasonableness and instead providing a non-exhaustive list of factors that must be considered when determining reasonableness. We recommend this approach as it allows courts to flexibly respond to the circumstances of each case, without unintentionally limiting its considerations. It is important that the list of factors for consideration be non-exhaustive, to enable any other relevant factors to be considered. It is also important that the factors for consideration are not written in such a way as to make it too difficult to establish liability, as this could dilute the purpose of the legislation.

**9. If the recommendation is adopted, would it be useful to develop guidelines or industry standards about what is considered to be 'reasonable'?**

We recommend developing industry standards to assist in the determination of what is considered 'reasonable.' All organisations in Victoria that provide services or facilities for children are required to comply with the Victorian Child Safe standards.

We support this approach and believes that developing such guidelines would only assist in determining whether or not actions are reasonable.

Importantly, by requiring organisations to comply with guidelines, the hope is that children will be further safeguarded from harm. These guidelines should have a training element to them, making it compulsory for organisations providing services to children to undertake regular, structured training on child safety. The government division WorkSafe has a rigorous auditing process and regularly undertakes safety inspections of workplaces. We recommend working towards a similar approach (although adapted for the context) for organisations providing services to children.

This may assist not only in developing more robust measures to address abuse at the more serious scale, but also across the many different types of abuse (some of which are common place), and to improve good practice such as education.

***10. Would it be appropriate for a definition of reasonable steps to be graduated according to the type of service provided? If so, on what basis?***

As we recommend not defining the term ‘reasonable steps’ in legislation, but instead recommend providing a non-exhaustive list of factors to consider to allow the courts to respond flexibly based on the specific circumstances of each case, there would be no need to graduate a definition according to the type of service provided. This is because the requisite standard will vary depending on the particular circumstances of each case.

***11. How could it be ensured that ‘reasonable steps’ were actually effective to improve the safety of children?***

We recommend the NT government engage with a research body as soon as possible, with the aim of determining the effectiveness of the legislation when it does come into effect. The research body should be involved from the outset to understand baseline measures, then assess the impact the legislation is having on improving the safety of children once it has been implemented. The scope of research can be broad, however, the key focus should be assessing the reasonable steps of institutions as a result of legislative reform. This will assist in developing an evidence-based approach.

***12. Should the Royal Commissions ‘proper defendant’ recommendation be adopted?***

We agree with the following recommendations of the Final Report:

*Recommendation 94*

State and territory governments should introduce legislation to provide that, where a survivor wishes to commence proceedings for damages in respect of institutional child sexual abuse where the institution is alleged to be an institution with which a property trust is associated, then unless the institution

nominates a proper defendant to sue that has sufficient assets to meet any liability arising from the proceedings: a. the property trust is a proper defendant to the litigation b. any liability of the institution with which the property trust is associated that arises from the proceedings can be met from the assets of the trust.

*Recommendation 94*

The Australian Government and state and territory governments should consider whether there are any unincorporated bodies that they fund directly or indirectly to provide children's services. If there are, they should consider requiring them to maintain insurance that covers their liability in respect of institutional child sexual abuse claims.

**13. How would the proposed reforms impact your organisation?**

We provide a civil legal service across the Northern Territory and reforms to improve access to justice for victims of abuse and against institutions may result in increased approaches to NAAJA by victims. Whilst funding for legal services is from the Commonwealth Attorney-General it is not subject to fluctuations in demand resulting from reforms at the Territory level. Whilst we could anticipate there may be an increased demand for services, it is difficult to assess or project what this might be.

**14. Should a different model / approach be adopted? If so, what should it look like?**

As per question 9, we recommend developing robust industry measures and guidelines for all organisations providing services to children. These measures could be developed through a consultation process to ensure it is adaptable and suitable for the specific circumstances and objectives of protecting children.

**15. Should the consent of the nominee be required before it can be named a proper defendant?**

We disagree that the consent of the nominee should be required before it can be named a proper defendant.

**16. Should nomination be limited by the nature of association between the institution and the nominee?**

We disagree that nomination should be limited by the nature of association between the institution and the nominee. This view is in line with Victorian legislation, as neither section 7 of the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic), nor section 92 of the *Wrongs Act 1958* (Vic) places any limitations on the nature of association between the institution and the nominee.

**17. How can victims obtain access to justice where consent of a nominee is not provided to name an alternative proper defendant?**

As above, we do not believe the consent of the nominee should be required before it can be named a proper defendant. Therefore, the issue of how victims can obtain access to justice where consent of a nominee is not provided would not be raised.

***18. Are there any other controls that you think are necessary?***

We recommend reflecting the Victorian legislation in relation to controls. Victorian legislation defines associated trust to mean ‘a trust which an NGO uses to conduct the NGO’s activities and which it controls.’ The primary controls in this legislation are the definitions of ‘control’ and ‘associated trust.’ Once it is accepted that a trust is an ‘associated trust’ (and accordingly that the NGO controls the trust), the Act does not impose further restrictions or controls.

***19. Should recommendation 94 apply to all property trusts (including private trusts), or to statutory trusts only?***

We do not believe recommendation 94 should be limited to statutory trusts only, and should instead apply to all property trusts, including private trusts. This is in line with Victorian legislation, which is not limited to statutory trusts only, and rather applies to all ‘associated trusts.’ ‘Associated trust’ is defined in section 3 to mean a ‘trust which an NGO uses to conduct the NGO’s activities and which it controls.’

***20. Do the difficulties in identifying a proper defendant arise in respect of non-religious organisations?***

We believe the difficulties in identifying a proper defendant may arise in respect on non-religious organisations – this would depend on the context.

***21. Should the recommendation apply only to religious organisations?***

We do not believe the recommendation should not be limited to religious institutions, and should instead apply to any institution.

***22. What limits, if any, should there be on the association between an institution and an associated trust?***

We do not believe there should be any limitations on the association between an institution and an associated trust. Limitations could render it difficult for survivors of institutionalised sexual abuse to recover, and ultimately defeat the purpose of the legislation.

***23. Would it be reasonable to require every institution working with children to incorporate, or to have an incorporated ‘proper defendant’? What would the impacts of this be?***

A stipulation that every institution working with children incorporate, or have an incorporated 'proper defendant' would require effort and expense. We believe consideration should be given to how a more 'targeted' regime could be established that requires incorporation of a proper defendant in circumstances where an institution meets a particular risk profile.

However, every institution working with children should be held to the same standards in regards to child safety whether or not they are incorporated. As such, legislation and industry guidelines and standards developed as a result of the Royal Commission findings should apply to every institution working with children.

# **Options for the implementation in the Northern Territory of civil litigation reforms recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse**

Submission to Northern Territory Department of  
Attorney-General and Justice

**1 November 2018**

## CONTENTS

Who we are.....	3
Introduction .....	4
The definition of child abuse .....	4
The liability of institutions .....	4
Non-delegable duty or vicarious liability .....	4
Reverse onus of proof.....	10
Persons associated with an institution .....	11
Ensuring there is someone to sue.....	12
Requirement to have insurance.....	15
Retrospectivity .....	15
<b>Recommendations</b> .....	16
Conclusion.....	17

## Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.<sup>1</sup>

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<sup>1</sup> [www.lawyersalliance.com.au](http://www.lawyersalliance.com.au).

## Introduction

1. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the issues raised by the NT Department of Attorney-General and Justice options paper in relation to the implementation in the NT of the civil litigation reforms recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission). This submission makes comments on the definition of child abuse, the liability of institutions, the importance of ensuring that there is someone to sue, and the importance of requiring institutions to have insurance.
2. This submission builds on the ALA's submissions to the Royal Commission [**attached, Appendices 1 and 2**] and the ALA paper *Access to Justice for Survivors of Child Abuse, Best Practice Law Reform Proposals* [**attached, Appendix 3**].

## The definition of child abuse

3. The ALA favours consistency in definition and in particular, adopting the definition used in the *Limitation Amendment (Child Abuse) Act 2016* (NSW). The ALA notes the minor difference from the Victorian wording in the use of 'serious' in respect of physical abuse but doubts that the difference is of any true significance. The ALA strongly supports the inclusion of physical abuse and psychological abuse, agreeing that they can be as traumatic and destructive as sexual abuse and may in many circumstances be difficult to distinguish since they may be precursors to sexual abuse or may otherwise be associated with sexual abuse. We attach a paper by ALA spokesperson Dr A.S. Morrison RFD SC discussing, *inter alia*, the difficulties created by legislation confining the availability of a remedy to sexual abuse only [**attached, Appendix 4**]. See paragraph [5] of this paper in particular.

## The liability of institutions

### Non-delegable duty or vicarious liability

4. The ALA strongly prefers the principle of vicarious liability rather than a non-delegable duty. The High Court clearly held in *NSW v Lepore*<sup>2</sup> (*Lepore*) (by a majority) that a non-delegable duty of care can in fact be delegated in some circumstances. That was why the majority of the

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<sup>2</sup> (2003) 212 CLR 511.

High Court preferred to leave open a remedy in vicarious liability. Nothing that has happened since in Australian law has suggested that it would be easy to make a non-delegable duty non-delegable.

5. Moreover, the common law in Canada, England and Wales and, to an extent, in Australia has in any event moved on. The Canadian Supreme Court, in *Bazley v Curry*<sup>3</sup> (*Bazley*) and *Jacobi v Griffiths*<sup>4</sup> (*Jacobi*), adopted what is known as the 'close connection test'. See also the later decisions in *John Doe v Bennett*<sup>5</sup> and *EB v Order of the Oblates of Mary Immaculate in the Province of British Columbia (EB)*.<sup>6</sup> The close connection test gives rise to vicarious liability where the connection facilitated by the relationship between the institution and the abuser has a close connection to the abuse in question. In *EB*, this test is described as being met where the relationship between the institution and the abuser gives rise to 'power, trust or intimacy with respect to the children'.<sup>7</sup>
6. The House of Lords in *Lister v Hesley Hall Ltd*<sup>8</sup> (*Lister*) adopted the same close connection test, which does not require establishment of fault on the part of the institution. *Lister* was followed in subsequent decisions, including *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church (Maga)*,<sup>9</sup> *JGE v The English Province of Our Lady of Charity and The Trustees of the Portsmouth Roman Catholic Diocesan Trust (JGE)*,<sup>10</sup> *The Catholic Child Welfare Society & Ors (Appellants) v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools & Ors (Respondents) (Various Claimants)*.<sup>11</sup> See also on a related point, *Cox (Respondent) v Ministry of Justice (Appellant)*.<sup>12</sup>
7. In *Various Claimants*,<sup>13</sup> the English Supreme Court laid down clear principles for vicarious liability and the close connection test. Lord Phillips (with whom the other members of the court agreed) noted the views on vicarious liability expressed in the Court of Appeal in *JGE*

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<sup>3</sup> [1999] 2 SCR 534 at 559.

<sup>4</sup> [1999] 2 SCR 570 at 610.

<sup>5</sup> [2004] 1 SCR 436 at 446.

<sup>6</sup> [2005] 3 SCR 45.

<sup>7</sup> *Ibid*, at [51].

<sup>8</sup> [2002] 1 AC 215 at 224.

<sup>9</sup> [2010] EWCA Civ 256.

<sup>10</sup> [2011] EWHC 2871.

<sup>11</sup> [2012] UKSC 56.

<sup>12</sup> [2016] UKSC 10.

<sup>13</sup> [2012] UKSC 56.

and the impressive leading judgment of Ward LJ.<sup>14</sup> The following propositions were said by Lord Phillips to be well-established:

- (i) it is possible for an unincorporated association to be vicariously liable for the tortious acts of its members;
- (ii) one defendant may be vicariously liable for the tortious act of another defendant even though the act in question constitutes a violation of the duty owed and even if the act in question is a criminal offence;
- (iii) vicarious liability can extend to liability for a criminal act of sexual assault;<sup>15</sup> and
- (iv) it is possible for two different defendants to be vicariously liable for the single tortious act of a third defendant.

8. Lord Phillips held that the relationship between the De La Salle Institute and the brothers teaching at St William's, though not one of employment, was capable of giving rise to vicarious liability. He referred to *JGE, Maga* and *Lepore* but omitted reference to the NSW Court of Appeal decision in *Ellis v R (Ellis)*.<sup>16</sup>

9. Lord Phillips concluded (with the concurrence of the balance of the Supreme Court):

'Vicarious liability is imposed where a defendant, whose relationship with the abuser puts it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a strong causative link.

These are the criteria that establish the necessary "close connection" between the relationship and abuse.'<sup>17</sup>

10. Accordingly, in Canada, England and Wales, Ireland and the United States, the Roman Catholic Church has accepted or been held liable through its trustees for the criminal misconduct of priests or teachers. Only in Australia has a contrary view been taken in the *Ellis* decision. That

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<sup>14</sup> [2012] EWCA Civ 938 at [19].

<sup>15</sup> *Lister* [2002] 1 AC 215.

<sup>16</sup> [2015] NSWCCA 262.

<sup>17</sup> *Various Claimants* [2012] UKSC 56 at [86]-[87].

decision sits ill with the views expressed by the majority in *Lepore* and is at odds with the rest of the common law world in insisting on employment being proved before vicarious liability can be found. It is inconsistent with the substantial relationship between a church and its clergy, let alone others who act in that institution's name. The common law overseas has moved on to give precedence to form over function, as MacDuff J noted in *JGE*.<sup>18</sup> Actions taken in an institution's name, whether the actor is paid or unpaid, should give rise to vicarious liability.

11. See also *Cox (Respondent) v Ministry of Justice (Appellant)*.<sup>19</sup> There, Lord Reed (Lord Neuberger, Lady Hale, Lord Dyson and Lord Toulson agreeing) held the Ministry of Justice liable for injury to a catering manager even though it did not employ the prisoner who, while assisting in the kitchen, accidentally injured her. As with the De La Salle Institute in the *Various Claimants* case, the court looked at the substance of the relationship and not whether employment was technically made out. The same principles would clearly apply in respect of volunteers authorised or permitted to act by an institution, even where they are unpaid.
12. It follows that the ALA strongly supports an approach consistent with the developments in the rest of the common law world and which overcomes the difficulties created by the decision in *Ellis*.
13. The recent High Court decision in *Prince Alfred College Incorporated v ADC*<sup>20</sup> (*Prince Alfred College*) unanimously endorses the majority approach in *Lepore*, applying the House of Lords decision in *Lloyd v Grace, Smith & Carroll & O'Dea*<sup>21</sup> and a subsequent decision in *Morris v CW Martin & Sons Ltd*,<sup>22</sup> that criminal conduct (even sexual abuse) did not prevent vicarious liability. In the *Prince Alfred College* case, the High Court offered the following in relation to the definition of vicarious liability:

‘Consequently, in cases of this kind, the relevant approach is to consider any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim. In determining whether the apparent performance of such a role may be said to give the "occasion" for the wrongful act, particular features may be taken into account.

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<sup>18</sup> [2011] EWHC 2871, [11].

<sup>19</sup> [2016] UKSC 10.

<sup>20</sup> [2016] HCA 37.

<sup>21</sup> [1912] AC 716.

<sup>22</sup> [1966] 1 QB 716.

They include authority, power, trust, control and the ability to achieve intimacy with the victim. The latter feature may be especially important. Where, in such circumstances, the employee takes advantage of his or her position with respect to the victim, that may suffice to determine that the wrongful act should be regarded as committed in the course or scope of employment and as such render the employer vicariously liable.<sup>23</sup>

14. It is to be noted that the test proposed in *Lepore* by Gleeson CJ, after reference to the Canadian Supreme Court and House of Lords decisions referred to above, is very similar to the close connection test. However, *Prince Alfred College* did not clarify the position because an extension of time was refused. It was also asserted that there was inadequate evidence of a close connection between a housemaster's abuse of a child and the housemaster's employed role, which facilitated access to that child's dormitory at night. The lack of reference in the majority judgments to the trend of authorities in England and Wales post-2004 suggests that once the decision had been made to refuse an extension of time, the issue of the close connection test was not closely looked at. However, the High Court did adopt the close connection test at least in theory, even if its application in that case was somewhat surprisingly denied.
15. As to the organisations to which vicarious liability should be applied, we have already noted Lord Phillips' comments that unincorporated associations can be subject to vicarious liability. In NSW, the *Associations Incorporation Act 2009* (NSW) provides some assistance but even at common law, it was possible to appoint members of an unincorporated association's executive to represent the members in an action against it (a representative order). The reason such a remedy was denied in *Ellis* was because the association (the Roman Catholic Church) was so diverse and its membership so uncertain, that it would have been impossible to know to whom any remedy applied.
16. Accordingly, the ALA is of the view that vicarious liability, applying the close connection test, should be imposed on organisations whether incorporated or unincorporated, which operate for profit or are non-profit and which provide services exclusively to children or to children in addition to adults. While the size of the organisation may affect its capacity to meet a claim in

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<sup>23</sup> [2016] HCA 37, paragraph 81.

damages, that matter is best dealt with through insurance rather than by denying a remedy. Any organisation providing services to or for children should be covered.

17. The alternative would mean that a wide range of organisations that provide services, and where the Royal Commission has shown abuse to be rampant, would have no obligation to meet in respect of vicarious liability. Therefore no remedy would be available for victims and there would be no deterrent requiring better supervision and control to try and reduce the incidence of abuse.

18. The ALA notes the *NSW Civil Liability Amendment (Organisational Child Abuse Liability) Bill 2018* (NSW) which was recently passed by both houses of the NSW Parliament and is awaiting assent. Section 6H of that Bill reads as follows:

**6H Organisations vicariously liable for child abuse perpetrated by employees**

(1) An organisation is vicariously liable for child abuse perpetrated against a child by an employee of the organisation if:

- (a) the apparent performance by the employee of a role in which the organisation placed the employee supplies the occasion for the perpetration of the child abuse by the employee, and
- (b) the employee takes advantage of that occasion to perpetrate the child abuse on the child.

(2) In determining if the apparent performance by the employee of a role in which the organisation placed the employee supplied the occasion for the perpetration of child abuse on a child, a court is to take into account whether the organisation placed the employee in a position in which the employee has one or more of the following:

- (a) authority, power or control over the child,
- (b) the trust of the child,
- (c) the ability to achieve intimacy with the child.

(3) This section does not affect, and is in addition to, the common law as it applies with respect to vicarious liability.

(4) In this section: child abuse means sexual abuse or physical abuse perpetrated against a child but does not include any act that is lawful at the time that it takes place.

19. The wording of s6H appears reasonable, albeit that it imposes no more than the common law does already. However, subsection (2) limits the definition of child abuse to sexual abuse or physical abuse, excluding associated psychological abuse, as in the definition in the *Limitation Act*. The definitions of child abuse should be identical. The wording in s6H would preclude actions for psychological abuse alone in any event, but any suggestion that vicarious liability does not include rights for associated psychological abuse is clearly abhorrent where sexual or physical abuse is also involved. This is inconsistent and poor drafting.
20. The provisions for appointing a proper defendant seem, on the face of them, to be appropriate. However, the liability of organisations under Schedule 1 commences only in respect of child abuse (sexual or physical) but without mention of associated psychological abuse perpetrated after the commencement of the relevant provisions of the Act. This is in respect of s6F and has very peculiar consequences.
21. Section 6H, which attempts to define vicarious liability, also applies only prospectively. The existing test under the *Prince Alfred College* case is at least as wide as the proposed test. If there is any difference, it is likely that the new test narrows the rights of victims. Section 6H is likely to be an encumbrance and complication for victims rather than a benefit, and victims would be far better off with the common law as it stands. The High Court (albeit, by *dicta*) has made clear that vicarious liability is an existing right and the risk in attempting to define it, prospectively only, is both that the right may vary between existing and prospective victims and that the attempt to define it may narrow it. Section 6H, particularly given that it is only prospective, does more harm than good. The ALA strongly recommends that the NT legislation be retrospective.

## Reverse onus of proof

22. The ALA is of the view that merely reversing the onus of proof would be of minimal assistance to victims. Reversing the onus continues to rely on proving negligence, which can impose an insurmountable burden on victims. There have been enough examples in NSW (the case of former Armidale Catholic priest John Joseph Farrell being one<sup>24</sup>) where an institution has

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<sup>24</sup> Broken Rites Australia, *Background article: Father Farrell's crimes and the church's cover-up* (25 July 2017) <<http://www.brokenrites.org.au/drupal/node/210>>.

used its financial resources to protect an abusive member of the institution against the allegations of abuse. Institutions, with their resources, often use those resources to make life as difficult as possible for victims litigating a claim in order to try and reduce any potential liability either through settlement or judgment. Those institutions will have access to their records in respect of the abuser, which can be denied to the victim, as occurred in *Ellis* for example.

23. Merely reversing the onus is, it is submitted, a wholly inadequate remedy which will inevitably be exploited by institutions seeking to minimise financial costs. Placing the legal onus on an institution to establish that it acted reasonably may be satisfied by as little as a denial of knowledge or having an unenforced policy, resulting in an effective shift of evidentiary onus back on to the victim. Again, access to records has been an unhappy story from the point of view of victims. For example, in the St Stanislaw cases, the Vincentians have denied knowing who was running the school in the 1980s, notwithstanding that some staff from that period were still employed, and the Vincentians received large contributions of State and Commonwealth monies, paid wages and deducted monies for the Australian Taxation Office. The claim that they could not find out because all records had been seized by the police is difficult to believe in light of these facts.
24. Vicarious liability utilising the close connection test avoids the need for a reverse onus because proving negligence is no longer required.

### Persons associated with an institution

25. In many ways, the approach to vicarious liability adopted in Canada and England and Wales avoids the complexities because employment-like situations are covered regardless of whether the institution pays wages or not. However, the Royal Commission's recommendations for associated persons might, for greater certainty, be utilised.
26. In respect of the closeness of the connection, the distinction in the Canadian Supreme Court, where that closeness was upheld in *Bazley* and not in *Jacobi*, is probably helpful. On the other hand, the views, albeit *obiter*, expressed in *Prince Alfred College* in the Australian High Court are very troubling. The notion that a housemaster may not meet the close connection test when he has access to boys' showers and toilets and dormitories by day and night, and authority to authorise medical and surgical treatment for boys if parents cannot be contacted, is very troubling. Housemasters have *in loco parentis* authority. However deficient

the evidence on this point, the views expressed in the High Court imply a more restrictive view of the close connection test than has been endorsed by the Supreme Court of Canada and the House of Lords and its successor, the Supreme Court for England and Wales. There, as MacDuff J noted in *JGE*,<sup>25</sup> the test of vicarious liability has changed to give precedence to form over function. Thus, in *Maga*, abuse by a priest helping with a youth activities group was attributed to the priest's church vicariously because he wore clerical garb, even though the victim was not a member of that church or of his congregation. The combination of clerical garb and youth work alone was sufficient.

27. For our part, we would endorse the test as applied in those cases. If it is necessary to legislate, then the terminology in the *Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2014* (NSW) appears to us to be helpful in identifying those who should be covered in the context of the Catholic Church. Similar levels of connection would be appropriate in other institutions.

## Ensuring there is someone to sue

28. Both the Victorian Legislative Council Committee Inquiry<sup>26</sup> and the Royal Commission have recommended that a defendant should be identified and that that defendant should be required to have sufficient assets or insurance to meet any liability. It is noted that this provision is expressly retrospective in the Royal Commission's recommendation.<sup>27</sup>
29. There was clear evidence at the Royal Commission that the Roman Catholic Church is likely to be able to meet any potential common law claims in damage (see the evidence of Cardinal Pell, for example<sup>28</sup>) through the interest and earnings on its assets. Other institutions may struggle in this regard.

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<sup>25</sup> [2011] EWHC 2871, [11].

<sup>26</sup> Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-government Organisations, Volume 1* (November 2013) 20 <[https://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Report/Inquiry\\_into\\_Handling\\_of\\_Abuse\\_Volume\\_1\\_FINAL\\_web.pdf](https://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Report/Inquiry_into_Handling_of_Abuse_Volume_1_FINAL_web.pdf)>.

<sup>27</sup> Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015), 59, recommendations 94 and 95, <<http://www.childabuseroyalcommission.gov.au/getattachment/a34dc7eb-07e6-4444-8fcf-cb32a031f28c/Redress-and-Civil-Litigation-Report>>.

<sup>28</sup> See, for example, Transcript of Proceedings, *Royal Commission into Institutional Responses to Child Sexual Abuse* (Public Hearing – Case Study 8 (Day 62) (26 March 2014) 6565 (11-24), available at <<https://www.childabuseroyalcommission.gov.au/case-study/6c8c5e48-5c11-4902-a5e3-7f5988493fcf/case-study-8,-march-2014,-sydney>>.

30. There is a difficulty created by the manner in which the Catholic Church structures its organisation. Prior to the *Ellis* case it was accepted that the trustees, which in each diocese hold all of the Catholic Church's assets, are the appropriate defendants. However, the *Ellis* decision found that because the trustees did not run schools, charities or the Church itself, they were not liable. Accordingly, there was in law no one to sue.
31. In England and Wales, the Catholic Church accepts that its trustees are its secular arm and the proper body to sue. A reversion by the Catholic Church to the position prior to *Ellis* would largely eliminate this issue. However, unfortunately and despite the clear undertaking given by the Archbishops of Sydney and Melbourne on 15 July 2015, the Catholic Church has not always stuck to the letter of what was said. The Archbishops said publicly that it is the:

'... agreed position of every bishop and every leader of a religious congregation in Australia that we will not be seeking to protect our assets by avoiding responsibility in these matters ...'

and

'... anyone suing should be told who is the appropriate person to sue and ensure that they are indemnified or insured so that people will get their damages and get their settlements.'<sup>29</sup>

32. Unfortunately, the website of the Archdiocese of Sydney has made it clear that the Church will take any legal point available to it, including that there is no vicarious liability.<sup>30</sup> The recent conduct in respect of Ballarat abuse victims in denying vicarious liability in defences filed by the Diocese of Ballarat in actions brought against the Bishop is clearly at odds with the undertaking. Similarly, Francis Sullivan of the Truth, Justice and Healing Council had said on 22 May 2015 that '[i]f a survivor wants to take a claim to court, then at the very least they must have an entity to sue'.<sup>31</sup>

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<sup>29</sup> See speech by the Hon. Justice Peter McClellan AM to the Triennial Assembly of the Uniting Church in Australia on 15 July 2015.

<sup>30</sup> Sydney Catholic Archdiocese "The *Ellis* Decision – a Re-statement of the Law", [undated], available at <<https://www.sydneycatholic.org/justice/royalcommission/ellis.asp>>.

<sup>31</sup> Truth, Justice and Healing Council, 'Senior Church leaders commit to no *Ellis* Defence' (Media Release, 22 May 2015) <<http://www.tjhcouncil.org.au/media/102237/150522-MEDIA-RELEASE-Senior-church-leaders-commit-to-no-Ellis-defence.pdf>>.

33. He has subsequently issued a further press release, in which he said that the Church should assist victims in finding someone to sue.<sup>32</sup> Since the *Ellis* defence means there is no-one to sue, this assistance is meaningless.
34. It should be acknowledged that many bishops have not taken the *Ellis* point and the Diocese of Newcastle and Maitland is an example where very large sums have been paid out to an extraordinary number of abuse victims. However, the mere threat that the defence might be taken is still being used by some parts of that Church as a negotiating weapon to reduce any settlement sum.
35. Clearly, therefore, a remedy is required. The remedy need not be confined to the Catholic Church, although it is the only institution structured in such a way that it can argue that no liability arises. The ALA would suggest that the approach used in the *Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2014* (NSW) has merit in remedying this problem.
36. In Canada, Ireland and the United States, the courts have treated the Catholic Church as a corporation sole, making all parts of the Church, including its trustees, liable in abuse or negligence cases. In England and Wales, as previously mentioned, the Catholic Church accepts that its trustees are the appropriate body to sue. Only in Australia has a different position arisen.
37. As to the Royal Commission's 'proper defendant' recommendation, the ALA would prefer simply rendering all aspects and arms of any body, whether incorporated or unincorporated, liable through its assets, investments, income and insurance to meet any claims under the close connection test. It would be helpful if, in addition to the Royal Commission's recommendation, any such institution whether incorporated or not be required to nominate a 'proper defendant' and assets be required to stand behind that proper defendant. Again, the approach adopted in the *Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2014* (NSW) appears to us to have merit in this regard.
38. Where the proper defendant is itself covered by any existing policies of insurance, an insurer should be prevented from saying that the proper defendant was not the person or body indemnified under the policy. This could be achieved if the proper defendant is authorised

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<sup>32</sup> Truth, Justice and Healing Council, 'Ballarat Bishop to stand in as defendant in historic child sexual abuse claims' (Media Release, 19 February 2016) <<http://www.tjhcouncil.org.au/media/114371/160219-MEDIA-RELEASE-Bishop-Bird-to-stand-in-as-defendant-in-civil-claims.pdf>>.

on behalf of all aspects of the institution (and all insurance entitlements of all aspects of the institution are required to the extent covered by each policy) to meet any action brought against the institution through the nominated proper defendant.

39. There would also need to be a fall-back provision, to cover the situation where an institution has not nominated a proper defendant in advance. The most senior person or head of the institution should in those circumstances be deemed the proper defendant to be sued and in those circumstances, and all assets and insurance should be rendered liable to meet any claim.

## Requirement to have insurance

40. The ALA favours the requirement of insurance in respect of all institutions, incorporated or unincorporated, that provide services for children. The insurers would have to be required to provide cover in respect of abuse in these situations. Many sporting bodies already carry a significant degree of insurance but it is acknowledged that there would need to be an extension making it clear that sexual abuse by volunteers through access given in the course of the organisation's activities would be covered. There would undoubtedly be a cost but it is wholly inappropriate that as at present, the victims bear that cost and the institutions, which provide the opportunity for the abuse in the course of their activities, bear none. Moreover, pressure from insurers is likely to promote (through premiums) risk management procedures, which will diminish the likelihood of abuse in the future.

## Retrospectivity

41. Generally speaking, retrospectivity is unattractive and undesirable. However, and for good reason, retrospectivity has already been granted in abuse cases in respect of the limitation period. The same should apply in respect of the close connection test. After all, the common law has advanced in Canada and in England and Wales so as to deem the close connection test always to have been the law. *Lepore* and then *Prince Alfred College* have laid the basis for the close connection test already being part of the law in Australia. All that is retrospective is the detailed application of changes already instituted through the common law and which, by existing legal fiction, are deemed already and always to have been the true state of the law. In those circumstances, the ALA submits that the changes it recommends should be retrospective in effect. Otherwise, gross injustice for the extraordinarily large number of victims would be perpetuated and the victims required to carry a burden while the

associations and institutions, in whose name and under whose guise the abuse was committed, make no contribution. That is an unacceptable outcome.

## Recommendations

42. The ALA makes the following recommendations:

- (1) The definition of abuse that was used in the *Limitation Amendment (Child Abuse) Act 2016* (NSW) is adequate, although there should be a reference to associated psychological abuse should be added;
- (2) Vicarious liability combined with a 'close connection test' is preferable to non-delegable duties as a means to hold institutions liable for the abuse of children facilitated by the institution. Vicarious liability combined with a 'close connection test' also avoids the need for a reverse onus of proof, which we consider does not adequately ameliorate challenges in establishing claims for child abuse adequately. The Royal Commission proposals offer much less than the common law in the rest of the common law world and may indeed be overtaken by the common law in NSW;
- (3) In relation to persons associated with an institution, the types of connection examined in *JGE* and *Maga* would be appropriate to adopt. If legislation is considered necessary, the terminology in proposed s17 of the *Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2014* (NSW) should be adopted in relation to the Catholic Church, with similar levels of connection adopted for other institutions;
- (4) Rather than the Royal Commission's 'proper defendant' recommendation, all aspects and arms of any body, whether incorporated or unincorporated, should be rendered liable through its assets, investments, income and insurance to meet any claims under the close connection test. Such a body should be required to nominate a proper defendant with assets standing behind it. Where a proper defendant is not appointed, the person in the most senior position in the organisation is automatically the proper defendant. Where insurance exists, insurers should be prevented from seeking to avoid liability under the policy by ensuring that the proper defendant is authorised on behalf of all aspects of the institution to meet any action brought against it;
- (5) Insurance should be required for all institutions, whether they are incorporated or unincorporated. Any cost increase is appropriate, given the alternative that victims

bear the cost and the institutions bear none in the absence of adequate insurance;  
and

(6) All of the above recommendations should be applied retrospectively.

## Conclusion

43. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the consultation for options for the implementation in the Northern Territory of civil litigation reforms recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse. The ALA is available to provide further assistance to the NT Department of Attorney-General and Justice in developing the legislation to implement these reforms.

Yours Sincerely,

A handwritten signature in black ink, appearing to read 'Michael Grove', with a small dot at the end of the line.

Michael Grove

Northern Territory President & Director

Australian Lawyers Alliance

**Appendix 1 – Submission of the Australian Lawyers Alliance to the Royal Commission on Institutional Responses to Child Sexual Abuse in response to Issues Paper 5 – Civil Litigation (28 February 2014)**

# Civil Litigation

## Obstacles in the way of bringing common law claims

Submission of the Australian Lawyers Alliance to the  
Royal Commission on Institutional Responses to Child Sexual Abuse  
Response to *Issues Paper 5 – Civil Litigation*

**28 February 2014**

## CONTENTS

Who we are .....	3
Introduction.....	4
Summary of recommendations .....	4
The Current Law.....	6
Terms of reference .....	16
1. Elements of the civil litigation systems which raise issues for conduct of litigation brought by people who suffer child sexual abuse in institutional contexts .....	16
2. Other elements that raise issues for conduct of litigation.....	26
3. Early dispute resolution/mediation processes in civil litigation systems for people who suffer sexual abuse in institutional contexts .....	27
4. What changes should be made to address the elements of the civil litigation systems that raise issues for the conduct of litigation brought by people who suffer child sexual abuse in institutional contexts? .....	27
5. Do people who suffer child sexual abuse in institutional contexts want forms of redress in addition to, or instead of, damages through financial compensation? Can these other forms of redress be obtained through civil litigation?.....	28
Conclusion.....	34

For all enquiries regarding this submission, please contact Dr Andrew Morrison RFD SC at (02) 9231 3133.



## WHO WE ARE

The Australian Lawyers Alliance ('ALA') is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year across Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.<sup>1</sup>

The ALA is well placed to provide commentary to the Committee.

Members of the ALA regularly advise clients all over the country that have suffered injury or disability as a consequence of the wrongdoing of another.

## INTRODUCTION

The Australian Lawyers Alliance ('ALA') welcomes the opportunity to provide a submission to the Royal Commission into Institutional Responses to Child Sexual Abuse in response to the release of *Issues Paper 5 – Civil Litigation*.

The membership of the ALA retains specialist expertise in the laws governing, and the conduct of, relevant civil litigation.

## SUMMARY OF RECOMMENDATIONS

### **Incorporation**

Legislative change should ensure that all institutions with responsibility for children must be incorporated so that they can be sued at common law, as proposed by the Victorian Legislative Council Family and Community Development Committee Inquiry.<sup>2</sup>

### **Insurance**

All institutions with responsibility for children should be required to have appropriate insurance.

### **Liability**

All institutions with responsibility for children should be vicariously liable for the conduct of those who undertake their work, whether employed by them or not.

Institutions bearing a non-delegable duty should have the English test<sup>3</sup> imposed so that they are liable if they choose to delegate their particular responsibilities, whether at fault in the choice or supervision of the delegate or not.

### **Limitation periods**

The limitation period for institutional child abuse should be lifted throughout Australia.

### **Class actions**

There should be a uniform system of class actions in all Australian jurisdictions.

### **Record keeping**

Major institutions with responsibility for children should be required to create and maintain appropriate records.

### **Evidence**

Evidence in these cases should be exchanged between the parties in writing, prior to hearing but with a right to supplement with oral evidence, and the right to cross-examine.

### **Assessment of damages**

There should be a uniform system of assessment of damages for institutional abuse cases, employing the 3 per cent discount rate recommended by the Ipp Inquiry, and applicable in all Australian jurisdictions.

### **Cost of litigation, access to funding and legal services**

There should be appropriate costs recommendations to permit victims to obtain and use appropriate legal assistance.

### **Early dispute resolution and mediation**

Alternative dispute resolution, including mediation, should continue to be encouraged, as is the case in most Australian jurisdictions. Apologies are a helpful part of dispute resolution, but a genuine apology cannot be mandated.

### Other forms of redress

Victims' compensation rights are so variable and subject to such constraints that they form no satisfactory basis for compensating victims Australia wide.

A national compensation fund is broadly attractive to abusive institutions, but not to victims. Experience has been that government will have to contribute to such a fund and in times of financial stringency, compensation will need to be restricted. Non-governmental institutions will want to get the benefits of restricted payouts to protect their assets. A national compensation fund will inevitably be an undercompensation fund.

## THE CURRENT LAW

The following background analysis of the current legal position addresses a number of the issues raised.

In *State of NSW v Lepore* (2003) 212 CLR 511, the plaintiff was a seven year old pupil in a government school, assaulted by a teacher in a storeroom adjoining a classroom in 1978. The assault had a sexual element. His action against the education department failed at first instance but his appeal to the NSW Court of Appeal was successful on the basis of a non-delegable duty of care. On appeal by the State of NSW to the High Court, it was held that non-delegable did not amount to strict liability. However, relevant findings had not been made at first instance and a re-trial was ordered. The case was enlivened by recent superior court decisions in Canada and England. In *Bazley v Curry* (1999) 174 DLR (4th) 45 and *Jacobi v Griffiths* 174 DLR (4th) 71, the Canadian Supreme Court expressed the view that the Salmond test for vicarious liability of employers for employee acts did not preclude liability for criminal actions and sexual assaults. The traditional test was that vicarious liability was for employee acts authorised by an employer or unauthorised acts so connected with authorised acts that they may be regarded as modes (albeit improper modes) of doing authorised acts. Thus, employers for more than 100 years have been held liable for thefts by employees from customers. The fundamental question traditionally was

whether the wrongful act was sufficiently related to the employer's aims. The Canadian Supreme Court espoused a close connection test, which said that it was relevant whether power, intimacy and vulnerability made it appropriate to extend vicarious liability even for acts which were manifestly criminal. This approach was adopted by the House of Lords in England in *Lister & Ors v Hesley Hall Ltd* [2001] 2 All ER 769, where the plaintiffs were residents at a school for boys with emotional and behavioural difficulties. The defendant employed a warden who systematically sexually abused them. Overturning the Court of Appeal decision below, the House of Lords unanimously held the plaintiff should succeed, applying the close connection test, and found the defendant vicariously liable for the acts of criminal and sexual assault by its employee.

In *Lepore* in the High Court, Gleeson CJ said that vicarious liability was open and intentional wrongdoing, especially intentional criminality, was relevant but not conclusive as to whether or not it was proper to hold the education department liable. He referred to the sufficient connection test. Where there is a high degree of power and intimacy to commit sexual abuse may provide a sufficient connection between the sexual assault and the employment to make it just to treat such contact as occurring in the course of employment. [74].

Gaudron J held that where there is a close connection between what was done and what that person was engaged to do, vicarious liability might arise and an employer may be estopped from denying liability for deliberate criminal acts of an employee. McHugh J took the approach of the majority in the Court of Appeal that a non-delegable duty meant strict liability. Kirby J agreed with the approaches in Canada and the United Kingdom and would have found for the plaintiff on the basis of vicarious liability on the close connection test. Gummow, Hayne and Callinan JJ would not extend vicarious liability to deliberate criminal acts, however, Gummow and Hayne JJ agreed with the majority that a re-trial was required.

Accordingly, there was a majority of 4:3 for the proposition that the plaintiff could succeed in respect of criminal acts, but no clear agreement as to why. The action was

sent back for re-trial but ultimately settled on satisfactory terms.

In *Trustees of the Roman Catholic Church for the Diocese of Sydney and Pell v John Ellis* [2007] NSWCA 117, [2007] HCA 697, the plaintiff alleged that from about 1974, when he was 13, until about 1979, when he was 18, he was engaged as an altar server in the Roman Catholic Church at Bass Hill. He alleged (and the Church in its Towards Healing process accepted) that he was subject to frequent sexual assaults by a priest, Father Duggan. He sought a representative order against Cardinal Pell on behalf of the Church as an unincorporated association. He also sought to sue the Trustees of the Church, who held its property under the *Roman Catholic Church Trust Property Act* (1936) (subsequently amended in 1986) (NSW). It is noted that there is similar but not identical legislation in other states.

John Ellis approached the Catholic Church with his complaint. The Church took more than a year to appoint an investigator, by which time Father Duggan was no longer capable of saying anything useful. He subsequently died. The Church opposed an extension of time in which to sue on the basis that it was prejudiced by the death of Father Duggan. However, on the first day of hearing of the application, another former altar boy came forward and said he had also been abused by Father Duggan as successor to John Ellis. He said he knew that John Ellis was his predecessor and would also have been abused and would have disclosed this if asked. Steven Smith gave evidence (unchallenged) that in 1983 he gave Father McGloin, Dean of the Cathedral in Sydney, a statutory declaration detailing the sexual assaults upon him. Instead of investigating this claim, Father McGloin confronted him with the perpetrator and left them alone and Mr Smith did not pursue the matter further. The Church produced no records of the statutory declaration or of any investigation. The Church did not call Father McGloin. It did not challenge the allegations of sexual abuse, which in any event had been accepted in the Towards Healing investigation. It simply argued there was no-one to sue because the Trustees merely held the property of the Church, which was itself not a legal entity. At first instance, it was held that because the membership of the Church was so ill-defined, no representative order could be made against Cardinal Pell but there was an arguable case that the Trustees could be

sued. The failure to investigate in 1983 overcame the claims of prejudice which were in effect caused by the Church's own misconduct.

The Trustees appealed to the Court of Appeal. It held on 24 May 2007 that neither the current Archbishop nor the Trustees were amenable to suit in respect of the alleged negligence and supervision of a priest in the 1970s. The Church is an unincorporated association, as is the Catholic Education Office. Its membership is too uncertain to permit a representative order to be made. The Trustees who hold the property of the Church in each diocese are only liable in respect of property matters, at least for the period prior to legislative amendment in 1986 and the Church has argued even after legislative change in 1986. If this argument is correct, then not merely is there no-one to sue in respect of negligence or misconduct by priests, but nor is there anyone to sue in respect of negligence or misconduct by teachers in Roman Catholic parochial schools, at least in NSW and arguably in the rest of Australia. In any event, the Court held that priests are not employees of the Church and there is no vicarious liability. In part, this is because their stipends are paid by the parish (for the most part) rather than directly by the Church. The Church maintains that whether or not the Trustees who hold all the assets can be sued is a matter for the discretion of the bishop in each individual diocese, who may offer up the Trustees as a defendant or decline to do so.

In practice and in a number of dioceses such as Newcastle Maitland, a number of bishops have made that concession. Notably, however, in the Archdiocese of Sydney, no such concession is made to this day. The lawyers acting on behalf of the Catholic Church continue in discussions and negotiations to threaten that any litigation will fail if a nominal amount offered is not accepted.

The High Court refused special leave to appeal from the decision of the NSW Court of Appeal [2007] HCA 697.

Meanwhile the law has moved on in other countries. In *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256, the plaintiff, aged about 12 or 13 in 1975 and 1976, was sexually abused by Father

Clonan. The claimant's father complained to another priest and the Archdiocese was found negligent in not pursuing the matter. However, at first instance it was held that the Archdiocese owed the claimant no duty of care and was not vicariously liable for Father Clonan's sexual abuse of the claimant.

On appeal, Lord Neuberger MR in the Court of Appeal upheld the trial judge's finding that the claimant was not out of time to sue and held that the finding of sexual abuse was supported by the evidence. However, he followed the *Lister v Hesley Hall Ltd* approach in the House of Lords, which in turn followed the Canadian Supreme Court approach, and this meant the appropriate test was whether the wrongful conduct was so closely connected with acts the employee was authorised to do that for the purposes of the liability of the employer to third parties, the wrongful conduct may fairly and properly be regarded as done in the ordinary course of the employee's employment. Although the claimant was not himself a Roman Catholic, Father Clonan was dressed in clerical garb and developed his relationship under the cloak or guise of performing his pastoral duties in youth work. It was relevant that the claimant was young, and it was Church activities including discos on Church premises which gave Father Clonan the opportunity to pursue the sexual relationship. Applying the close connection test, the Master of the Rolls was of the view that vicarious liability was properly made out against the Archdiocese. He also found that the Church owed a duty of care to the claimant and that it was wrong (as had been done at first instance) to characterise it as an allegation of a duty of care to the world in general. In addition, he found that in failing to investigate the complaint the Church was directly liable. Longmore and Smith LJJ, also applying the close connection test, agreed.

On the other hand, in *PAO, BJH, SBM, IDF and TMA v Trustees of the Roman Catholic Church for the Archdiocese of Sydney & Ors* [2011] NSWSC 1216, Hoeben J had to consider whether actions by various plaintiffs against Trustees of the Roman Catholic Church for the Archdiocese of Sydney and various members of the Patrician Brothers religious order should be struck out. It was alleged Archdiocese Trustees operated and managed Patrician Brothers Primary School Granville (they certainly held the property of the school) when in 1974, each plaintiff was sexually assaulted by

Thomas Grealy (also known as Brother Augustine) whilst young students. Associate Justice Harrison had earlier declined to strike out or summarily dismiss the five proceedings. The plaintiffs submitted there was evidence before the Court showing some involvement of the Archdiocese Trustees in the running of schools and in particular, some responsibility for the financial management of funds collected by the schools by way of fees, donations and the like. Hoeben J concluded there was no evidence before the Court connecting the Archdiocese Trustees directly or indirectly to the conduct of the Granville school and no indication that such evidence was likely to arise in the future. The plaintiffs' cases against the Trustees were held to be hopeless and should not be permitted to go further. It was not suggested that there was any legal entity in respect of the Roman Catholic Church which might be sued in respect of the abuse at the school. Applying the *Ellis* decision, Hoeben J struck out all five claims.

However, in England in *JGE v The English Province of Our Lady of Charity and The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2011] EWHC 2871 (QB), the preliminary issue was whether the Trustees of the Roman Catholic Church could be liable to the plaintiff for sexual abuse and rape by a Roman Catholic clergyman now deceased. This occurred when she was in a children's home in Hampshire between 1970 and 1972 conducted by an arm of the Church. The defendant contended that the clergyman was not its employee and nor was the relationship akin to employment. It argued the action should be struck out because vicarious liability could not arise. Significantly, however, the Roman Catholic Church in England and Wales accepted that its Trustees stood in the shoes of the bishop for present purposes, accepted that for the purposes of litigation its Trustees holding its property were its secular arm and were a proper defendant if vicarious liability arose.

MacDuff J noted that the test for vicarious liability had changed to give precedence to function over form and that the old approach in *Trotman v North Yorkshire County Council* [1999] LGR 584 (CA) had been replaced in relation to vicarious liability and the scope of employment by the House of Lords decision in *Lister v Hesley Hall Ltd*, applying a close connection test. This approach had been followed in *Maga*.

MacDuff J added that vicarious liability does not depend upon whether employment is technically made out. True it is that the relationship between the Church and priests contain significant differences from the normal employer/employee relationship. The differences include the lack of the right to dismiss, little by way of control or supervision, no wages and no formal contract.

However, he noted that in Canada, the Supreme Court in *Doe v Bennett & Ors* [2004] ISCR 436, held a bishop vicariously liable for the actions of a priest who had sexually abused boys within his parish. Employment was not conceded, but the priest had taken a vow of obedience to the bishop and the bishop exercised extensive control over the priest, including the power of assignment, the power of removal and the power to discipline him. In these circumstances, the Canadian Supreme Court held the relationship was “akin to employment” and sufficient to make the bishop vicariously liable. MacDuff J dismissed the strike-out application.

On appeal to the English Court of Appeal, Ward LJ referred to *NSW v Lepore* and quoted the views of Gaudron J at [123-125]. Applying the organisation test, the priest was part of the Church’s organisation and wholly integrated into the organisational structure of the Church’s enterprise. The priest was not an independent contractor and was more like an employee. He concluded the defendants were vicariously liable for misconduct, including criminal misconduct by a priest. Davis LJ took a similar view, Tomlinson LJ dissenting. The defendants were refused leave to appeal to the Supreme Court (replacing the House of Lords) because another case was about to deal with these issues.

That case was the decision in *The Catholic Child Welfare Society & Ors (Appellants) v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools & Ors (Respondents)* [2012] UKSC 56.

At issue was who if anyone was liable for a large number of alleged acts of sexual and physical abuse of children at a residential institution for boys in need of care originally operated by the De La Salle Institute, known as Brothers of the Christian Schools and operating as St William’s School. The appeal to the English Supreme Court required a

review of the principles of vicarious liability in the context of sexual abuse of children. The claims were brought by 170 men in respect of abuse between 1958 and 1992. The Middlesbrough defendants took over the management of the school in 1973, inheriting the previous liabilities. They used a De La Salle brother as headmaster and contracted four brothers as employee teachers. The Middlesbrough defendants were held vicariously liable for the acts of abuse by those teachers, and this was not challenged on appeal. However, the Middlesbrough defendants challenged the findings below that the De La Salle order was not vicariously liable for the actions of its brothers and therefore liable to contribute in damages. The Middlesbrough defendants' appeal seeking contribution had been rejected in the Court of Appeal, but leave was granted to appeal to the Supreme Court.

Lord Phillips (with whom the other members of the Court agreed), noted the views on vicarious liability expressed in the Court of Appeal in *JGE* and the impressive leading judgment of Ward LJ. [19]. The following propositions were said by Lord Phillips to be well-established.

- (i) It is possible for an unincorporated association to be vicariously liable for the tortious acts of its members.
- (ii) One defendant may be vicariously liable for the tortious act of another defendant even though the act in question constitutes a violation of the duty owed and even if the act in question is a criminal offence.
- (iii) Vicarious liability can even extend to liability for a criminal act of sexual assault. *Lister v Hesley Hall*.
- (iv) It is possible for two different defendants to be each vicariously liable for the single tortious act of another defendant.

There were two issues before the Supreme Court. The first was whether the relationship between the De La Salle Institute and the brothers teaching at St William's was capable of giving rise to vicarious liability. The second was whether the alleged acts of sexual abuse were connected to that relationship in such a way as to give rise

to vicarious liability.

Whilst it was relevant that the brothers who taught at the school were not contractually employed by the De La Salle Institute but rather by the Middleborough defendants, this did not preclude the De La Salle order being vicariously liable. As in *JGE*, the relationship was so close in character to one of employer/employee, that it was just and fair to hold the employer vicariously liable. The relationship between teaching brothers and the Institute had many of the elements, and all the essential elements, of the relationship between employer and employee. It was relevant that the brothers passed on their wages to the De La Salle Institute and were there to promote the purposes of the De La Salle Institute.

Lord Phillips then turned to the argument that sexual abuse can never be a negligent way of performing duties under an employment-like relationship. He referred to *JGE*, *Maga* and *NSW v Lepore* (where the majority in the High Court left such liability open) although he described the four different sets of reasons in the majority as having “shown a bewildering variety of analysis”. The NSW Court of Appeal decision in *Ellis* is surprisingly not mentioned.

Applying the Canadian close connection test in *Bazley v Curry* and *Jacobi v Griffiths* as well as *John Doe v Bennett* and *Blackwater v Plint*, as well as the House of Lords decision in *Lister v Hesley Hall*, he also noted that in a commercial context the House of Lords had taken a similar view in *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48; [2003] 2 AC 366, where dishonest conduct by a solicitor was held to involve the firm in liability because such conduct was part of the risk of the business.

Lord Phillips [86] (with the concurrence of the balance of the Supreme Court) said:

“Vicarious liability is imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a

strong causative link.

[87] These are the criteria that establish the necessary ‘close connection’ between the relationship and abuse.”

In England, Canada, Ireland and the United States, the Roman Catholic Church accepts or has been held to be liable through the trustees who hold its property if lawfully sued for the misconduct of priests or teachers. In countries such as the United States and Canada, the Church is treated as a Corporation Sole, giving it a corporate entity which can be sued. In each of those countries it is now established through the close connection test that the Church and its trustees are liable for the criminal conduct of clergy, including sexual abuse of children, which occurs in the course of their duties.

Only in Australia, in the common law world, has a contrary view been taken. Only in Australia are the assets of one church invulnerable to claims because the church is said to have no relevant corporate entity and its trustees (at least prior to 1986, and the Church would argue even since then) are immune from suit. The families of children attending Catholic parochial schools would be appalled to learn that whether or not they have a remedy in negligence against the school for injury through the fault of a teacher or in respect of sexual abuse by a teacher depends upon the whim of the bishop in the particular diocese. In some diocese, the *Ellis* point will not be taken. In the Archdiocese of Sydney, experience suggests that it is always taken as a means of generating settlement leverage.

In the Victorian Legislative Council Family and Community Development Committee Inquiry “Portrayal of Trust” Report of 13 November 2013, the Committee recommended important civil law reforms, including:

1. requiring all churches to have incorporated legal status so they can be sued;
2. making churches vicariously liable for their personnel (including clergy and teachers);

3. removing the limitation period, which restricts access to justice.

It has recommended legislative change to remedy the issues of legal identity available to be sued, access to the assets of the Church, as well as removing the limitation restrictions making an extension of time extraordinarily difficult. In NSW, draft legislation, the *Roman Catholic Church Property Amendment (Justice for Victims) Bill 2012 (NSW)*, has been circulated in the NSW Legislative Council but not introduced [copy annexed]. That legislation would have the effect of making the trustees in each archdiocese vicariously liable for the actions of priests and opening a window of time during which the limitation restrictions applicable in NSW would not apply to prevent claims.

Nor is it acceptable that in Australia, as distinct from the rest of the common law world, any church can effectively be immune from suit in respect of child sexual abuse due to its structure.

That a religious body can employ teachers, accept taxpayer funds, and have charitable status, all whilst legally non-existent, defies common sense.

## TERMS OF REFERENCE

Turning then to the specific questions asked, the remedies would seem to be as follows.

### **1. Elements of the civil litigation systems which raise issues for conduct of litigation brought by people who suffer child sexual abuse in institutional contexts**

(a) There needs to be legislative change in respect of any churches that is currently unincorporated under individual state laws to give it legal form. That may mean making it liable through the trustees holding its assets or by some other means. Any church or institution with care for or a role in the care of children should be compelled to be incorporated and insured.

(b) All institutions which care for or have a role in the care of children should be

required to hold insurance policies against liability, which should include liability for the sexual misconduct of employees, clergy and those given access to children under its auspices. This may require in respect of sporting organisations some form of overall insurance cover to which such organisations are required by law to contribute in return for indemnity.

- (c) It is submitted that absent a case in which the High Court has the opportunity to adopt the close connection test, there should be legislative change mandating that test in respect of vicarious liability for the conduct of those in employment-like circumstances, such as clergy.

Institutions generally owe a non-delegable duty of care to victims. However, in *State of NSW v Lepore* [2003] 212 CLR 511, it was said that the duty was only to take reasonable steps when delegating responsibility to others.

In *Woodland v Essex County Council* [2013] UKSC 66, it was held that where an organisation delegated part of its own duties, it could not avoid liability merely because it had no reason to suppose the delegate would abuse its trust. That higher level of non-delegable care should be mandated by law in Australia in institutional abuse cases.

- (d) It is difficult to envisage situations in which regulators of organisations or institutions involved in or with the care of children could be held liable for failures within those institutions. Nor is it the circumstance where legislative change to that position seems appropriate. Making government responsible for misconduct within private operators is a very poor second-best to requiring those operators to be responsible for the conduct of those they employ or those to whom they give access to children and requiring those organisations to have appropriate insurance.
- (e) This is not the place for a detailed discussion of the limitation regimes which vary widely amongst the Australian states and territories. Suffice it to say that there is a wide variety of regimes but in general, the normal limitation period for tortious

claims is three years. Time may not run in respect of infants and those under disabilities but even this is not universal if, as in NSW, there is an adult who could have brought the proceedings on behalf of the infant or disabled person. There are provisions for extensions of time in all jurisdictions but these vary widely from the very limited rights in Queensland to the far more liberal regime in South Australia. In general, however, it is very difficult and expensive to obtain an extension of time if a substantial period is involved.

A 2009 survey by the Anglican church found that the average time from abuse to first complaint was 23 years.<sup>4</sup> That accords with our experience as legal practitioners in this field.

Not merely does the injured person have to qualify in respect of the specific extension of time provisions in the particular state or territory where the cause of action arose, but the overarching question is compliance with the decision in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, where the High Court requires that a fair but not perfect trial still be possible. Where significant witnesses are no longer available or records destroyed through lapse of time, this will frequently preclude an extension of time to which a plaintiff would otherwise be entitled and even though there is no fault on the part of the claimant.

The Victorian Legislative Council Inquiry has recommended and the draft legislation circulated in the NSW Legislative Council has suggested a waiving of the limitation restrictions, at least for a period of time. Given that the institutionally abused have generally been in the weakest position to protect their rights and interests and frequently the action in suing should have been instituted by the very organisation responsible for their care, legislative reform along the lines suggested by the Victorian Legislative Council Committee or in the draft bill, the *Roman Catholic Church Property Amendment (Justice for Victims) Bill 2012* (NSW), would be an appropriate remedy.

(f) As to class actions, again, this is not the place for an extensive treatise on the varying state, federal and territory legislative schemes for class actions. There are significant differences between them. A single provision to be universally adopted

in all states and territories in respect of institutional child sexual abuse, perhaps adopting the Federal Court provisions, might be a way forward.

- (g) Access to relevant records which are often many decades old, is frequently a challenging problem. The worst problem in this regard is usually in respect of the Roman Catholic Church, where identifying a legal entity to which a subpoena might be issued becomes extremely challenging.

For example, there are a large number of claims of historic abuse in the 1980s at St Stanislaus school operated by the Roman Catholic Church in NSW. The school's records for the period have been seized by the police and are not available at present whilst criminal proceedings are ongoing. The current school and the Vincentian Order, the Church itself and Roman Catholic Church Insurance say that they do not know what legal entity it was that operated the school at the relevant time. This is despite the fact that the school would have been receiving grants from the State and Commonwealth government (presumably paid to the non-legal entity Catholic Education Office and then paid on to an unknown legal entity at the school), staff were employed by some legal or non-legal entity, group certificates issued, wages records issued, tax deducted and paid to the Commonwealth and appropriate records kept for compliance with the various obligations, including workers' compensation insurance and the like.

By maintaining in respect of that school that no-one can identify the legal entity which conducted at the relevant time in the 1980s, Catholic Church Insurance delays claims by multiple victims of abuse in respect of clergy/teachers who have already been the subject of criminal conviction.

It is also common for it to be asserted that the cost of retrieving records and sorting them, particularly when they are from a considerable period, perhaps many decades earlier, is very high. Again, it is unfair that that expense be required to be met upfront by the victim, with the possibility of recovering some portion (but not a complete indemnity) under costs and disbursements on a successful action on a much later date. It is submitted that all major institutions with responsibility for children should be



required to keep appropriate records, maintain them, at least electronically, for upwards of 30 years and make them accessible. Access should be at either nominal or no cost. Otherwise the interests of justice may be precluded by costs and by efforts to have subpoenas struck out because the amount of work involved is said to be excessive for the institution.

(h) There can be no doubt that the ordinary court process of giving evidence, being cross-examined and being in the public gaze can be traumatic and stressful for many victims. The following matters however, are also relevant considerations. Organisations and institutions sued are entitled to test the evidence and it cannot simply be assumed that an allegation is true because it has been made. Courts have the power to make orders restricting access of the public in appropriate cases or even where access is permitted, not permitting the publication of information such as anything which would identify the name, family or location of a person making a claim of abuse. These are very important safeguards in the current legal system which, it is submitted, are generally effective, albeit that there is some variation in the way in which these things are done from jurisdiction to jurisdiction.

Increasingly, courts are inclined to prefer that lay witnesses' evidence be substantially put in writing, which can then be supplemented by some much briefer oral evidence and cross-examination. Whilst not universal in the varying court systems, this does have the effect, when used, of greatly reducing the stress on those required to give evidence. Greater use of this as a tool in these cases is accordingly commended. It should not, however, it is submitted, be used to replace evidence in-chief entirely because if it were to, then the judge or judge and jury hearing the case (dependent on jurisdiction) would only see the plaintiff in cross-examination, which may paint a false picture of the witnesses' evidence.

The other matter which needs to be borne in mind is that the overwhelming majority of cases settle before getting to court. Mediation, arbitration, informal and formal settlement conferences are normal in all jurisdictions under different formats adapted to local needs. Only a small minority of cases are actually heard in court.

It is submitted that we should be very hesitant to replace well-established and relatively effective systems of justice in the ordinary court system in these circumstances. There is a real risk of simply creating a parallel system at vast public expense and without many of the safeguards existing in an independent judicial system.

- (i) The difficulties of proving that a victim's injuries and losses were caused by the abuse can be exaggerated. As was pointed out in *Shorey v PT Ltd* (2003) 77 ALJR 1104 by the High Court, all a plaintiff has to establish is that the tortious act was "a cause" not "the cause" of the loss. It was also said in that case that the law as laid down in *Watts v Rake* (1960) 108 CLR 158 and *Purkess v Crittenden* (1965) 114 CLR 164 remains settled law applicable to judicial reasoning whether at first instance or on appeal.

In *Watts v Rake*, Dixon CJ said (160):

"If the disabilities of the plaintiff can be disentangled and one or more traced to causes in which the injuries he sustained through the accident play no part, it is the defendant who should be required to do the disentangling and to exclude the operation of the accident as a contributory cause. If it be the case that at some future date the plaintiff would in any event have reached his present pitiable state, the defendant should be called upon to prove that satisfactorily and moreover to show the period at the close of which it would have occurred. For myself I do not think that he has proved more than that at an earlier time than other men the plaintiff would have reached a stage of disability but not the same disability."

Referring to this passage in *Purkess v Crittenden*, Barwick CJ, Kitto and Taylor JJ said (at 168 to 169) that:

"We understand that case to proceed upon the basis that where a plaintiff has, by direct or circumstantial evidence, made out a prima facie case that incapacity has resulted from the defendant's negligence, the onus of adducing evidence that his incapacity is wholly or partly the result of some pre-existing condition or that incapacity, either total or partial, would, in any

event, have resulted from a pre-existing condition, rests upon the defendant. In other words, in the absence of such evidence the plaintiff, if his evidence be accepted, will be entitled to succeed on the issue of damages and no issue will arise as to the existence of any pre-existing abnormality or its prospective results, or as to the relationship of any such abnormality to the disabilities of which he complains at the trial. ...

[I]t is enough for the defendant merely to suggest the existence of a progressive pre-existing condition in the plaintiff or a relationship between any such condition and the plaintiff's present incapacity. On the contrary it was stressed that both the pre-existing condition and its future probable effects or its actual relationship to that incapacity must be the subject of evidence (i.e. either substantive evidence in the defendant's case or evidence extracted by cross-examination in the plaintiff's case) which, if accepted, would establish with some reasonable measure of precision, what the pre-existing condition was and what its future effects, both as to their nature and their future development and progress, were likely to be. That being done, it is for the plaintiff upon the whole of the evidence to satisfy the tribunal of fact of the extent of the injury caused by the defendant's negligence. In the present case the evidence accepted by the learned trial judge by no means established with any reasonable degree of precision the extent of the appellant's pre-existing affliction or what its future effects, apart from the result of the defendant's negligence, were likely to be. That being so we think it was proper for him to deal with the case on the basis that the defendant's negligence was the cause of the appellant's permanent disability and, accordingly, we propose to deal with this appeal on the same basis."

In other words, whilst the legal onus is on the plaintiff, there is an effective shift of evidentiary onus to the defendant if it is to be asserted that the plaintiff's problems are caused by some pre-existing condition. Relevantly, that condition could often be some previous abuse prior to that within an institutional context. Whilst the *Civil Liability Acts* and their equivalents generally place the onus in law permanently on the plaintiff, there does not appear to have been a decision in any jurisdiction to indicate that the shift of evidentiary onus has changed. In these circumstances, a correct application of the current law makes proof of causation based upon appropriate

medical evidence indicating that the institutional abuse was a cause of the condition, relatively easy. Unless some court was to take a different view of the law, the situation as laid down in the High Court in the leading authorities referred to earlier, seems, it is submitted, to be quite satisfactory.

- (j) There are significant variations in the way damages are assessed. Given the extent to which they vary from one state and territory to another, it is beyond the scope of these submissions to provide a treatise on the complexities in this regard.

It is, however, possible to point out the major discrepancies and injustices. The first is the discount rate. The High Court at common law in *Todorovic v Waller* (1981) 150 CLR 402 compromised on a 3% discount rate on lump sum compensation. The discount rate is meant to reflect the advantages of an upfront sum which can be invested in relatively secure investments and the return which might be expected after inflation and taxation are taken into account. In England, the current rate is 2½% and there is significant pressure to reduce it further. However, NSW adopted a 5% discount rate in all cases except where there is an intentional tort or sexual abuse and where the perpetrator is being sued. See s 3B of the *Civil Liability Act* 2002. In simple negligence cases, the discount rate is 5%. That is the same in all other jurisdictions but without the exception for intentional injuries and sexual misconduct and except in Western Australia and the Northern Territory, where the discount rate is 6%.

The requirement that monies be conservatively invested so as to produce on average over a lengthy period of time a return of 6% after tax and inflation is simply laughable. Experience has indicated that for someone with a long-term disability and a reasonably long life expectancy, the reduction in the allowance for future care and future economic loss brings the overall damages down in a 5% case by between 25% and 30% by comparison with a 3% case. The discount in a 6% case by comparison with a 3% in similar circumstances will be more like 35% or 40%.

It is not possible to be precise in respect of these figures given that they will vary significantly according to the length and cost of future care and length and extent of future diminution of economic capacity and future medical needs. However, long

experience has indicated that whereas a 3% discount rate is a high discount but may be achievable, 5% and 6% discount rates are simply punitive.

The Ipp Report and a NSW Legislative Council Report unanimously recommended a 3% discount rate, and it is submitted that the Royal Commission should take the same approach.

In this regard the Ipp Committee stated:

*“...in the Panel’s opinion, using a discount rate higher than can reasonably be justified by reference to the appropriate criteria would be an unfair and entirely arbitrary way of reducing the total damages bill. Furthermore, we have seen that the group that would be most disadvantaged by doing so would be those who are most in need — namely the most seriously injured. It would be inconsistent with the principles that have guided our thinking in this area to reduce the compensation recoverable by the most seriously injured by increasing the discount rate, simply because damages awards in serious cases could thereby be significantly reduced. In this context, it should be noted that although an increase in the discount rate can yield large reductions in awards in serious cases, such cases represent only a relatively small proportion of the total compensation bill...”*

*This... suggests to the Panel that 3 per cent remains a reasonable rate, and does not appear to be any good reason to go above 4 per cent. We therefore recommend a nationally uniform discount rate of 3 per cent.”<sup>65</sup>*

The NSW Legislative Council Report relevantly stated:

*“On a separate issue, the Committee also notes that all areas of personal injury law in New South Wales apply a discount rate of 5% to future economic loss damages paid as a lump sum. This discount rate is intended to acknowledge that a plaintiff awarded a lump sum gains control of that money straight away, allowing the plaintiff to invest the money and gain interest. However, the Committee is concerned that the 5% discount rate is simply too high, meaning that many permanently injured people who receive a lump-sum will not have sufficient income on which to live in the future, and believes that a 3% discount rate would be more appropriate, in line with the recommendation of the Review of the Law of Negligence Report. Importantly, while other Government reforms to personal injury compensation law, notably the use of the thresholds, have sought to limit*

*the amount of damages payable to the less seriously injured, the 5% discount rate affects the most seriously and catastrophically injured, who are most in need of assistance.*<sup>6</sup>

There are wide variations in the way in which damages for non-economic loss/general damages for pain and suffering and loss of amenities of life are assessed. One way of looking at it would be to say that those in Western Australia and Queensland appear to feel pain only half as much as those in NSW. Victoria is somewhere in-between. That is unsatisfactory in circumstances where activities, abuse and failings can occur even in a single case across multiple jurisdictions. Some attempt to standardise the approach, as well as the method of assessment, would seem appropriate.

In some jurisdictions there are caps on compensation for economic loss and caps on compensation by way of interest and for compensation for gratuitous services. Those caps will inevitably result in under-compensation in some cases, albeit that the economic loss caps will rarely apply to child sexual abuse victims in practice.

The Ipp Inquiry recommended a 3% discount rate and a single set of principles for compensation. The different states and territories have very much gone their own way in the various *Civil Liability Acts* and equivalent legislation, leaving compensation a mess of common law modified by statute differently in every jurisdiction. Given that these matters are largely for state and territory law, a single recommended approach would seem appropriate.

(k) Litigation is undoubtedly expensive, particularly if it goes to hearing. Except for Aboriginals and Torres Strait Islanders, civil legal aid is extremely rare throughout Australia. Even in the very exceptional case where it is granted, it does not adequately fund the expert reports required, let alone pay for a reasonable quality of legal services.

Litigation funding in Australia (unlike England) is quite rare. In general, the only effective form of legal aid available is from relatively well-resourced firms of lawyers (practising as solicitors), who fund litigation on a no win/no fee basis in most cases,

and hope to recover their fees at the conclusion of the case.

Again, this is not the place for a detailed description of the different costs regimes in the different states and territories. Suffice it to say that there are very wide variations in respect of what entitlement exists on any costs order following assessment or taxation. In general, however, it would be fair to say that whereas an order for costs in the 1960s or early 1970s might have produced something close to the market cost of lawyer's services and the market cost of expert medical, engineering and like expert reports, that is no longer the case. Cost pressures meant that those who had the responsibility of updating costs and disbursements to be allowed could appear to be restraining inflationary pressures by keeping increases well below the true cost of inflation. The effect, however, was that the shortfall has increasingly been met out of the ultimate damages. The result is that an order for costs in a jurisdiction such as NSW is now worth about 60% to two-thirds of the reasonable costs and disbursements assuming competent and moderately charging legal practitioners. The balance comes out of the successful plaintiff's damages.

By comparison, in England, 100% of the reasonable costs and disbursements are recovered. It is submitted that in justice, that ought to be the situation here. Restricting costs and disbursements benefits insurers but harms the victims. In the exceptional case, an order for indemnity costs still only compensates about 90% of the reasonable costs and disbursements and not 100%.

The regimes which offer indemnity costs by way of benefit for a successful costs offer vary but in general favour insurer/defendants. Whereas a plaintiff who does not beat a defendant's offer goes from receiving costs to paying costs, the insurer that does not beat a successful plaintiff's offer only goes from paying standard costs to paying indemnity costs. The penalty is vastly less. Yet in general, plaintiffs have little financial capacity and institutions and their insurers tend to have vastly greater capacity to fund and fight litigation. The imbalance is clearly an injustice.

## **2. Other elements that raise issues for conduct of litigation**

The above comments adequately set out the elements of the civil litigation systems that raise issues for the conduct of litigation in these circumstances.

**3. Early dispute resolution/mediation processes in civil litigation systems for people who suffer sexual abuse in institutional contexts**

In general, early dispute resolution and mediation processes work well. The overwhelming majority of cases never reach court. That is as it should be. It should be the exceptional case which either through extraordinary complexity or through the unreasonableness of one side or the other, needs to be litigated.

The difficulties set out above should be addressed in the way earlier specified. The Victorian Upper House Inquiry raised the possibility of a specialist tribunal. Sometimes these can be effective, for example, the Dust Diseases Tribunal in NSW, but the multiplicity of different systems of justice is generally undesirable as well as expensive. Our members have appeared before many different tribunals as well as regularly in the courts. Our overwhelming preference in the interests of justice is to retain the right of hearing before an independent judge (or judge and jury) as the final resort if a matter does not resolve in the ordinary course of early dispute resolution.

**4. What changes should be made to address the elements of the civil litigation systems that raise issues for the conduct of litigation brought by people who suffer child sexual abuse in institutional contexts?**

Creating a separate system or systems in relation to compensation of victims is broadly unattractive and likely to be ultimately less just than access to the independent judiciary.

Within all the states and territories there are various criminal injury compensation regimes with different limitation restrictions and different criteria for compensation, as well as different amounts permitted to be awarded. In NSW, the maximum award has recently been reduced to \$15,000 and those proffering legal assistance by way of obtaining expert reports and the like will receive only nominal amounts. The limitation period precludes the use of this system in most cases in any event. For all practical purposes it is useless in terms of access to reasonable compensation.

It is submitted that a proper and standardised legal regime in respect of liability and compensation applicable in all states and territories to be administered by the ordinary courts is, in our view, ultimately the fairest and most just alternative.

5. **Do people who suffer child sexual abuse in institutional contexts want forms of redress in addition to, or instead of, damages through financial compensation? Can these other forms of redress be obtained through civil litigation?**

### **Apology**

The main other form of redress that is desired by a large number of victims is a genuine apology by the institution where the abuse has occurred. Experience has been that many of the apologies proffered, for example by the Towards Healing process, have been perfunctory rather than heartfelt and have failed to meet the real needs of the victim. On the other hand, some apologies have been clearly genuine and effective. Experience in the medico-legal field as well as in the field of sexual abuse victims suggests that a genuine apology does a great deal to assuage the feelings of the victim. Such apologies can be part of a resolution by way of settlement in all jurisdictions now. It is, however, hard to see how they could be mandated and remain genuine. Apologies should, it is submitted, be encouraged but not required.

### **Other forms of assistance**

The only other forms of assistance likely to be desirable would be by way of interim damages or early payments for medical assistance, counselling and the like. These are available in some but not all jurisdictions. A standardised scheme of interim

awards and of entitlement to seek early assistance in this regard would be desirable.

### **The inadequacy of a compensation fund**

We note that there have been suggestions from various institutions, and from survivor associations, that a national compensation fund should be established to provide compensation to victims of abuse.<sup>7</sup>

With respect, we do not believe that calls for a compensation fund are purely motivated by a wish to demonstrate justice, but rather a wish to curtail liability and to avoid the higher cost of compensating people appropriately. Rather than a compensation fund, we believe that this will act as an undercompensation fund.

The processing of compensation funds has proven to lack an appropriate degree of trust and victims will want to know that justice has been done: to them, to their abusers, and to the institution. A compensation scheme may deny victims the solace of that transparency.

The following examples are illustrative:

### **Victims Compensation Scheme NSW**

In NSW, in 2013, the statutory compensation scheme set up for victims of crime was radically slashed, with maximum payments reduced from \$50,000 to \$15,000, with only nominal payments for legal assistance. There had been no increase to compensation payments, not even for inflation, in 25 years.

As of June 2011, the waiting period for a victims compensation decision was, on average, 25 months.

In 2013, the Australian Lawyers Alliance was a signatory to a joint letter of over 30 organisations lodging an urgent complaint regarding the changes, to the UN Special rapporteur on violence against women, Ms Rashida Manjoo.

### **Compensation for Stolen Generations in Australia**

We note that the Australian Human Rights Commission's 1997 report, *Bringing Them Home*, made 54 recommendations regarding the treatment of the Stolen Generation; 34 addressing reparations, and 11 specifically addressing monetary compensation. In the report, the AHRC also recommended the establishment of a National Compensation Fund.<sup>8</sup> This proposal has faced a distinct absence of political will, with bills introduced in the Federal parliament on a number of occasions, but not proceeding.

We note that despite calls for a national compensation fund for Indigenous Australians that were part of the stolen generation, most Indigenous Australians who suffered grievous impacts to their lives, health and relationships, continue to go uncompensated.

The first member of the Stolen Generation to be awarded compensation was Mrs Valerie Linlow, in the NSW Victims Compensation Tribunal in 2002. Mrs Linlow was awarded \$35,000 in compensation.<sup>9</sup>

In 2007, in the leading case of *Trevorrow v State of South Australia (No. 5)* [2007] SASC 285 (1 August 2007) Mr Bruce Trevorrow was awarded \$525,000 in damages for compensation for a lifetime of sorrow and pain, plus \$250,000 interest.<sup>10</sup>

## **Canada**

In Canada, residential schools were run for First Nations peoples in the 19<sup>th</sup> and 20<sup>th</sup> century, the last school closing in 1983 or 1984. Children were often separated from their families, experienced physical and sexual abuse and lost their culture and language.<sup>11</sup> In 2000, the Canadian government requested the Law Commission of Canada ("LCC") to investigate institutional child abuse.

Compensation became accessible for survivors via the Independent Assessment Process or the Common Experience Payment. Compensation was available up to \$275,000.00 for the most serious physical and sexual abuse. A further amount of up to \$250,000 could be sought for lost income due to the consequences of abuse, and up to \$15,000.00 for the cost of future care.<sup>12</sup>

The Common Experience Payment deadline passed in 2012.<sup>13</sup> The Independent

Assessment Process deadline also passed in 2012.<sup>14</sup> The sustainability of the fund remains to be seen.

### **Attempts to obfuscate compensation**

There have been further international examples of institutions taking extensive action to prevent paying compensation. We pay reference to some of these below:

#### **United States**

- In 2007, America's most senior Roman Catholic cleric obtained permission from the Vatican to move US\$57 million of church funds into a trust to shield it from sexual abuse victims seeking compensation.<sup>15</sup>
- In 2013, over 400 survivors of sexual abuse were slated to receive compensation totalling \$16.5 million, after acting as a committee of unsecured creditors, and after approving the terms of a bankruptcy by the North American branch of the 'Irish' Christian Brothers.<sup>16</sup> The North American branch of the Christian Brothers filed for bankruptcy "in the face of ever mounting sexual abuse claims made against its U.S. and Canadian members."<sup>17</sup>
- In 2014, the Milwaukee diocese of the Roman Catholic Church in the US, proposed setting aside \$4 million to compensate victims. In 2011, the Milwaukee diocese filed for bankruptcy, saying pending sexual abuse lawsuits could leave it with debts it couldn't pay.<sup>18</sup>

#### **Northern Ireland**

- In Northern Ireland, the Historical Institutional Abuse Inquiry (HIA) is examining allegations of child abuse in children's homes and other residential institutions from 1922 to 1995.<sup>19</sup> We note that the Inquiry aims to establish if there were "systemic failings by institutions or the state in their duties towards those children in their care". It will also determine if victims should receive an apology and compensation.

We note that the HIA inquiry is due to complete its hearings by June 2015 and deliver its final report to the Northern Ireland Executive in January 2016.<sup>20</sup>

### **UN Committee on the Rights of the Child**

- In 2014, the UN Committee on the Rights of the Child released a scathing report into the decades of abuse of girls and women at the Magdalene laundries in Ireland.<sup>21</sup> While Ireland set up a state compensation fund for survivors, no religious orders contributed to the compensation fund; no religious orders offered an apology to survivors, and refused to accept ‘unanimous survivor testimony that they were imprisoned and subjected to forced labour, torture as well as other cruel, inhuman or degrading treatment’.<sup>22</sup>

The UN Committee on the Rights of the Child urged that, in this instance, the Holy See ensure that full compensation be paid to the victims and their families, either through the congregations themselves or through the Holy See as supreme power of the Church and legally responsible for its subordinates in Catholic religious orders placed under its authority.<sup>23</sup>

Furthermore, the Committee also expressed ‘its deepest concern about child sexual abuse committed by members of the Catholic churches who operate under the authority of the Holy See, with clerics having been involved in the sexual abuse of tens of thousands of children worldwide.’<sup>24</sup>

The Committee noted that it was ‘gravely concerned that the Holy See has not acknowledged the extent of the crimes committed, has not taken the necessary measures to address cases of child sexual abuse and to protect children, and has adopted policies and practices which have led to the

continuation of the abuse by and the impunity of the perpetrators.<sup>25</sup>

## Institutions in Australia

### Anglican church

- The Anglican church gave evidence to the Royal Commission previously that it has a policy of providing a maximum of \$75,000 in compensation.<sup>26</sup>
- A 2009 study conducted by the Anglican Church analysed 191 alleged cases of child sexual abuse, reported from 17 dioceses throughout Australia between 1990 and 2008. This represented most, (but not all) of the reported cases across Australia in that period. The report noted that:

‘Of the 44 cases that were known to go to court, 53% ended in the accused person being convicted. Nineteen percent of cases resulted in dismissal, license removal or deposition from Holy Orders by the Church; whilst the transfer of an accused person subsequent to the complaint was uncommon. Counselling was offered to complainants in 52% of cases and compensation or other reparation by the church in 36% of cases.’<sup>27</sup>

### Catholic Church

- The Catholic Church’s Melbourne Response scheme currently caps victims’ compensation in Victoria at \$75,000.<sup>28</sup> While media report that the national equivalent, Towards Healing, has an unlimited cap,<sup>29</sup> in reality, legal practitioners’ experiences are different.
- Within the Roman Catholic Church, the negotiations surrounding compensation are entrusted to each diocese; a person’s access to compensation therefore effectively depends on the whim of each archbishop. Legal practitioners have commonly experienced the *Ellis* defence being alluded to or directly raised to push persons into settlements that are much less than they would otherwise have been. This is particularly the experience

in the Sydney archdiocese.

## **Findings of the Victorian Legislative Council Family and Community**

### **Development Committee Inquiry**

The Victorian Inquiry noted in their report, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations*, (2013), that the approach of institutions to financial compensation ‘often does not provide a clear explanation of the basis on which an organisation makes a financial payment, how the amount awarded is determined and obligations regarding confidentiality.’<sup>30</sup>

The Committee also noted that institutions ‘rarely encourage participants in the process to seek independent legal advice before reaching an agreement that might affect their subsequent legal rights.’<sup>31</sup>

The Committee also noted that ‘for many victims of criminal child abuse, the option of pursuing a claim through civil litigation is central to their desire for justice. Many told the Inquiry that civil litigation is not only an avenue to seek compensation, but also a form of acknowledgement and accountability for the harm they have suffered.’<sup>32</sup>

However, no civil claims of criminal child abuse against religious organisations have been decided by the Victorian courts to date. Civil litigation in these cases is generally resolved through private settlements.<sup>33</sup>

## **CONCLUSION**

The specialised knowledge and experience of our members in these areas makes us peculiarly qualified to offer assistance should the Royal Commission desire it. If any of the above matters need elucidation, we would be very happy to assist in any way we can.

## REFERENCES

<sup>1</sup> Australian Lawyers Alliance (2012) <[www.lawyersalliance.com.au](http://www.lawyersalliance.com.au)>

<sup>2</sup> Victorian Legislative Council Family and Community Development Committee Inquiry, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations*, (2013). Accessed at [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Report/Preliminaries.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Report/Preliminaries.pdf)

<sup>3</sup> This refers to the decision in *Woodland v Essex County Council* [2013] UKSC 66.

<sup>4</sup> The report analysed 191 alleged cases of child sexual abuse, reported from 17 dioceses throughout Australia between 1990 and 2008. See Patrick Parkinson, Kim Oates, Amanda Jayakody, *Study of Reported Child Sexual Abuse in the Anglican Church*, (May 2009), at 5. Accessed at

<http://www.anglican.org.au/docs/Study%20of%20Reported%20Child%20Sexual%20Abuse%20in%20the%20Anglican%20Church%20May%202009%20Full%20Report.pdf>

<sup>5</sup> Commonwealth of Australia, *Review of the Law of Negligence, Final Report* (2 October 2002), ('Ipp Report'), at 13.105, 13.106. Accessible at

[http://www.amatas.com.au/assets/ipp\\_report.pdf](http://www.amatas.com.au/assets/ipp_report.pdf)

<sup>6</sup> Parliament of NSW, NSW Legislative Council, General Purpose Standing Committee No. 1, *Report on personal injury compensation legislation*, (Report No. 28) (2005) page xxii. Accessible at

[https://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/6deb694c553e0db8ca2570d10000c9a/\\$FILE/Final%20Personal%20Injury%20Report%208%20Dec%202005.pdf](https://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/6deb694c553e0db8ca2570d10000c9a/$FILE/Final%20Personal%20Injury%20Report%208%20Dec%202005.pdf)

<sup>7</sup> For example, see CLAN, cited in 'Child sex victims call for compensation: Royal Commission,' *The Newcastle Herald*, 17 September 2013. Accessed at <http://www.theherald.com.au/story/1779811/child-sex-victims-call-for-compensation-royal-commission/>. This approach has also been supported by the Catholic Church, see Jane Lee, 'Catholic Church backs sex abuse compensation scheme,' *The Age*, 14 November 2013. Accessible at <http://www.theage.com.au/victoria/catholic-church-backs-sex-abuse-compensation-scheme-20131114-2xi2y.html>.

<sup>8</sup> Australian Human Rights Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, April 1997, at Recommendation 15. Accessible at

<http://www.humanrights.gov.au/publications/bringing-them-home-report-1997>

<sup>9</sup> Debra Jopson, 'First compensation win for the Stolen Generation,' *The Age*, 18 October 2002. Accessible at <http://www.theage.com.au/articles/2002/10/17/1034561266360.html>

<sup>10</sup> See the judgment on costs and interest: *Trevorrow v State of South Australia* (No. 6) [2008] SASC 4 (1 February 2008) (Gray J)

<sup>11</sup> 'Residential Schools Canada: Alberta, NWT Bishops Latest To Apologize,' *Huffington Post Alberta Canada*, 24 February 2014. Accessed at

[http://www.huffingtonpost.ca/2014/02/24/residential-schools-canada\\_n\\_4848585.html](http://www.huffingtonpost.ca/2014/02/24/residential-schools-canada_n_4848585.html)

<sup>12</sup> BisLaw Personal Injury Trial Lawyers, *Information for Survivors*. Accessed at <http://bislaw.ca/indian-residential-school-claims/information-for-survivors/>

<sup>13</sup> Service Canada, *Common Experience Payment*,

<http://www.servicecanada.gc.ca/eng/goc/cep/index.shtml>

<sup>14</sup> Aboriginal Affairs and Northern Development Canada, *Independent Assessment Process*,

<https://www.aadnc-aandc.gc.ca/eng/1100100015632/1100100015633>

<sup>15</sup> Jon Swaine, 'Cardinal Dolan asked Vatican to hide millions from sexual abuse victims,' *The Telegraph UK*, 2 July 2013. Accessed at

<http://www.telegraph.co.uk/news/worldnews/northamerica/usa/10155673/Cardinal-Dolan-asked-Vatican-to-hide-millions-from-sexual-abuse-victims.html>

<sup>16</sup> 'Abuse victims to receive \$16.5m as Christian Brothers declare US bankruptcy,' *The Journal IE*, 23 May 2013. Accessed at <http://www.thejournal.ie/christian-brothers-us-bankruptcy-922771-May2013/>

<sup>17</sup> Dara Kelly, 'Mounting sexual abuse claims causes U.S. Christian Brothers to file for bankruptcy,' *Irish Central*, 30 April 2011. Accessible at <http://www.irishcentral.com/news/mounting-sexual-abuse-claims-causes-us-christian-brothers-to-file-for-bankruptcy-121020724-237384971.html#ixzz2uJ9tNcJx>

<sup>18</sup> 'Milwaukee Catholic Archdiocese proposes \$4m fund for abuse victims,' *The Guardian*, 13 February 2014. Accessed at <http://www.theguardian.com/world/2014/feb/12/milwaukee-catholic-archdiocese-4m-fund-abuse-victims>

<sup>19</sup> 'Historical Abuse Inquiry – the Background,' *BBC News Northern Ireland*, 13 January 2014. Accessible at <http://www.bbc.co.uk/news/uk-northern-ireland-25637486>

<sup>20</sup> 'Historical Abuse Inquiry – the Background,' *BBC News Northern Ireland*, 13 January 2014. Accessible at <http://www.bbc.co.uk/news/uk-northern-ireland-25637486>

<sup>21</sup> UN Committee on the Rights of the Child, *Concluding observations on the second periodic report of the Holy See*, (31 January 2014), at 8. Accessible at [http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/VAT/CRC\\_C\\_VAT\\_CO\\_2\\_1\\_6302\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/VAT/CRC_C_VAT_CO_2_1_6302_E.pdf)

<sup>22</sup> 'UN demands Vatican compensate Magdalene laundry victims,' *Breaking News IE*, 5 February 2014. Accessed at <http://www.breakingnews.ie/ireland/un-demands-vatican-compensate-magdalene-laundry-victims-621851.html>

<sup>23</sup> UN Committee on the Rights of the Child, *Concluding observations on the second periodic report of the Holy See*, (31 January 2014), at 8. Accessible at [http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/VAT/CRC\\_C\\_VAT\\_CO\\_2\\_1\\_6302\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/VAT/CRC_C_VAT_CO_2_1_6302_E.pdf)

<sup>24</sup> *Ibid*, at 9.

<sup>25</sup> *Ibid*.

<sup>26</sup> Lucy McNally, 'Anglican Church offers compensation to NSW victims of abuse at children's home in Lismore,' *ABC News*, 17 February 2014. Accessible at <http://www.abc.net.au/news/2014-02-17/anglican-church-offers-compensation-to-nsw-victims-of-abuse-at-5265430>

<sup>27</sup> Patrick Parkinson, Kim Oates, Amanda Jayakody, *Study of Reported Child Sexual Abuse in the Anglican Church*, (May 2009), at 34. Accessed at <http://www.anglican.org.au/docs/Study%20of%20Reported%20Child%20Sexual%20Abuse%20in%20the%20Anglican%20Church%20May%202009%20Full%20Report.pdf>

<sup>28</sup> Jane Lee, 'Catholic Church backs sex abuse compensation scheme,' *The Age*, 14 November 2013. Accessible at <http://www.theage.com.au/victoria/catholic-church-backs-sex-abuse-compensation-scheme-20131114-2xi2y.html>

<sup>29</sup> *Ibid*.

<sup>30</sup> Victorian Legislative Council Family and Community Development Committee Inquiry, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations*, (2013) at xxxv. Accessed at [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Report/Preliminaries.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Report/Preliminaries.pdf)

<sup>31</sup> *Ibid*.

<sup>32</sup> *Ibid*.

<sup>33</sup> *Ibid*, at xxxix.

**Appendix 2 – Submission of the Australian Lawyers Alliance to the Royal Commission into Institutional Responses to Child Sexual Abuse, Consultation Paper on Redress and Civil Litigation (2 March 2015)**

# **Redress and civil litigation**

## **Providing effective redress to survivors of abuse**

Submission to Royal Commission into Institutional Responses to Child  
Sexual Abuse, Consultation Paper on Redress and Civil Litigation

**2 March 2015**

## CONTENTS

Who we are .....	3
Introduction.....	4
Issue 1 – A national scheme?.....	4
Issue 2 – Past and future victims .....	5
Issue 3 – Counselling and care.....	6
Issue 4 - Monetary compensation.....	7
Issue 5 – Eligibility and standard of proof .....	11
Issue 6 - Funding.....	12
Issue 7 – Interim arrangements .....	13
Issue 8 - Civil Litigation.....	14
The Limitation Period .....	14
The Preferred Model for Reform .....	17
The Width of the Cases to Which the Reformed Law Should Apply .....	19
Retrospectivity .....	19
Vicarious Liability .....	22
Non-Delegable Duties.....	23
The Proper Defendant.....	24
Insurance .....	26
Conclusion.....	26



## WHO WE ARE

The Australian Lawyers Alliance ('ALA') is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.<sup>1</sup>

## INTRODUCTION

1. The Australian Lawyers Alliance welcomes the opportunity to have input into the issues raised by the consultation paper on Redress and Civil Litigation. Many of our members represent victims of abuse and hope to contribute to the issues raised.

## ISSUE 1 – A NATIONAL SCHEME?

### ***Should there be a single national redress scheme led by the Commonwealth Government or an alternative approach through individual States and Territories?***

2. There are advantages and disadvantages in a single national scheme. It would be slow to implement and require the referral of powers by states and territories. However, the alternative is a model which individual states and territories may or may not follow or implement only in part, creating great difficulty for those abused across jurisdictions and making injustice widespread between victims. We favour a single national scheme despite the potential delays in implementation.
3. The implementation of a national scheme would mean that there is less likely to be inequality in compensation amounts across jurisdictions. This would also reduce the number of disputes, as claimants would not be required to dispute which jurisdictional scheme would be more appropriate under their circumstances for their claim.
4. Creating a national scheme also avoids duplication in terms of processes, precedent and administration. We believe that in the long term, the administration of a national scheme would be more efficient.

5. We submit that compensation previously paid under schemes (whether statutory or otherwise) should clearly be taken into account in any future scheme, by giving credit in respect of amounts previously received.
6. For those individuals dissatisfied with the scheme, common law rights should remain.

## ISSUE 2 – PAST AND FUTURE VICTIMS

***Should the redress scheme provide for future victims or merely the past?  
Interaction between a direct personal response (primarily but not exclusively  
an apology) and a redress scheme.***

7. If the underlying causes that currently inhibit survivors from being able to claim compensation at common law are addressed, we submit that there may be a reduced need for a redress scheme for future victims of institutional abuse. It should also mean that most future victims would have access to a common law remedy should they wish to avail themselves of it.
8. However, allowance should be made for non-compliant institutions and for people who cannot face the stress of the risk of litigation. Although overwhelmingly, most cases resolve without going to court, it would be appropriate to give access to the scheme to future victims.
9. Even in the future, there will be some victims who won't be able to sue and there will be some people who won't wish to go to court. If the average time is 22 or 23 years before they come forward, the scheme will be closed before anyone abused in the last ten years gets a chance. An end date may not be likely to work.
10. If the underlying causes that currently inhibit survivors from being able to

claim compensation at common law are addressed retrospectively, we submit that this would enable many past survivors to have access to a common law remedy. This would also reduce the cost of a redress scheme.

11. These underlying causes include dealing with the problems in respect of limitation periods; vicarious liability; identity of defendants; incorporation of organisations as a legal entity capable of being sued; and the potential role of insurance. Doing so retrospectively should mean that most victims have access to a common law remedy, reducing the cost of a redress scheme.
12. With regard to apologies, they cannot be mandated. An apology which is as lacking in apparent sincerity as that read by Cardinal Pell without looking at the victim of his bureaucratic maladministration, John Ellis, (who was only a few metres away) is utterly without meaning or utility. There is undoubtedly a place for apologies, but they cannot be legislated.

### ISSUE 3 – COUNSELLING AND CARE

***Principles for counselling and psychological care, including existing services and gaps in those services.***

13. There should be no fixed limits on counselling and psychological care provided to survivors under a redress scheme.
14. There may be a need for payment of the gap between medical charges and the scheduled fee in respect of practitioners who do not bulk-bill. An option under which existing Medicare services are utilised but gap payments are met through supplementary funding seems attractive.

## ISSUE 4 - MONETARY COMPENSATION

***How would the loss be valued, what should the maximum sum be and should there be an option for payment by instalments or merely a lump sum? What should happen in respect of past payments to individuals?***

15. In respect of monetary payments, there appears to be much to be said for using something like s16 of the NSW *Civil Liability Act* 2002. Under that section, there is a cap, and payments (in that case for pain and suffering only) are judged as a percentage of a most extreme case, with reduced benefits in the lower range. Payments start at about 15% and a full percentage of a most extreme case is reached at about 33%. In NSW, the maximum amount for a most extreme case is currently \$572,000 (indexed) for pain and suffering alone. Other heads of damage such as economic loss and care may greatly exceed this sum.
16. If there were to be a reduction at the lower end of the range, it would certainly need to be significantly less than the 15% starting point under the NSW CLA. Moreover, it would be appropriate for both pain and suffering and past and future economic loss to be included within such a calculus.
17. Allowance for medical needs should be in a different category and should be, it is suggested, unrestricted, to the extent that they are over and above existing Medicare entitlements.
18. It would have to be recognised that such a scheme (which would still be significantly less than the Irish scheme) might in many cases grossly inadequately compensate for economic loss but such claims should, it is submitted, be more appropriately left to the common law to compensate, subject to appropriate legislative changes, to make such remedies more readily available for both past and future victims.

19. The NSW experience of percentages of a most extreme case goes back to the implementation, initially for motor accidents, from about 1988 and has in general terms been satisfactory. The definition of what is included would, of course, have to be varied.
20. We note that the Royal Commission has arranged for modelling of average monetary payments of \$50,000, \$65,000 and \$80,000, (with proposed maximum payments of \$100,000, \$150,000 or \$200,000). While we recognise that these are averages, the caps on damages in the Melbourne Response, reported to be \$75,000, were amounts which fell well below community expectations.
21. Compensation amounts for the Irish Residential Institutions Redress Board were recommended by the Compensation Advisory Committee to be categorised into five bands:<sup>2</sup>

Redress band	Total weighting for severity of abuse and injury/effects of abuse	Award payable by way of redress
V	70 or more	£200,000 – £300,000
IV	55 – 69	£150,000 – £200,000
III	40 – 54	£100,000 – £150,000
II	25- 39	£50,0000 – £100,000
I	Less than 25	Up to £50,000

22. In Ireland, the relevant Minister was also empowered under the *Residential Institutions Redress Act 2002* to make regulations regarding the amounts to

be paid, with up to €300,000 available for individuals meeting Redress Band V. The Board was further empowered to make an award in excess of €300,000 for exceptional cases. It could also make an additional award to an applicant calculated by reference to the principles of aggravated damages, on the same basis as an award of the High Court. This was required to take account of the circumstances of abuse, and could not be more than 20 per cent of the award.

23. A redress scheme needs to be structured to ensure long term compliance by institutional contributors. The Irish experience is instructive. By 2009, seven years after the scheme had been established, the initial indemnity agreement between the government and institutions was failing. At one stage, institutions were meeting only about 10 per cent of the Board's payments.
24. Of course, in the way it is suggested in the Consultation Paper, there would be a need for guidance criteria for those tasked with assessing appropriate percentages. There would also need to be a right for review of a determination. It would be desirable, in the interests of reducing expense for the initial claim, to be non-litigious but with appropriate support services to assist victims who might otherwise be incapable of presenting their claim. Both the initial determination should be before an independent person and there should be a right of review by a review panel, which should also be wholly independent. There should be a right to costs recovery in respect of review where legal representation might be more appropriate. Review by the courts should be restricted to the category of cases laid down in *House v The King* (1936) 55 CLR 499 at 505. Where a court does uphold administrative review (essentially on the basis of error of law, failure to have regard to established facts or having regard to matters which are legally irrelevant) the reviewing court, on upholding an application for prerogative relief, should have power to substitute its own determination so as to avoid

the unfortunate applicant having to start all over again. It would, however, be anticipated that the need for such administrative review before the courts would be limited to a tiny minority of cases by the application of *House v The King* (1936) 55 CLR 499.

25. It would be clearly be appropriate that in respect of any redress scheme, the amounts payable would be subject to reduction for any benefits previously received from institutions or government. It should not, however, be subject to any payback to Medicare or Department of Social Security (Centrelink). It would be possible in the criteria for assessment to provide that regard should be had to previous benefits in determining where on the scale the victim should lie.
26. For our part, we would adopt the Victorian approach evident in the *Limitation of Actions Amendment (Criminal Child Abuse) Bill* 2014 (VIC) which includes sexual or physical abuse whether by act or omission but add related psychological abuse. We would not seek to include psychological abuse alone, which seems to us to involve substantial evidentiary and definition difficulties. It would be arbitrary and, in our view, irrational to exclude physical abuse. A case such as *Salvation Army (South Australia Property Trust) v Graham Rundle* [2008] NSWCA 347 illustrates the psychological effects as well as the physical effects of repeated beatings, starvation, being confined to a cell and deprived of warmth (blankets) as a young child.
27. The difficulty of any scheme having a fixed closing date seems to us to be almost insuperable, having regard to the known very long delay in victims coming forward and the very real difficulties many victims have in articulating their issues. We would suggest an open-ended scheme in these circumstances, albeit that for future victims, the combination of deterrence and more effective civil legal remedies, together with insurance and the

redress scheme, should progressively reduce the potential for future claims.

28. As to whether payment should be by lump sum or periodic payment, we suggest allowing for both at the option of the victim. Those who cannot manage their affairs will require court approval and the money managed for them according to state and territory arrangements.

## ISSUE 5 – ELIGIBILITY AND STANDARD OF PROOF

### ***Eligibility for redress, appropriate standard of proof and whether deeds of release should be required or merely the payment offset against any common law entitlement?***

29. We would suggest that because the amounts available would inevitably be substantially less than reasonable compensation under common law rights, an appropriate measure may be that recommended by the Senate Community Affairs References Committee of 'reasonable likelihood' as the standard of proof.<sup>3</sup> This places the onus higher than plausibility but lower than the balance of probabilities, which is the standard utilised for litigation. We submit that a standard of proof that is based on the balance of probabilities, as previously recommended by the Truth, Healing and Justice Council, is grossly inappropriate, especially considering that the compensation amounts will be significantly lower under the scheme than available under the common law.
30. Many victims will need assistance to present and do themselves justice. There will need to be some form of advocacy mechanism, not necessarily by lawyers. Lawyers might be more appropriate on review, where costs might be available for successful applications but not those who are unsuccessful.

31. Decision-makers will need legal training, and will need to be independent of institutions and government, as should the review process. We would support as little legal formality as possible, with most claims being primarily determined on paper applications. It will be necessary and desirable in many cases for there to be medical input prior to determination in order to do justice to victims. Such medical review should be done without expense to the victim and should assist the decision-maker.
32. Given that any redress scheme is unlikely to offer anything approaching the true value of common law compensation, it seems to us that it would be an injustice to require a deed of release. On the other hand, any payments made (together with any previous institutional or government compensation) should necessarily be taken into account and remain recoverable or repayable if common law damages are ultimately and successfully pursued. In respect of the redress scheme, any payments made should be offset against common law awards.

## ISSUE 6 - FUNDING

***Appropriate funding arrangements, funder of last resort in respect of institutions that entirely cease to exist or are impecunious and what flexibility should be allowed in implementing redress schemes and funding between different jurisdictions.***

33. There would clearly need to be a levy upon institutions, which might be proportionate to abuse complaints statistics and past numbers of claims rather than payments since there has been a wide variation in institutions meeting their obligations to compensate. Institutions which have offered the least redress in the past should not benefit from this. Government will clearly also have to contribute substantially since state and territory governments bear a substantial share of responsibility for those in their

care.

34. An alternative approach would be to require institutions and government to contribute prospectively to a fund and thereafter meet claims which the redress fund finds established against them. In respect of an institution which has wholly ceased to exist (with no related or successful organisations) or with a genuine incapacity to meet payments, there would need to be a proportionate levy on all contributing institutions, so that government alone does not bear the whole burden.
35. We would strongly oppose having different redress schemes in different states and territories. This could only lead to significant injustice, as well as extraordinary complexity for those injured in more than one jurisdiction by the same institution.
36. Clearly, it would be necessary for those who might have claims against more than one institution to have some further limitation upon their rights of recovery so that they could not receive many multiples of the maximum for a single institution's abuse.

## ISSUE 7 – INTERIM ARRANGEMENTS

### ***What interim arrangements should apply pending more permanent arrangements?***

37. This must necessarily depend upon the availability of funding but at least medical and counselling services could be made freely available pending the redress scheme starting to operate fully.

## ISSUE 8 - CIVIL LITIGATION

***Reform of limitation periods, vicarious liability, having an appropriate legal entity to sue, how governments and non-government institutions should behave in respect of claims, insurance and retrospectivity require attention.***

### The Limitation Period

38. In respect of limitation periods, there is a clear need for action. In the Royal Commission's Interim Report, Volume 1 (at 5.1 on page 158) appears a finding based upon 1,677 private interviews that 'survivors took an average of 22 years to disclose their abuse after it began'. This is remarkably close to the period of 23 years from last abuse to first complaint found by an Anglican Queensland survey of victims.<sup>4</sup>
39. The reasons for delay include infancy; lack of access to independent legal and other advice; psychological injury consequent upon sexual and/or physical abuse; ignorance of the nature of the abuse or indeed, in some cases that it is abuse at all; lack of insight into the sequelae of such abuse; fear or threats by abusers or those associated with them, directed both at the victim and, on occasions, at the victim's family; gross embarrassment; unwillingness to disclose details of abuse to family or others who may disbelieve them; an unwillingness to undergo the trauma of complaint in respect of criminal, let alone civil, remedies.
40. The explanatory notes to the Victorian Discussion Paper on the *Limitation of Actions Amendment (Criminal Child Abuse) Bill 2014 Exposure Draft* referred to the incongruity of circumstances in which the perpetrator can be tried and convicted of sexual abuse many years later but the institution under whose aegis the abuse occurred, can argue that on the lower civil onus, a fair trial is no longer possible. Such an argument was advanced (albeit unsuccessfully) in *Salvation Army (South Australia Property Trust) v*

*Graham Rundle* [2008] NSWCA 347.

41. It is worthy of note that limitation regimes vary enormously throughout Australia, ranging from regimes under which extensions of time over lengthy periods are well nigh impossible (Western Australia and Queensland) to more liberal regimes such as South Australia. In the *Salvation Army v Rundle* case referred to above, the extension of time application was in respect of prolonged sexual and physical abuse in a Salvation Army institution in South Australia in the early 1960s, brought in NSW, where the victim now lives. His abuser was convicted of offences against a substantial number of victims, including the plaintiff, in quite recent times.
42. There is in the NSW Discussion Paper, *Limitation periods in civil claims for child sexual abuse*,<sup>5</sup> a helpful summary of the various issues under NSW law in relation to potential rights to extension of time. Those rights, however, are markedly less liberal than the South Australian law applied by the NSW court and it is most unlikely that time would have been extended if the abuse had occurred in NSW and NSW law had had been applied rather than the law of South Australia in respect of limitation extensions.
43. Moreover, all applications for extension of time, as distinct from proving incapacity under the *Limitation Act* 1969 (NSW) must meet the *Brisbane South*<sup>6</sup> test, where the plaintiff must establish that a fair trial is still possible after a prolonged lapse of time and given a presumed reduction in capacity of witnesses to recall evidence, even where records have not been destroyed.
44. The existing rights for minors, save where the abuse is by a parent/guardian, in NSW, bind a child by the conduct of the parent/guardian and if that person fails to bring an action in time, then notwithstanding the infancy of the victim, the child loses the right to an extension of time and to

sue. It is not apparent why that exception is just or fair but it illustrates the difficulties created by the present law.

45. Moreover, the need to apply for an extension of time or to prove disability can itself be extremely traumatic. See, for example, *John Ellis v Pell and the Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2006] NSWSC 109.
46. John Ellis was cross-examined for more than three days in circumstances where it was being put to him that he was lying and presenting a false case in respect of abuse, notwithstanding that the Church had accepted on the *Briginshaw*<sup>7</sup> onus that the abuse had occurred and in fact the Church had other evidence (which it did not disclose) supporting its own finding to that effect. Similarly, in *Salvation Army (South Australia Property Trust) v Graham Rundle* [2008] NSWCA 347, the Salvation Army's conduct was heavily criticised, as was the conduct of two solicitors who were found to have sought to mislead the court as to the extent of the information available to that Church. It is noteworthy that that was a case where the limitation period was extended back to offences occurring in the early 1960s but relevantly under the law of South Australia. Had the relevant limitation law been that of NSW rather than the significantly more liberal South Australian regime, as suggested earlier, it is unlikely that the plaintiff would have succeeded.
47. To put victims through the gruelling process required under the NSW limitation regime to establish an extension of time amounts, it is submitted, inflicts legal abuse on top of sexual and psychological abuse.
48. Sadly, the history of such conduct, including by organisations such as state governments claiming to be model litigants, is replete with examples of poor conduct. See the approach of the State of NSW in *TB and DC v State of*

*NSW, TB v State of NSW* [2009] NSWSC 326, [2012] NSWSC 143 and [2014] NSWSC 1145 *DC (and TB) v State of NSW* [2010] NSWCA 15.

## The Preferred Model for Reform

49. In the Victorian Department of Justice *Limitation of Actions Amendment (Criminal Child Abuse) Bill 2014 - Exposure Draft*, it is proposed to completely remove limitation periods applying to civil actions, including the longstop limitation period, to do so retrospectively and to do so in respect of acts or omissions amounting to physical or sexual abuse ‘that could, at the time the act or omission is alleged to have occurred, constitute a criminal offence under the law of Victoria or the Commonwealth.’
50. This approach, similar to that of British Columbia, has very considerable advantages. The trauma and expense of litigation to obtain an extension of time or establish a disability is removed. We attach the Australian Lawyers Alliance Submission to the Victorian Department of Justice Exposure Draft to these submissions.
51. The Victorian approach is not perfect. For reasons which are unclear, it excludes (perhaps accidentally) psychological abuse connected with the physical or sexual abuse. Section 27A of the draft should, in our submission, be amended to read:

*‘criminal child abuse means an act or omission in relation to a person when the person is a minor—*

- i. *(a) that is physical or sexual **or related psychological abuse**; and...*

52. In addition, Section 27A rightly, in our submission, makes the criteria an

allegation that ‘could, at the time the act or omission is alleged to have occurred, constitute a criminal offence ...’ This avoids having to establish criminality on the *Briginshaw* onus and the mere allegation is sufficient to obtain the exemption. However, the exempting provision goes on to use the words, ‘constitute a criminal offence under the law of Victoria or the Commonwealth’.

53. Again, this drafting seems to us to be deficient (albeit perhaps accidental). To prove that it could be an offence under the law of the place where the action is brought may create difficulties, given substantial differences in law between the different states and territories. The reference to the Commonwealth is broadly unhelpful, given that the Commonwealth generally does not govern this area of criminal law. We would relevantly insert ‘constitute a criminal offence under the law of a State or Territory or the Commonwealth.’
54. Ideally, this drafting would thus read:
- ‘criminal child abuse means an act or omission in relation to a person when the person is a minor—*
- i. *(a) that is physical or sexual **or related psychological abuse**; and...*
  - ii. *(b) that could, at the time the act or omission is alleged to have occurred, **constitute a criminal offence under the law of a State or Territory or the Commonwealth.***
55. It is to be borne in mind that many of the institutions and much of the abuse crosses state and territory boundaries and the moving on of abusers from one place to another, as well as the movement of victims, is an unnecessary complication which can readily be avoided by appropriate drafting.
56. In the NSW Department of Justice Discussion Paper on *Limitation Periods*

of *Civil Claims of Child Sexual Abuse*, Option A is very similar to the Victorian draft. A copy of this organisation's submission in relation to the NSW Discussion Paper is also annexed.

### **The Width of the Cases to Which the Reformed Law Should Apply**

57. In our view, sexual or physical abuse or associated psychological injury should be included. Sheer physical abuse can lead to devastating trauma and there is ample evidence of this in cases such as *Rundle*.<sup>8</sup> Beatings, deprivation of food and warmth in an orphanage were clearly at least as causative of psychological injury as anything else. Separating out sexual and physical injury would be wholly inappropriate in these circumstances, as would any attempt to exclude the psychological consequences of either sexual or physical abuse. There does seem to us to be a case for excluding pure psychological injury (without sexual or physical abuse) since the difficulties of proof, uncertainties of diagnosis and risk of injustice to defendants seem to us to outweigh the advantages of that further change.

### **Retrospectivity**

58. We think this is a rare exception to the general rule against retrospectivity. The injustice is so gross, the need so great and the number of victims so substantial that it would reflect very poorly on our society not to give a remedy to victims in these circumstances. The Irish example suggests that providing a remedy retrospectively is possible and there is certainly evidence that major institutions, such as the Roman Catholic Church, are (according to Cardinal Pell's evidence to the Commonwealth Royal Commission) well able to meet common law damages. It is noteworthy that the Salvation Army through its spokesperson on the ABC *Four Corners* program on 18 August 2003, said:

'We have no statute of limitations applying to victims of the Salvation Army ... we will never close the book on anyone who has gone through our care as long as they live ...'

59. In *Rundle*, the Salvation Army vigorously defended an extension of time in respect of an abuse victim, one of whose abusers was subsequently charged with multiple offences and gaoled, all the way to the Court of Appeal. Institutions should be held to account and justice for victims should have priority. This is one of the rare circumstances where retrospectivity is justified. The Victorian draft legislation is expressly retrospective, including in respect of cases presently on foot and excluding only cases where a final judgment or settlement has occurred. It seems to us that this is an appropriate outcome.
60. It is to be noted that there are examples of retrospective legislation in respect of rights in NSW, such as the amendments to s3B of the *Civil Liability Act 2002*, which deprived some claimants of their right to common law damages even whilst their cases were part-heard. We would not wish to see such an injustice revisited but providing rights to those wrongly denied them in the past falls into a very different category.
61. Moreover, the Victorian draft and the NSW Option A only require that an allegation of sexual or physical criminal conduct be made in order to avoid the limitation regime. Given the extraordinary complexity, varying opportunities from jurisdiction to jurisdiction and expense and trauma of bringing extension of time applications even where they are available, we commend the Victorian proposal and approach. To prove incapacity under the *Brisbane South* test places an extraordinary burden on litigants. It has undoubtedly deterred and prevented many genuine claims for compensation. Alternatives discussed in the NSW Department of Justice

Discussion Paper would still require a lengthy, expensive and contested application to the courts in most cases, which of itself would deter many from pursuing their rights. It would still be traumatic for victims. The reality is that once through the hurdle of limitation periods (as in *Rundle*), the overwhelming majority of cases then settle satisfactorily. There is no reason why this should not continue to occur after the limitation bar is lifted, particularly given the degree of case management which now occurs in courts and the various incentives to settle, such as offers of compromise and *Calderbank* offers.

62. We commend the Victorian approach with minor modification in two respects. One is including associated psychological abuse and the other is in avoiding any issue as to which state or territory the criminality is alleged to have occurred in. Subject to these minor changes, the Victorian draft legislation properly reflects the findings of the Victorian Legislative Council Inquiry 'Betrayal of Trust' dated 13 November 2013. This approach might appropriately be used as a guideline for all states and territories with the minor caveats referred to earlier.
63. We note that alternatives such as an extended limitation period are suggested to ameliorate the problem. Given the very long periods involved, this does not seem to be a practicable or just solution in many cases. The real protection for defendants is in the requirement for plaintiffs to prove the case on the balance of probabilities, and courts are perfectly capable of having regard to the evidentiary difficulties faced by all parties after lengthy periods of time. After all, in *Rundle*, despite the abuse having occurred between 1960 and 1965, one of the perpetrators was found guilty and sentenced to a lengthy period of imprisonment on the criminal onus within the last five years. The suggestion that defendants on the civil onus need higher standards of protection than on the criminal onus, in our submission, defies logic.

## Vicarious Liability

64. In *State of NSW v Lepore*,<sup>9</sup> the majority (albeit with different reasoning) left open vicarious liability despite criminality. This is consistent with longstanding law, such as *Lloyd v Grace, Smith & Co* [1912] AC 716. We commend the close connection test established in Canada,<sup>10</sup> *Bazley v Curry* [1999] 2 SCR 534 at 558-59 [40]; *Jacobi v Griffiths* [1999] 2 SCR 570 and by the House of Lords in *Lister & Ors v Hesley Hall Ltd* [2001] 2 All ER 769, more recently followed in *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256, in *JGE v The English Province of Our Lady of Charity and The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2011] EWHC 2871 (QB) and most particularly and recently in the English Supreme Court (replacing the House of Lords), in *The Catholic Child Welfare Society & Ors (Appellants) v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools & Ors (Respondents)* [2012] UKSC 56. There, Lord Phillips (with whom the other members of the court agreed) accepted that an employment-like relationship without it actually being employment could be sufficient for vicarious liability to arise, an unincorporated association could be vicariously liable for the tortious conduct of its members, a defendant could be vicariously liable for the tortious act of another defendant even though the act in question constituted a violation of the duty owed and even if the act in question was a criminal offence and vicarious liability could extend even to a criminal act of sexual assault and that it is possible for two different defendants to be each vicariously liable for the single tortious act of another defendant.
65. In particular, Lord Phillips, with the concurrence of the balance of the Supreme Court, said:

[86] ‘Vicarious liability is imposed where a defendant,

whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a strong causative link.

[87] These are the criteria that establish the necessary 'close connection' between the relationship and abuse.'<sup>11</sup>

66. It is this approach, it is respectfully submitted, which should commend itself as the underlying principle. This approach appears to be established in law in common law countries other than Australia. The position on vicarious liability in Australia has not been considered in the High Court since the inconclusive decision in *Lepore*, but the rest of the common law world has clearly moved on. *Trustees of the Roman Catholic Church for the Diocese of Sydney v Ellis* (2007) 70 NSWLR 565 stands in stark contrast with this.
67. If we consider whether the child or the institution has better prospects of controlling the abusive conduct, then there can be no doubt that placing responsibility on the institution (even when negligence cannot in a particular case be proven) ultimately serves the interests of promoting protective conduct and deterring and reducing the likelihood of misconduct. Leaving the burden on an infant merely heaps one abuse on top of another.

### Non-Delegable Duties

68. There is a marked difference between the approach taken in *Lepore* in respect of non-delegable duties and that taken in previous High Court decisions, such as *Kondis v State Transport Authority* [1984] HCA 61. In

effect, the majority (McHugh J dissenting) in *Lepore* found that a non-delegable duty was delegable. We respectfully submit that this conclusion produces an absurd outcome. Again, Australia seems to be behind at least some of the common law world on this issue. See, for example, the English Supreme Court decision in *Woodland v Essex County Council* [2013] UKSC 66 (23 October 2013).

69. Again, if we look to whether the individual child or the institution (in respect of *Woodland*, an education authority) had the greater opportunity to provide protection and ensure proper supervision, then the answer is undoubtedly the institution, even if the fault was that of its delegate. Again, the interests of justice lie with non-delegable duties being in truth non-delegable.

### The Proper Defendant

70. References were made in the Royal Commission Consultation Paper to the difficulties involved in suing unincorporated associations. These difficulties at common law can be overstated. In general, if an organisation has an identified membership, then a representative order can be made against its committee or trustees or head in order for the action to take place and liability will then fall upon the whole of the membership. Such a representative order was sought unsuccessfully (ultimately) in the *Ellis* case,<sup>12</sup> because the Church was so amorphous that its membership was uncertain.
71. This is a relatively unusual complication.
72. This was the first time that this problem had directly arisen. Previously, the practice of the Church in each diocese had been to accept that its trustees (incorporated by state or territory law) and holding its property, were the

appropriate body to sue in respect of claims in negligence against 'the Church'. That remains the position espoused by the Roman Catholic Church in England and Wales. The position of the Church is a matter in each of its diocese for determination by the particular bishop.

73. As the Royal Commission heard, Cardinal Pell decided to deter future claims by raising this matter, bringing in Victorian solicitors to oppose the claim and vigorously (and quite inappropriately) defending the claim on the basis of falsity, when the Church had itself accepted on the *Briginshaw* onus that the abuse had occurred.
74. Since *Ellis*, some parts of the Church have continued to use the defence that the Church is effectively immune from suite. See *PAO, BJH, SBM, IDF and TMA v Trustees of the Roman Catholic Church for the Archdiocese of Sydney & Ors* [2011] NSWSC 1216 (Hoeben J) and *Uttinger v The Trustees of the Hospitaller Order of St John of God Brothers* [2008] NSWSC 1354. However, other bishops such as the Bishop of Newcastle/Maitland, have not taken the point and continued to permit the trustees to be sued.
75. Given that the status of the Roman Catholic Church was created at its own request by acts of the state and territory legislatures, it should be recommended that the various acts be amended to make the trustees liable along the lines of the legislation currently before the NSW Legislative Council in *The Roman Catholic Church Property Amendment (Justice for Victims) Bill 2012*.
76. Other churches and institutions do not generally appear to raise the same difficulties involved in the peculiar structure of the Roman Catholic Church and it is to that Church that specific amendments of state and territory legislation is required. Should any other significant institution lack an identifiable body to be sued, then the state or territory should similarly

legislate protection. One option might be to simply provide that the present leadership of the body be responsible in law for the conduct of their predecessors and the organisation (whether or not under the same name) to which they have succeeded as leaders. It might also be enacted that all assets of and related to the organisation, whether held in law by it, might be subject to liability in such actions. This, however, would be significantly more controversial but might be necessary if there were indicia of any attempt to evade the intent of legislative change.

77. However, the principal need for amendment is in respect of the Roman Catholic Church in all states and territories and the amendment is relatively simple, as has been indicated in the NSW Legislative Council discussion on the amendment bill.

## INSURANCE

78. The complexities of insurance are very considerable. Even where insurance exists, there are significant doubts as to whether it covers criminal liabilities. There are significant difficulties in regard to small organisations such as sporting activities for children, where the cost might be prohibitive even if adequate insurance was available.
79. We would suggest that this is a matter for further consideration and a separate discussion paper from the Royal Commission.

## CONCLUSION

80. We are happy to elaborate upon any of the issues that we have raised in this submission.

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## REFERENCES

- <sup>1</sup> Australian Lawyers Alliance (2012) <[www.lawyersalliance.com.au](http://www.lawyersalliance.com.au)>
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- <sup>4</sup> Patrick Parkinson, Kim Oates, Amanda Jayakody, 'Study of Reported Child Sexual Abuse in the Anglican Church', (May 2009), at 5.
- <sup>5</sup> NSW Department of Justice, Discussion paper: *Limitation periods in civil claims for child sexual abuse*, January 2015. Accessed at <http://www.justice.nsw.gov.au/legal-services-coordination/Documents/Discussion%20paper%20on%20amendments%20to%20Limitations%20Act%201969.pdf>
- <sup>6</sup> *Brisbane South Regional Health Authority v Taylor* [1996] HCA 25; 186 CLR 541.
- <sup>7</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336
- <sup>8</sup> *Salvation Army (South Australia Property Trust) v Graham Rundle* [2008] NSWCA 347
- <sup>9</sup> *State of NSW v Lepore* (2003) 212 CLR 511
- <sup>10</sup> *John Doe v Bennett* [2004] 1 SCR 436
- <sup>11</sup> *The Catholic Child Welfare Society & Ors (Appellants) v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools & Ors (Respondents)* [2012] UKSC 56 at [86] – [87].
- <sup>12</sup> *Trustees of the Roman Catholic Church for the Diocese of Sydney v Ellis* (2007) 70 NSWLR 565

## **Appendix 3 – Access to Justice for Survivors of Child Abuse, Best Practice Law Reform Proposals**



**Access to justice  
for survivors of child abuse**  
*best practice law reform proposals*



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## **About us**

The Australian Lawyers Alliance is a national association of lawyers, academics and other professionals, dedicated to protecting and promoting justice, freedom and the rights of the individual.

We receive no government funding and are funded entirely by our members.

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## CONTENTS

Who we are .....	2
Introduction .....	2
Limitation periods.....	4
Sexual, physical and psychological abuse .....	5
Institutional nexus .....	6
Retrospective application.....	6
Duty of institutions (where institutions are involved).....	7
Identifying a proper defendant.....	9
Deeds of release .....	11
Recommendations .....	13

## Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence. While maintaining our plaintiff common law focus, our advocacy has since expanded to criminal and administrative law, in line with our dedication to justice, freedom and rights.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.<sup>1</sup>

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<sup>1</sup> [www.lawyersalliance.com.au](http://www.lawyersalliance.com.au).

## Introduction

1. Jurisdictions around Australia have started to respond to recommendations from the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission). In its report on Redress and Civil Litigation, the Royal Commission recommended that all jurisdictions remove limitation periods for child sexual abuse as soon as possible. It also made a number of other recommendations designed to remove obstacles in civil litigation that prevented survivors of abuse from accessing justice.
2. While supporting the Royal Commission's prioritised removal of limitation periods, the Australian Lawyers Alliance (ALA) believes that comprehensive law reform is required as soon as possible to ensure that survivors of child abuse are not unfairly prevented from accessing compensation for the injuries caused by the abuse. We also believe that consistent law reform across all Australian jurisdictions is the best way to secure justice for everyone, wherever they might be in the country. Some jurisdictions are already starting to consider and implement some of the Royal Commission's recommendations. As such, we felt it was timely to share what we consider to be best practice law reform to ensure justice for all survivors of child abuse.
3. In our suggestions, we have decided not to limit our recommendations to the terms of reference of the Royal Commission. While the recommendations of the Royal Commission are clearly constrained by its terms of reference, the ALA believes that justice requires broader reforms to accommodate injuries arising from all child abuse, not simply child abuse of a sexual nature or with an institutional nexus. We believe that survivors of child abuse of a sexual, physical or associated psychological nature should all benefit from the law reform that the Royal Commission has already started to inspire.
4. These recommendations are therefore based on those of the Royal Commission, but are not identical, providing instead our own interpretation of what justice requires.
5. Most Australian jurisdictions have either removed or are in the process of removing limitation periods for civil litigation in line with the Royal Commission's recommendations.
6. However, ensuring justice for survivors requires much more comprehensive legislative reform than removing just this one obstacle. The Royal Commission has examined cases where justice

has been unavailable for many reasons, including the absence of an entity to sue. Challenges in accessing justice have also emerged in gaps in the common law which interrupt the trail of liability from the perpetrator to the institution that has facilitated the abuse. Deeds of release can also pose an unfair obstacle to accessing fair compensation for survivors of abuse.

7. This short report offers the ALA's views on what is required for comprehensive law reform to ensure that justice is available for all survivors of child abuse.

## Limitation periods

8. For generations, limitation periods have effectively prevented people from mounting successful personal injury claims for injuries sustained as a result of child abuse. While limitation periods were originally designed to ensure that defendants were treated fairly in civil litigation, in cases of child abuse, they have notoriously ensured unfair outcomes for claimants.
9. As revealed by the Royal Commission, the unique nature of child abuse means that the time that typically elapses between the abuse giving rise to injury and the disclosure of that abuse is on average approximately 22 years.<sup>2</sup> Obstacles to bringing claims earlier include both the psychological trauma suffered by the survivor (meaning they may have difficulty revealing their experiences earlier), as well as refusal by authority figures to accept that the child was telling the truth about their experiences at the time the abuse took place, including accusations that the child's disclosure was a lie. Some witnesses to the Royal Commission have also described being subject to pressure from the institution or even the community to refrain from disclosing the abuse, due to the reputational damage that would ensue.
10. In its report on Redress and Civil Litigation, the Royal Commission recommended that state and territory governments remove limitation periods for claims for damages "brought by a person where that claim is founded on the personal injury of the person resulting from sexual abuse of the person in an institutional context when the person is or was a child".<sup>3</sup> It further

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<sup>2</sup> Royal Commission, *Redress and Civil Litigation Report* (2015), 444.

<sup>3</sup> Royal Commission, *Redress and Civil Litigation Report* (2015), recommendation 85.

recommended that the removal have retrospective effect, that courts' existing powers to stay proceedings not be otherwise affected and that this reform be made as a priority.<sup>4</sup>

11. The ALA believes that limitation periods should be removed for injuries caused by a wider selection of abusive behaviours and in circumstances where there is no institutional nexus with the abuse. We agree that the removal should have retrospective effect. To restrict reform to cases of sexual abuse with an institutional nexus will give rise to unfairness for some survivors. Even in the absence of limitation periods, courts should retain their discretion to stay claims where the interests of justice required it.

## Sexual, physical and psychological abuse

12. Removing limitation periods is clearly an important step in ensuring that survivors of child abuse are able to access justice and fair compensation for any injuries they have sustained. The ALA notes, however, that there is no reason why the terms of reference of the Royal Commission should limit the types of claims that limitation periods should be removed for. For the same reason that survivors of child sexual abuse have difficulty in disclosing their experiences, survivors of child physical and related psychological abuse will also face difficulties. There is also often a combination of sexual, physical and psychological abuse. To remove limitation periods for the claims arising from injuries caused by only one aspect of child abuse (sexual abuse) while leaving claims for injuries arising from other abuse statute-barred would be illogical and, in practice, likely impossible.
13. The ALA therefore believes that limitation periods should be removed for claims arising from child abuse of a sexual, physical and associated psychological abuse. In the ALA's view, the Victorian reforms passed in 2015 constitute best practice,<sup>5</sup> with the NSW reforms passed in 2016<sup>6</sup> being substantively similar. The same reforms should be implemented in all jurisdictions across Australia.

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<sup>4</sup> Royal Commission, *Redress and Civil Litigation Report* (2015), recommendations 86-88.

<sup>5</sup> *Limitation of Actions (Child Abuse) Bill 2015* (Vic).

<sup>6</sup> *Limitation Amendment (Child Abuse) Bill 2016* (NSW).

## Institutional nexus

14. The Royal Commission has recommended that limitation periods be removed so that claims against institutions for child abuse are not statute-barred. While this is the extent of the recommendation that can be made by the Royal Commission, given its terms of reference, justice requires a more comprehensive response.
15. The ALA does not support any requirement that there be an institutional nexus for the removal of limitation periods to apply. Limitation periods should be lifted in relation to all child sexual, physical and associated psychological abuse, regardless of whether there is an institution involved in the abuse or not. While in practice, the vast majority of claims will continue to involve institutions, due to the financial reality that institutions will generally be best placed to pay damages, it would be unfair to restrict the reforms in this way. To do so could leave survivors feeling as though they had been abused by the wrong person or in the wrong place, even though the injuries they have suffered are the same.

## Retrospective application

16. The ALA believes that limitation periods should be removed in all cases child abuse, including where the abuse occurred prior to the limitation period being lifted.
17. Retrospective law reform is controversial and usually not preferable. However, in the area of historical child abuse, the ALA believes that the evidence presented by the Royal Commission demands a response that includes retrospective reforms.
18. If limitation periods are not lifted retrospectively, survivors would have to seek permission from the court to bring a claim outside of any limitation period that applied. Even where this application was successful, it would constitute an unfair burden on the client. It would also act as an effective bar to many claims, forcing survivors to forego compensation for their injuries or accept unfairly low amounts in informal settlements in the knowledge that their claim would fail in court. Further, in circumstances where the abuse has not been reported because the child was disbelieved or discouraged from taking the complaint further by officers of the institution responsible, failing to remove limitation periods retrospectively would effectively reward this unconscionable behaviour.

## Duty of institutions (where institutions are involved)

19. Where an institution is involved in child abuse, tracing liability from the perpetrator in question to the institution that facilitated the abuse or is otherwise liable for the injuries can be complex. Australian common law has not developed in line with that of other common law countries, such that liability has traditionally been difficult to establish in cases of child abuse.
20. The Royal Commission outlined three possible approaches to attaching liability to institutions for child abuse:
- an action in negligence;
  - vicarious liability; or
  - breach of non-delegable duty.
21. According to the Royal Commission, the preferred approach is to introduce legislation that would impose a non-delegable duty on certain institutions, but restrict this duty to prospective, rather than retrospective, claims.<sup>7</sup> The Royal Commission believes a non-delegable duty would be too great a burden for some institutions, such as institutions arranging foster care or kinship care, or not-for-profit or volunteer institutions other than those providing residential facilities for children, schools or day care facilities, or religious organisations. For any abuse connected to those institutions, the Royal Commission recommends reversing the onus of proof, requiring those institutions to demonstrate that they took reasonable steps to prevent abuse before they are able to avoid liability.<sup>8</sup>
22. The ALA believes that there is a need for stronger protections for survivors of abuse, to ensure that institutions pay compensation for injuries caused by abuse connected to them.
23. A traditional means of holding an institution liable for the actions of an individual in an employment context is vicarious liability. It is clear from *Lloyd v Grace, Smith & Co* [1912] AC 716 that vicarious liability is available in cases of criminal conduct. A lack of clarity on this point was introduced by *NSW v Lepore* (2003) 212 CLR 511, with three of the seven judges ruling that vicarious liability could never arise from criminal conduct. This was not a majority view, however, and it would appear that the availability of vicarious liability for criminal conduct

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<sup>7</sup> Royal Commission, *Redress and Civil Litigation Report* (2015), recommendations 90, 93.

<sup>8</sup> Royal Commission, *Redress and Civil Litigation Report* (2015), recommendations 89-93.

remains. Nevertheless, given the uncertainty, legislative clarification on this point would benefit survivors of child abuse seeking compensation for their injuries.

24. A further challenge with vicarious liability and child abuse claims relates to the requirement for an employment-like relationship. Even where an institution is involved in facilitating child abuse, such as a church or a school, it is not always the case that the individual who offends against the child is employed by that institution. Churches do not technically employ priests, for example. Cleaners or other support staff might be contractors or volunteers rather than employees. While the strictness of the employment requirement varies across common law countries, it can constitute an insurmountable hurdle in the ability to hold institutions liable for injuries arising from child abuse.
25. An alternative means for attaching liability to an institution for crimes committed by an individual might be via the concept of a non-delegable duty. According to this concept, which can arise when there is a particular relationship of vulnerability between the institution and the individual to whom the duty is owed, some duties are so important that they cannot be delegated. This resolves one of the obstacles that exist with vicarious liability, being the requirement for an employment relationship between the institution and the offender. However, following the judgment in *Lepore*, it became clear that non-delegable duties can in fact be delegated, and may not survive criminal conduct by the offender.<sup>9</sup>
26. For these reasons, the ALA advocates combining vicarious liability with a 'close connection test' to establish whether an institution should rightfully be held liable for the conduct of an individual. Based on discussion of this test in case law across the common law world,<sup>10</sup> we propose the following definition of a close connection test:
- Close connection means that an organisation will be vicariously liable for the conduct of an associated individual where the risk of abuse by that individual was created or increased by the nature of the enterprise engaged in by the organisation. Relevant to

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<sup>9</sup> The same problem exists in the UK. In *NA v Nottinghamshire County Council* [2015] EWCA 1139, the institution was absolved of liability under both vicarious liability and non-delegable duty when it gave children to an abusive carer in the absence of negligence.

<sup>10</sup> *Lister v Hesley Hall* [2001] 2 All ER 769 (HL); *State of NSW v Lepore* (2003) 212 CLR 511, [74] per Gleeson CJ; *The Catholic Child Welfare Society & Ors (Appellants) v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools & Ors (Respondents)* [2012] UKSC 56, [86] per Lord Philips; *Prince Alfred College Incorporated v A, DC*, [2016] HCA 37, per French CJ; *Lister v Hesley Hall* [2001] 2 All ER 769 (HL).

that increased risk will be matters such as (but not confined to) disparity of authority and/or power between the organisation or the associated individual and the victim, including but not confined to vulnerability or intimacy in the relationship so created.

27. The ALA believes this standard should be applied to all institutions. We understand the Royal Commission's argument that extending full liability to not-for-profit or volunteer institutions generally may discourage community activities for children. However, we believe that the safety of children must be protected to the highest possible standard in all circumstances.

## Identifying a proper defendant

28. Removing limitation periods and clarifying institutional responsibility is of little use if the institution is able to avoid liability by virtue of its internal structure. The case of John Ellis brought this issue into sharp focus. Ellis, whose claim against the Catholic Church was the subject of Case Study 8 of the Royal Commission, had been abused as an altar boy by an Assistant Priest in the Catholic Church in the 1970s. He became aware of the extent of his injuries many years later and, after a failed attempt to engage with the Church's Toward Healing redress program, sought to sue, *inter alia*, the trustees of the Church for compensation. The Court held that the Church trustees were not liable for the actions of the Assistant Priest who perpetrated the abuse.
29. The Royal Commission has recommended that state and territory governments introduce 'legislation to provide that, where a survivor wishes to commence proceedings for damages in respect of institutional child sexual abuse where the institution is alleged to be an institution with which a property trust is associated, then unless the institution nominates a proper defendant to sue that has sufficient assets to meet any liability arising from the proceedings:
- a. the property trust is a proper defendant to the litigation
  - b. any liability of the institution with which the property trust is associated that arises from the proceedings can be met from the assets of the trust.'<sup>11</sup>
30. The ALA supports this recommendation. While no jurisdiction has yet implemented this reform as far as we are aware, it is an essential reform that is required to ensure that the

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<sup>11</sup> Royal Commission, *Redress and Civil Litigation Report* (2015), recommendation 94.

maximum number of survivors are able to access justice. We would recommend expanding the application of the proposed legislation to sexual, physical and associated psychological abuse.

31. The Roman Catholic Church is the institution of primary concern in this regard. It was the Roman Catholic Church that established the Ellis Defence by arguing successfully that the assets of the trust should not be available to meet compensation payable for historical sexual abuse. While members of the Church have said that they believe that this defence should no longer be used, and that a defendant with funds to meet the claim should always be identified,<sup>12</sup> others have refrained from providing this assurance.<sup>13</sup> Given the Church's disparate structure, the fact that some members deny the very existence of the Ellis Defence makes it clear that legislative reform is needed to ensure that compensation is available when a valid claim is made.
32. There is a lapsed Bill in NSW that could act as a useful model in relation to child sexual abuse and the Roman Catholic Church. That Bill, introduced into the NSW Parliament in 2014 by Mr David Shoebridge MLC, allows the assets held by the Church trust on behalf of the Church to be made available for the payment of compensation in proceedings relating to sexual abuse 'by a member of the Church's clergy, a Church official or a Church teacher of the plaintiff who was, at the time of the sexual abuse, under the care of the Church'.<sup>14</sup> The trust can also be joined in any action against those people for injuries arising from sexual abuse.<sup>15</sup>
33. All other jurisdictions have different legislation establishing or regulating trusts that hold property on behalf of the Roman Catholic Church.<sup>16</sup> We support the passage of this Bill in NSW and similar legislation in all other jurisdictions.

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<sup>12</sup> Truth Justice and Healing Council, Media Release: Senior Church leaders commit to no Ellis Defence, 22 May 2015, <http://www.tjhcouncil.org.au/media/102237/150522-MEDIA-RELEASE-Senior-church-leaders-commit-to-no-Ellis-defence.pdf>.

<sup>13</sup> Chris Vedelago, Cameron Houston, "Church to block victims' court bids despite promise to abandon practice by Pell", *The Age*, 18 May 2015, available at <http://www.theage.com.au/victoria/church-to-block-victims-court-bids-despite-promise-toabandon-practice-by-pell-20150517-gh3jkr.html>; Sydney Catholic Archdiocese "The Ellis Decision – a Re-statement of the Law", [undated], available at <https://www.sydneycatholic.org/justice/royalcommission/ellis.asp>.

<sup>14</sup> *Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2014* (NSW), proposed s19(1).

<sup>15</sup> *Ibid*, proposed s18(1).

<sup>16</sup> See, for example, *Roman Catholic Property Trust Act 1937* (ACT); *Catholic Church in the Northern Territory Act* (NT); *Roman Catholic Church (Corporation of the Sisters of Mercy of the Diocese of Cairns) Land Vesting Act*

34. While the current concern relates to the Roman Catholic Church, and the legislation establishing trusts for that Church should be the priority, we also support the passage of reforms that would implement similar liability on other institutions in line with the Royal Commission's recommendation for sexual, physical and associated psychological abuse.
35. In this regard, a Bill was introduced into the Victorian Parliament in 2016. That Bill, the *Wrongs Amendment (Organisational Child Abuse) Bill 2016 (Vic)*, permits an institution that is not capable of being sued to nominate a body to be sued, in proposed s92(1), with the consent of the nominee. In our submission, this is a positive development, but ultimately inadequate to ensure justice for survivors.
36. The ALA submits that in addition to the option contained in proposed s92(1), any entity, including but not confined to a trust which holds property or insurance on behalf of the institution, should be answerable for any compensation ordered for child abuse connected to the institution. This recommendation is effectively in line with that of the Royal Commission.

## Deeds of release

37. The Royal Commission supports disregarding deeds of release in relation to any redress scheme established for survivors of abuse: 'Survivors who have received monetary payment in the past – whether under other redress schemes, state or victims of crimes schemes, through civil litigation or otherwise – should be eligible to be assessed for a monetary payment under [a redress scheme]'.<sup>17</sup> The Royal Commission has also stated that "We are satisfied that deeds of release should be disregarded for the purposes of redress... provided that any previous monetary payments are taken into account."<sup>18</sup> It also recommends that, in the period prior to the establishment of a redress scheme, deeds of release should not be required.<sup>19</sup> It

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1945 (Qld); *Roman Catholic Church (Incorporation of Church Entities Act 1994 (Qld)*; *Roman Catholic Church (Northern Land) Vesting Act 1941 (Qld)*, *Roman Catholic Church Lands Act 1985 (Qld)*; *Roman Catholic Archdiocese of Adelaide Charitable Trust Act 1981 (SA)*; *Roman Catholic Church Property Act 1932 (Tas)*; *Roman Catholic Trusts Act 1907 (Vic)*; *Roman Catholic Church Lands Act 1895 (WA)*; *Roman Catholic Church Property Act 1911 (WA)*. Please note that while most of this legislation has not been tested in courts in the same way that the NSW and Queensland legislation has, it is possible that a similar interpretation as that taken in *Lepore* could be applied.

<sup>17</sup> Royal Commission, *Redress and Civil Litigation Report* (2015), recommendation 23.

<sup>18</sup> Royal Commission, *Redress and Civil Litigation Report* (2015), 259.

<sup>19</sup> Royal Commission, *Redress and Civil Litigation Report* (2015), recommendation 83.

is silent, however, on the impact of deeds of release signed prior to the release of the report on compensation paid in the future outside of the redress scheme, by way of civil litigation or directly negotiated settlements, for example.

38. The ALA believes that legislative reform is needed to ensure that deeds of release signed as a part of a settlement or redress scheme under the law in place prior to the advent of the Royal Commission and the law reform that has emanated from its recommendations do not unfairly restrict survivors from accessing justice.
39. It is likely that many of these deeds were concluded under unfair pressure. Even if there was no direct duress, the state of the law prior to recent reforms meant that many survivors were effectively forced to accept inadequate settlement sums, as the defences available to the institutions often meant that civil litigation and full common law damages were not available.
40. We recognise that there might be policy concerns regarding retrospectively voiding clauses of validly concluded contracts. However, it is important to acknowledge the extent of the other legal changes being recommended by the Royal Commission and implemented in different jurisdictions around Australia. To enforce deeds of release that were concluded under the pre-Royal Commission law would be to entrench unfairness and penalise those who had sought to resolve their claims as soon as they were able.

## Recommendations

The ALA believes that the following reforms are necessary to ensure that justice is fully accessible for survivors of child abuse:

- Limitation periods should be removed for all actions for compensation for injuries arising from child abuse of a sexual, physical or associated psychological nature;
- Institutional involvement in child abuse should not be required in order for other law reforms enhancing access to justice to apply;
- All reforms should be retrospective, so that survivors of child abuse that has already occurred who are discovering their injuries now or in the future are not inhibited from accessing justice;
- Where an institution is involved in child abuse, liability should be attached to them by way of vicarious liability, combined with a close connection test;
- Where an institution is involved in child abuse, a proper defendant should always be identifiable. Where the institution itself does not nominate a proper defendant, any trust or similar asset or insurance-holding entity connected with the institution should be answerable to any suit against the institution for compensation related to injuries stemming from child abuse;
- Deeds of release that relate to settlements that have been reached under laws in place prior to the reforms enhancing access to justice for survivors of child abuse should not be enforceable. Where an individual has received an inadequate settlement sum due to the existence of defences that the Royal Commission and this paper recommends removing, that sum should be taken into account in determining a fairer amount, in view of common law principles.

We are happy to work with any jurisdiction or policy-maker to assist in realising these recommendations.

**Appendix 4 – Recent Developments in Relation to Institutional Responses to Child Sexual Abuse by Dr Andrew Morrison RFD SC**

**Australian Lawyers Alliance WA State Conference**  
**8 September 2017**  
**Curtin Graduate School of Business**  
**Perth Campus**

**Recent Developments in Relation to**  
**Institutional Responses to Child Sexual Abuse**

**by**

**Dr Andrew Morrison RFD QC**  
**Wardell Chambers**  
**10/111 Elizabeth Street, Sydney**

## **Introduction**

1. In this paper I discuss recent developments in Australian law in respect of limitation periods in sexual abuse claims,<sup>1</sup> together with a discussion of recent significant authorities on the opportunities to sue at common law. I will also say something about the proposed National Redress Scheme.<sup>2</sup>

## **Limitation Periods**

2. The Royal Commission into Institutional Responses to Child Sexual Abuse, reviewing some thousands of cases following interviews with victims, concluded that the average time from last abuse to first reporting was of the order of 22 years<sup>3</sup>, which coincides neatly with an Anglican Queensland survey producing similar results.<sup>4</sup> Limitation regimes in Australia vary enormously from state to state but it would be fair to say that Queensland is towards the tougher end of the spectrum. By legislative amendment, first Victoria<sup>5</sup> and then NSW<sup>6</sup> have amended their limitation periods so as to grant an unlimited period for the bringing of claims of this nature.
3. In Victoria, the wording is “sexual abuse, physical abuse and associated psychological abuse” and the wording in NSW is similar, with the addition of the word “significant” before “physical abuse”.
4. With effect 11 November 2016, the Queensland Parliament legislated to remove limitation periods for sexual abuse victims.<sup>7</sup> The Government accepted a submission that all defendants should be subject to the changed limitation regime and not just institutions. However, the Queensland legislation does not extend to physical abuse or psychological abuse. To this extent, the legislation falls into line with Victoria and NSW. However, the Queensland legislation does not extend to physical abuse or psychological abuse.
5. It is most unclear what this means. If, for example, a child is beaten during the course of a rape, it seems at least arguable that the beating forms part of the rape and the

limitation period would be extended for the whole occurrence. But what if the child had been repeatedly beaten on previous occasions so as to be coerced into assenting to the sexual abuse? What about the associated psychological trauma? On one view, these matters are so associated with the sexual abuse that a court would have to take them into account in assessing damages. On another view, they might be separated. The artificiality of distinguishing between sexual and physical and associated psychological abuse is obvious and is a significant defect in what is proposed. In any event, it may well be that at law once the plaintiff has a valid cause of action in respect of sexual abuse, it would be perfectly open to plead and claim for physical and associated psychological abuse during the same period on the basis that they are sufficiently connected in time and sufficiently related in respect of cause of action so as to give rise to a right to pursue the further claim without an extension of time being required..

6. In respect of Victoria, NSW and Queensland, the court has the power to deny an extension of time by staying proceedings where injustice should lead to a stay. This is not, I think, identical with the heavy onus placed on an applicant for extension of time under the High Court decision in *Brisbane South Regional Health Authority v Taylor*<sup>8</sup>. It is not to be readily assumed that lapse of time will make a fair trial impossible. The onus on a defendant seeking a stay will be heavy, given the intention of the legislation is to remedy an injustice which was itself caused by the abuse. The delay was in the ordinary case, a consequence of (directly or indirectly) the abuse. The defendant bears a substantial onus and I would have thought that courts would be loathe to stay proceedings even if some witnesses have died or some documents have disappeared, particularly in circumstances where those occurrences are themselves a consequence of the defendant's tort. Moreover, it is to be borne in mind that criminal proceedings on the much higher onus of proof commonly proceed in respect of matters going back 50 years and more. There have been recent criminal convictions in South Australia, for example, in respect of abuse at a Salvation Army institution in the early 1960s. I do not think that we should be too concerned about the prospects of a stay.

7. I note that in *Connellan v Murphy* [2017] VSCA 116, a stay was granted in Victoria under this provision but in highly exceptional circumstances and the court emphasised that it would be a rare case where a remedy was denied.
8. There have also been developments in other jurisdictions. With effect 4 May 2016, the Commonwealth has issued a Legal Services Direction not to plead a defence to a time-barred child abuse claim and not to oppose any extension of time. That direction ceases to apply after 30 April 2019.<sup>9</sup> In the ACT, there is legislation currently before the Legislative Assembly to extend the limited removal of limitation periods in institutional child abuse claims to all child abuse claims. However, child abuse is defined as sexual abuse and does not appear to extend to physical or psychological abuse.<sup>10</sup> In the Northern Territory, there is legislation currently before the Parliament to remove the limitation period in identical terms to the NSW legislation, being sexual abuse, serious physical abuse and associated psychological abuse.<sup>11</sup> In South Australia, legislation is currently before the Parliament to remove limitation periods for sexual abuse in an institutional context. This is the most restrictive extension in Australia.<sup>12</sup> Yet the Government has shown little inclination to progress even this small step. In Tasmania, the relevant legislation is the *Limitation Act* 1974. In November 2016, the Tasmanian Government announced its intention to remove time limits for survivors of child sexual and physical abuse but nothing has yet occurred. In Western Australia, legislation is currently before the Parliament to remove all limitation periods for child sexual abuse claims but without mention of physical abuse and psychological sequelae.<sup>13</sup> It is to be hoped that a more hopeful decision may be forthcoming from the new administration.

### **Developments in the Law on Vicarious Liability**

9. The recent case of *Prince Alfred College Incorporated v ADC*<sup>14</sup> is remarkable in several respects. The plaintiff was 12 years old and a boarder at Prince Alfred College, where Dean Bain was employed as a housemaster. He was sexually abused in his dormitory. The plaintiff failed at first instance before Vanstone J in the Supreme Court of South Australia.<sup>15</sup> He succeeded on appeal in establishing vicarious liability but not direct negligence (by a majority) in the Full Court of the

Supreme Court of South Australia.<sup>16</sup> The defendant appealed successfully to the High Court.<sup>17</sup>

10. At first instance, Vanstone J accepted that the appropriate approach was that of Gleeson CJ in *State of NSW v Lepore*.<sup>18</sup> Whilst the relationship between a boarding housemaster and a boarding student would be closer than that of a day student and teacher, the ordinary relationship was not one of intimacy and sexual abuse was so far from being connected to the teacher's proper role that it could be neither seen as an authorised mode of performing an authorised act nor in pursuit of the employer's business, nor in any sense within the course of employment. Vanstone J was of the view that the school did not create or enhance the risk of sexual abuse.
11. On appeal, the majority in the Full Court, Kourakis CJ and Peek J would not have found the school negligent in respect of the appointment of the teacher as a housemaster or supervision of him (Gray J dissenting). However, the court unanimously found the school vicariously liable, applying the Gleeson CJ version of the "close connection" test.
12. In the High Court, the Court, French CJ, Kiefel, Bell, Keane and Nettle JJ held that the school's appeal should be allowed on the basis that the plaintiff should not have been granted an extension of time under the *Limitation Act* given the extraordinary delay and given a fair trial on the merits was no longer possible. The court went on to express a view as to whether or not criminality precluded vicarious liability. The decision in *Lepore* was analysed. No basis was said to be shown for disturbing the decision that non-delegable duty of care was not an appropriate remedy. The court considered the decisions of the House of Lords in *Lloyd v Grace, Smith & Co* [1912] AC 716 and *Morris v CW Martin & Sons Ltd* [1966] 1 QBE 716. It was said [56] that those cases were decided by reference to the position in which the employer had placed the employee vis-à-vis the victim. The court went on to analyse the Canadian decisions in *Bazley v Curry* [1999] 2 SCR 534 at 559 and *Jacobi v Griffiths* [1999] 2 SCR 570 at 610. The court also referred to *John Doe v Bennett* [2004] 1 SCR 436 at 446 and *EB v Order of the Oblates of Mary Immaculate in the Province of British Columbia* [2005] 3 SCR 45, where reference was made to "power, trust or intimacy

with respect to the children”. The analysis of the United Kingdom cases included *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at 224.

13. It seems extraordinary that the court’s discussion stops at that point, prior to the High Court decision in *Lepore*, when the law in the United Kingdom has been expanded enormously by subsequent decisions in cases such as *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256, *JGE v The English Province of Our Lady of Charity and the Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938, *The Catholic Child Welfare Society & Ors (Appellants) v Various Claimants (FC) and the Institute of the Brothers of the Christian Schools & Ors (Respondents)* [2012] UKSC 56 and most recently, the important Supreme Court decision in *Cox (Respondent) v Ministry of Justice (Appellant)* [2016] UKSC 10. The failure to mention these important decisions may be a reflection of a failure on the part of counsel to draw them to the Court’s attention, as appears also to have been the case in the Full Court in South Australia. However, if that is the case, it reflects an extraordinary lack of research on the part of all concerned.
14. Ultimately, the court decided [85] that much of the evidence relating to the housemaster’s position of power had been lost. On that basis, the questions of power and intimacy could not be determined.
15. Given the in loco parentis authority of a housemaster over boys under his care, that seems a somewhat surprising basis on which to decide that an extension of time should not have been granted. Who else would have been legally entitled to enter a child’s dormitory after lights out? Presumably, evidence could and should have been called, going back to the 1960s as to the power and authority of housemasters in that school at the time and in boarding schools generally. The failure to do so appears to have caused the refusal of the extension of time. Yet the position of a housemaster has not changed and such evidence would be readily available.
16. However, the court, by implication, appears to have adopted the approach taken by Gleeson CJ in *Lepore* and as a consequence, has determined that criminality of itself does not defeat vicarious liability and the appropriate question is whether the

authority placed the abuser in such a position of power and intimacy as to make it just to hold the institution liable to the victim for the consequences of the abuse. [84].

17. It was to have been hoped that this case would have advanced beyond the decision in *State of NSW v Lepore* [2003] 212 CLR 511 but the High Court does not even consider employment-like cases given that the case it was concerned with involved true employment. It is to be anticipated that these issues will require revisiting in the near future, hopefully with the more recent English cases under consideration.
18. A separate judgment by Gageler and Gordon JJ agreed that an extension of time should not have been granted but adopted the Canadian approach in *Bazley v Curry* and *Jacobi v Griffiths*. They at least referred to the more recent English decision in *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1 at 26.
19. It follows that Australia still lags behind most of the common law world in the application of the close connection test to vicarious liability but at least there is a basis for recovery without fault on the part of the institution. Clearly, the issue will have to be revisited in the High Court. See the recent paper by Dr James Goudkamp and James Plunkett, 'Vicarious Liability in Australia: On the Move?'<sup>19</sup>

### **Vicarious Liability and the Catholic Church**

20. In *Trustees of the Roman Catholic Church v Ellis*<sup>20</sup>, the Church argued that its trustees do not employ priests and the current bishop or archbishop was not responsible for them. In any event, the unincorporated association known as the Catholic Church was too amorphous to be capable of being sued by the traditional actions against unincorporated associations. This argument was accepted by the NSW CA, leaving Mr Ellis with no remedy for the abuse perpetrated on him.
21. In the United States, Canada and Ireland, the courts have treated the Catholic Church as a corporation sole, making it liable to suit in abuse or negligence cases. That does not appear to be so in Australia. *PAO, BJH, SBM, IDF and TMA v Trustees of the Roman Catholic Church for the Archdiocese of Sydney & Ors*<sup>21</sup> affirmed that no

action lies against the trustees of the diocese which held the property of the school where abuse occurred.

22. However, the archbishops of Melbourne and Sydney, Archbishop Denis Hart and Archbishop Anthony Fisher, were announced by the Hon. Justice Peter McClellan AM on 15 July 2015 to have stated publicly that it is the “agreed position of every bishop and every leader of a religious congregation in Australia that we will not be seeking to protect our assets by avoiding responsibility in these matters” and that “anyone suing should be told who is the appropriate person to sue and ensure that they are indemnified or insured so that people will get their damages and get their settlements”.<sup>22</sup>
23. This would seem to be a reversion to the pre-*Ellis* position, where the Church accepted that its trustees were the appropriate body to be sued whether in respect of sexual abuse by clergy or negligence injuring pupils attending parochial schools (18½% of the Australian school population). Francis Sullivan of the Truth, Justice and Healing Council issued a press release on 22 May 2015, calling for legislation to implement the right to sue and said, “If a survivor wants to take a claim to court, then at the very least they must have an entity to sue”.
24. The NSW legislation is the *Roman Catholic Church Property Trust Act* 1936 as amended. In Queensland, the relevant legislation is the *Roman Catholic Church (Corporation of the Sisters of Mercy of the Diocese of Cairns) Land Vesting Act* 1945 (Qld), *Roman Catholic Church (Incorporation of Church Entities) Act* 1994 (Qld). This legislation whilst not identical, is relevantly similar to that in other states and territories.
25. Prior to the *Ellis* decision, the Church in Australia accepted that the trustees who hold all the property of the Church in each diocese or archdiocese are the appropriate body to sue. That remains the case in England and Wales, where the Church accepts that its trustees are its secular arm.
26. It might have been thought that the archbishops’ undertakings and the comments from Francis Sullivan indicated a reversion to that position. Regrettably, however, it would

seem that some elements of the Church have recanted. In late 2015, the Archdiocese of Sydney issued on its website a document entitled “The *Ellis* Decision - a Re-statement of the Law”, saying “There is no such thing as the ‘*Ellis* defence’. The *Ellis* Decision did not create new law.”<sup>23</sup>

“While the Court found that the body corporate was not responsible for the assistant priest, it did not set up a so-called “*Ellis* defence” or any new law. This decision is consistent with the longstanding rule of law that you cannot be liable for the criminal actions of others unless you are directly or indirectly responsible for supervising their conduct, and there has been negligence or other actionable conduct.”<sup>24</sup>

Francis Sullivan issued a further press release, in which it was said that the Church should assist victims in finding someone to sue. The whole point of the *Ellis* defence is that there is no-one to sue.

27. It would seem that the Catholic Church, alone amongst churches and other non-government bodies in Australia, does not accept responsibility for its clergy or its lay members on the basis of vicarious liability. This means that if a child is injured by a teacher’s negligence in a parochial school, it is entirely at the whim of the local bishop as to whether or not he will offer up the trustees, who hold the school’s property, to be sued. This is wholly unacceptable. Legislative reform is required along the lines proposed in the Shoebridge Bill circulated in the NSW Upper House.<sup>25</sup> The NSW Government has issued a consultation paper and ALA will put in submissions in accordance with its best practice document, circulated to all governments and ALA branches.

## **Other Cases**

28. In *Erlich v Leifer & Anor*<sup>26</sup>, the plaintiff sued for psychiatric injury as a result of the sexual abuse by the first defendant/headmistress. The plaintiff attended an ultra-orthodox Jewish school from ages 3 to 18 and it was found that, over a period of about 3 years, she was sexually abused by the headmistress. The headmistress left the jurisdiction with the active assistance of the school community as soon as the allegations became known and has successfully resisted extradition from Israel. Rush J concluded that the school was vicariously liable because the relationship “was

invested with a high degree of power and intimacy” and the headmistress used that power and intimacy to commit sexual abuse. [1-8]. Rush J found that the plaintiff, as a result of the abuse, had suffered a major psychiatric illness with profound effects. [168].<sup>27</sup>

29. In *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church*<sup>28</sup>, the plaintiff, aged about 12 or 13 in 1975 and 1976, was sexually abused by Father Clonan. In the English Court of Appeal, Lord Neuberger MR (Longmore and Smith LJJ agreeing) upheld the trial judge’s finding that the claimant was not out of time to sue and that the finding of sexual abuse was supported by the evidence. He followed the *Lister* close connection test because Father Clonan obtained access to the boy through his clerical garb and youth work. Vicarious liability was therefore established.
  
30. In *JGE v The English Province of Our Lady of Charity and The Trustees of the Portsmouth Roman Catholic Diocesan Trust*<sup>29</sup>, the preliminary issue was whether the Trustees of the Roman Catholic Church could be liable to the plaintiff for sexual abuse and rape by a Roman Catholic clergyman now deceased. This occurred when she was a young child in a children’s home in Hampshire between 1970 and 1972 conducted by an arm of the Church. The defendant contended that the clergyman was not its employee and nor was the relationship akin to employment. It argued the action should be struck out because vicarious liability could not arise. Significantly, however, the Roman Catholic Church in England and Wales accepted that its Trustees stood in the shoes of the bishop for present purposes and accepted that, for the purposes of litigation, its trustees holding its property were its secular arm and were a proper defendant if vicarious liability arose. MacDuff J noted the test of vicarious liability had changed to give precedence to form over function. Vicarious liability does not depend upon whether employment is technically made out. He noted that in Canada, the Supreme Court in *Doe v Bennett & Ors* [2004] ISCR 436, held a bishop vicariously liable for the actions of a priest who had sexually abused boys within his parish. An appeal to the English Court of Appeal was dismissed.

31. The next case was *The Catholic Child Welfare Society & Ors (Appellants) v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools & Ors (Respondents)* [2012] UKSC 56.
32. At issue was who, if anyone, was liable for a large number of alleged acts of sexual and physical abuse of children at a residential institution for boys in need of care, originally operated by the De La Salle Institute, known as Brothers of the Christian Schools and operating as St William's School. The appeal to the English Supreme Court required a review of the principles of vicarious liability in the context of sexual abuse of children. The claims were brought by 170 men in respect of abuse between 1958 and 1992. The Middlesbrough defendants took over the management of the school in 1973, inheriting the previous liabilities. They used a De La Salle brother as headmaster and contracted four brothers as employee teachers. The Middlesbrough defendants were held vicariously liable for the acts of abuse by those teachers, and this was not challenged on appeal. However, the Middlesbrough defendants challenged the findings below that the De La Salle order was not vicariously liable for the actions of its brothers and therefore liable to contribute in damages. The Middlesbrough defendants' appeal seeking contribution had been rejected in the Court of Appeal, but leave was granted to appeal to the Supreme Court.
33. Lord Phillips (with whom the other members of the Court agreed), noted the views on vicarious liability expressed in the Court of Appeal in *JGE* and the impressive leading judgment of Ward LJ [19]. The following propositions were said by Lord Phillips to be well-established.
  - (i) It is possible for an unincorporated association to be vicariously liable for the tortious acts of its members.
  - (ii) One defendant may be vicariously liable for the tortious act of another defendant even though the act in question constitutes a violation of the duty owed and even if the act in question is a criminal offence.
  - (iii) Vicarious liability can even extend to liability for a criminal act of sexual assault. *Lister v Hesley Hall*.

- (iv) It is possible for two different defendants to be each vicariously liable for the single tortious act of another defendant.<sup>30</sup>
34. Lord Phillips held that the relationship between the De La Salle Institute and the brothers teaching at St William's, though not one of employment, was capable of giving rise to vicarious liability. He referred to *JGE, Maga* and *NSW v Lepore* but not to the NSW CA decision in *Ellis*.
35. Lord Phillips concluded [86] (with the concurrence of the balance of the Supreme Court):
- “Vicarious liability is imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a strong causative link.
- [87] These are the criteria that establish the necessary ‘close connection’ between the relationship and abuse.”<sup>31</sup>
36. Accordingly, in England, Canada, Ireland and the United States, the Roman Catholic Church has accepted or been held liable through its Trustees for the criminal misconduct of priests or teachers. Only in Australia has a contrary view been taken in the *Ellis* decision. That decision sits ill with the views expressed in *Lepore* and is at odds with the rest of the common law world.
37. In *Cox (Respondent) v Ministry of Justice (Appellant)*<sup>32</sup>, Lord Reed (Lord Neuberger, Lady Hale, Lord Dyson and Lord Toulson agreeing) held the Ministry of Justice liable for injury to a catering manager even though it did not employ the prisoner, who, whilst assisting in the kitchen, accidentally injured her. Lord Reed, quoting the words of Lord Phillips in *Various Claimants* case, where he said, “The law of vicarious liability is on the move”, added “It has not yet come to a stop”.

38. In *DC v State of NSW*<sup>33</sup> and *TB v State of NSW*<sup>34</sup> (*Below: TB and DC v State of NSW & Anor*<sup>35</sup>), each of the plaintiffs had a long history of sexual abuse as young girls from their stepfather. There was also physical violence involved. In April 1983, the elder girl complained to YACS (predecessor of DOCS) about the abuse. She, her sister and her mother were interviewed and the YACS officer assessed that the abuse had occurred. The girls were charged with being neglected children but the stepfather was not reported to police. In September of that year, the stepfather admitted to the YACS officer the abuse, about which he was unrepentant. The YACS officer had sought to avoid the stepfather seeing the girls alone but was aware he was regularly at their home. The girls, now women, sued in negligence, complaining that they suffered continued abuse through the failure to report. At the time of the original complaint, the stepfather had a history of sexually abusing children and was on bail for rape of his son's 15 year old girlfriend, for which he was subsequently convicted. Many years later, he was charged and convicted in relation to sexual abuse of the two stepdaughters.
39. The plaintiffs succeeded by a majority on appeal but the State of NSW obtained leave to appeal to the High Court. After hearing full argument, the HCA acceded to the respondent/plaintiffs' application and revoked the appellant's leave to appeal on the grounds that the case was now purely factual and raised no issue suitable for the High Court. Accordingly, the decision in favour of the plaintiffs in the NSW CA stands.<sup>36</sup>

### **The National Redress Scheme**

40. The national redress scheme proposed by the Royal Commission to supplement common law rights has been supported by the Commonwealth. The States have been cautious in their response, apart from South Australia, which has opposed it outright. The Irish scheme had a cap of €300,000, which could be exceeded in some circumstances.<sup>37</sup> The Royal Commission proposed a cap of \$200,000. The Commonwealth has proposed a \$150,000 cap. South Australia will not go beyond its own scheme, which has a \$100,000 cap. Clearly, there will be great difficulty in obtaining appropriate contribution from the institutions without mandatory legislation.

41. In the Federal budget, the Commonwealth allocated \$33.4 million in 2017/18 for its own share of a national redress scheme but at present, no state has committed itself or funding. Whilst the Catholic and Anglican churches appear supportive, it appears likely that the only useful way of putting pressure on some recalcitrant institutions would be to make participation a condition of retention of their charitable status. However, the Commonwealth has not yet proposed using what in effect is the only weapon in its armoury.

## Conclusion

42. Clearly, there is still significant work to be done in some jurisdictions in respect of extending the limitation period to physical and associated psychological abuse and in South Australia, in getting rid of the restriction to abuse in an institutional context. There is a need for legislation to make the trustees of the Catholic Church liable for the conduct of clergy and volunteers in the same way as any other non-government organisation. The redress scheme is inadequate but might assist some victims if intergovernmental agreement can be achieved. The High Court will have to reconsider the issue of vicarious liability in the light of the more recent English Supreme Court decisions relating to the application of the close connection test. The Government consultation paper gives an opportunity for NSW to lead the way.

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<sup>1</sup> I am particularly grateful to Anna Talbot, Vici Jacobs and Toks Oqundari of ALA for their research into the status of legislation throughout all Australian jurisdictions.

<sup>2</sup> This is a shortened and updated version of a paper originally presented on 17 February 2017 to the ALA Queensland State Conference.

<sup>3</sup> Royal Commission Interim Report on Redress and Civil Litigation Vol 1 at 5.1 on p 158

<sup>4</sup> Patrick Parkinson, Kim Oates, Amanda Jayakody 'Study of Reported Child Sexual Abuse in the Anglican Church' (May 2009) at p 5 - average of 23 years.

<sup>5</sup> *Limitation of Actions Act* 1958 as amended by *Limitation of Actions Amendment (Child Abuse) Act* 2015 (Vic) with effect 21 April 2015.

<sup>6</sup> s 6A of the *Limitation Act* 1969 (NSW) has retrospectively removed all limitation periods for child sexual abuse or significant physical abuse and associated psychological sequelae. The amendments were assented to and commenced on 17 March 2016.

<sup>7</sup> *Limitation of Actions Act* 1974 as amended by the *Sexual Abuse and Other Legislation Amendment Act* 2016, with effect 11 November 2016.

<sup>8</sup> (1996) 186 CLR 541.

<sup>9</sup> Legal Services Direction - time-barred child abuse claims, 4 May 2016.

<sup>10</sup> ACT Justice and Community Safety Legislation Amendment Bill 2017.

<sup>11</sup> Limitation Amendment (Child Abuse) Bill 2017 (NT).

<sup>12</sup> Limitation of Actions Institutional Child Sexual Abuse) Amendment Bill 2016 (SA).

<sup>13</sup> Limitation Amendment (Child Sexual Abuse Actions) Bill 2015 to amend the *Limitation Act* 2005 (WA).

<sup>14</sup> [2016] HCA 37.

<sup>15</sup> [2015] SASC 12 (Vanstone J).

<sup>16</sup> [2015] SASCFC 161.

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- <sup>17</sup> [2016] HCA 37.
- <sup>18</sup> (2003) 212 CLR 511 at [40-54].
- <sup>19</sup> Oxford University Commonwealth Law Journal 25 May 2017.
- <sup>20</sup> [2007] NSWCA 117.
- <sup>21</sup> [2011] NSWSC 1216 (Hoeben J).
- <sup>22</sup> Speech by the Hon. Justice Peter McClellan AM to the Triennial Assembly of the Uniting Church in Australia, on 15 July 2015.
- <sup>23</sup> Sydney Catholic Archdiocese “The *Ellis* Decision - A Re-statement of the Law”, [undated], available at [https://www.sydneycatholic\\_org/4/justice/royalcommission/ellis.asp](https://www.sydneycatholic_org/4/justice/royalcommission/ellis.asp).
- <sup>24</sup> *Ibid.*
- <sup>25</sup> Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2014 (NSW)
- <sup>26</sup> [2015] VSC 499 (Rush J).
- <sup>27</sup> General damages for pain and suffering etc. were assessed at \$300,000. Past economic loss, including superannuation, was allowed at \$50,358 and future economic loss, including superannuation, was allowed at \$501,422. It is worth noting that superannuation was allowed for past and future at 9% of net rather than gross loss and no allowance was made for increasing rates of superannuation in the future. These calculations appear to be in error. Medical expenses were allowed in the sum of \$16,641 after a reduction for the vicissitudes of life of 15%. Such a reduction is, of course, contrary to High Court authority. *Sharman v Evans* [1977] HCA 8. The sum of \$100,000 was awarded by way of exemplary damages against the school in the light of its conduct in assisting the headmistress and her family to leave the jurisdiction. The sum of \$150,000 in exemplary damages was awarded against the headmistress personally.
- <sup>28</sup> [2010] EWCA Civ 256.
- <sup>29</sup> [2011] EWHC 2871 (QB).
- <sup>30</sup> Note, however, at this point that in NSW, the Court of Appeal, without reference to the English Supreme Court decision, said in *Day v The Ocean Beach Hotel Shellharbour Pty Ltd* [2013] NSWCA 250 at [697] that dual vicarious liability is not permissible at law.
- <sup>31</sup> [2012] UKSC 56 at [86] and [87].
- <sup>32</sup> [2016] UKSC 10.
- <sup>33</sup> [2016] NSWCA 198.
- <sup>34</sup> [2016] NSWCA 198.
- <sup>35</sup> [2015] NSWSC 575 (Campbell J).
- <sup>36</sup> *New South Wales v DC & Anor* [2017] HCA 22 (14 June 2017).
- <sup>37</sup> €300,000 is approximately AU\$434,000 at current exchange rates.



Our **Mission** is to prevent child sexual assault in our society.  
Our **Vision** is to make Australia the safest place in the world to raise a child.

7<sup>th</sup> November 2018

Director, Legal Policy  
Department of the Attorney-General and Justice  
GPO Box 1722  
Darwin, NT 0801  
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To whom it may concern,

I apologise for the delayed response to the request for feedback on the *Options for the implementation in the Northern Territory of the civil litigation reforms recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse* and hope that our late comment is able to be accepted.

We congratulate the Northern Territory government for acting on the recommendations regarding duties and liability of institutions and the identification of defendants. We acknowledge the importance of civil litigation processes for many victims of child sexual assault as an avenue for not only accessing financial compensation for experiences harm, but also for receiving an acknowledgement of harm committed and institutional responsibility.

In relation to the current Consultation Paper, we believe it provides an appropriate framework in response to recommendations made by the Royal Commission and although we are not legal experts, we offer the following comments.

#### Discussion questions

1. What are your views on adopting a statutory duty of care that incorporates a non-delegable element and a reverse onus provision, as opposed to the two distinct duties recommended by the Royal Commission?
2. What are your views on the proposal to extend the Proposed Duty to related physical and psychological abuse?
3. What financial or associated impacts would the Proposed Duty have on Territory institutions, such as the cost and availability of insurance and the ability to provide services to children?

Bravehearts supports the proposal in the current Consultation Paper that the Northern Territory Government adopt a statutory duty of care provision which incorporates a non-delegable element and a reverse onus of proof provision, following the reforms adopted in Victoria.

There are many barriers for survivors when they are placed in a position to prove that an institution failed in their duty of care. In addition, we believe that adopting the Royal Commission's recommendation, to reverse the onus of proof will have a positive impact in motivating organisations to ensure that they are focussed on child protection and prioritise the safety of children and young people they work/engage with.

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Bravehearts believes that all forms of child abuse should be covered by civil litigation reforms.

From twenty years working with clients, and as noted in the Consultation Paper, we know that child sexual assault rarely happens in isolation from other forms of abuse. Physical abuse, psychological abuse and neglect are often a factor in the harms suffered; for example, grooming of children and young people by sex offenders often involves psychological manipulation and abuse.

All forms of childhood trauma can impact on children's development across a range of domains including physical, emotional, social and cognitive. Child sexual assault and other forms of abuse have also been linked with long term poor mental health outcomes, with research also showing that those who experienced child sexual assault at greater risk of mental health issues. Diagnoses of anxiety, depression and personality disorders are common in adults with a history of child sexual assault and/or child abuse.

There are a number of well researched and documented long term impacts affecting adult survivors. Individuals with a history of child sexual assault and/or child abuse are at an increased risk for:

- mental illness;
- substance abuse;
- homelessness;
- suicidality;
- re-victimisation, including domestic violence and sexual assault;
- relationship issues;
- parenting difficulties; and
- health issues.

Bravehearts believes that ensuring appropriate avenues for redress, including civil litigation, is a key responsibility and part of governments' duty of care to survivors of childhood sexual assault and abuse more generally.

While it is likely that these reforms will have an impact on insurance premiums, increasing premiums and potentially making insurance more difficult to obtain, we would support a model similar to Workplace Health and Safety that could include controls around insurance prices against organisation responsibilities.

Organisations working with or engaging children and young people, must be focused on ensuring the protection and safety of all children and young people. This has to extend to ensuring responsibility and meaningful and appropriate reparation is provided if a child or young person is harmed within their organisation.

The imposition of a non-delegable duty should further enshrine an organisation's focus on the best interests of the child in services, program delivery, policy and process. Child-safe organisation, need to include focus on governance, culture, practice, and risk management, with an emphasis on transparency and accountability.

Bravehearts has also advocated that insurance for organisations working with children and young people should be dependent on audits to ensure that the organisation can prove it is compliant with regard to:

- Child protection and risk management practices – governance, policy and procedure;
- Appropriate and regularly refreshed training and evaluation in relation to child protection; and

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- Adherence to mandatory reporting.

#### Discussion questions

4. Are there any organisations to which the Proposed Duty should not apply? If so, why?

Our position is that all organisations suggested by the Royal Commission should be included. However, in addition we would also advocate that community-based, non-government, not for profit and volunteer organisations be added.

Bravehearts holds, that any organisation that provides services to or work with children (including those that also provide services or work with adults) have a duty of care to ensure, as far as practicable, the safety and well-being of those children and young people who they have contact with.

Legislation should list the organisation on which the non-delegable duty would be imposed, as per Recommendation 90 of the of Royal Commission’s Redress and Civil Litigation Report:

90. The non-delegable duty should apply to institutions that operate the following facilities or provide the following services and be owed to children who are in the care, supervision or control of the institution in relation to the relevant facility or service:

- a. residential facilities for children, including residential out-of-home care facilities and juvenile detention centres but not including foster care or kinship care
- b. day and boarding schools and early childhood education and care services, including long day care, family day care, outside school hours services and preschool programs
- c. disability services for children
- d. health services for children
- e. any other facility operated for profit which provides services for children that involve the facility having the care, supervision or control of children for a period of time but not including foster care or kinship care
- f. any facilities or services operated or provided by religious organisations, including activities or services provided by religious leaders, officers or personnel of religious organisations but not including foster care or kinship care.

In addition to these organisations, as noted above, we would also advocate that community-based, non-government, not for profit and volunteer organisations be added.

#### Discussion questions

5. Should there be any limitation on who may be considered an associate of an institution?

6. Should liability extend to acts of abuse committed by children under the care, control or supervision of institutions? Why or why not?

Bravehearts supports the Royal Commission recommendation to extend all institutional liability to all persons associated with an institution, as well as the inclusion of the full range of persons ‘associated with’ an organisation as per the Royal Commission’s recommendation.

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If a child or young person has been harmed by a peer, unless the organisation can show that it had no knowledge of the harm occurring and that it had in place appropriate safeguards, policies and procedures for preventing and responding to harm, then organisational liability should be extended to such matters. All organisations working with or engaging children and young people, have a duty of care to ensure, as far as practicable, the safety and protection of those children and young people from all harm.

#### **Discussion questions**

7. How closely associated should an institution and a perpetrator need to be to result in potential liability? For example, should an institution be liable for abuse committed by an employee or volunteer in their own home, against a child met through the institution?

We note in relation to the considerations relating to the connection between the perpetrator or the abuse and the organisation, if the contact with the victim is facilitated by or through the organisation or as a direct result of the organisation, the organisation has a responsibility and duty of care to ensure that proper safeguard are in place and that policy, process and procedures are followed.

The organisation has a duty of care to ensure the suitability of those engaged under contracts and to ensure any contact with children or young people is appropriately monitored.

We note through our work with survivors that often the sexual assault or abuse did not occur on the premises of the school or organisation, but in the home environment by volunteer, employees, teachers who the victim met through the organisation. It is critical that organisational policies are in place around contact with children and young people. In matters where the organisation has not taken appropriate steps to ensure policy around contact with children and young people met within the organisation is in place, the organisation has failed in its duty of care and therefore should be liable is a child is harmed in such circumstances.

#### **Discussion questions**

8. What would be the benefit and/or implications of defining the term 'reasonable steps' in legislation?

9. If the recommendation is adopted, would it be useful to develop guidelines or industry standards about what is considered to be 'reasonable'?

10. Would it be appropriate for a definition of reasonable steps to be graduated according to the type of service provided? If so, on what basis?

11. How could it be ensured that 'reasonable steps' were actually effective to improve the safety of children?

Defining 'reasonable steps' would provide guidance around expectations for organisations. Consideration will need to be given to covering all organisations as organisations vary in size and structure. The 'reasonable steps' for organisation A may vary to that of organisation B.

However, there are basic minimum standards that would be applicable to all organisations, for example: that the interests, safety and protection of children and young people is paramount; that appropriate child protection policies and procedures are in place; that regular risk management

audits are conducted; that a reporting/complaints procedure is transparent and in place; and that staff are regularly trained in child protection issues.

Bravehearts advocates that child-safe organisation include not just a focus on policy and process, but on instilling a child-safe culture, embedding the organisation's commitment to child protection in practice and attitudes throughout the organisation.

Similar to Safe Work Australia, a body and 'code of practice' may need to be established to oversee organisations to ensure that they are taking all necessary steps and ensure that the 'reasonable steps' were actually effective to improve the safety of children

#### **Discussion question**

12. Should the Royal Commissions 'proper defendant' recommendation be adopted?
13. How would the proposed reforms impact your organisation?
14. Should a different model / approach be adopted? If so, what should it look like?

Bravehearts is supportive of adoption of the Royal Commission's 'proper defendant' recommendation.

We believe that the Royal Commission's recommendations are workable. Institutions that provide services to children should be made to have a mandatory legal structure or encouraged to be incorporated.

#### **Discussion questions**

15. Should the consent of the nominee be required before it can be named a proper defendant?
16. Should nomination be limited by the nature of association between the institution and the nominee?
17. How can victims obtain access to justice where consent of a nominee is not provided to name an alternative proper defendant?
18. Are there any other controls that you think are necessary?

Bravehearts position is that it is reasonable to require all institutions working with children to be incorporated, or be required to have an incorporated 'proper defendant', or have a mandatory legal structure. We believe that evidence from the Royal Commission has demonstrated the importance of ensuring that the organisational structure is such that is focussed on the rights and best interests of those it engages with, specifically children and young people.

Our position is that institutions that provide services for children should be incorporated. This would ensure that impecunious or non-incorporated bodies are able to be sued at common law and survivors are not denied access to justice on the basis of the nature of the institution or its financial status.

We also support that legislation could be introduced to allow claims to be brought against a 'nominal defendant', to be funded by all unincorporated organisations that provide services to children, proportionate to their size and the extent to which they engage with children (in the same

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way that claims may be brought against a nominal defendant under compulsory third party insurance legislation).

**Discussion questions**

19. Should recommendation 94 apply to all property trusts (including private trusts), or to statutory trusts only?
20. Do the difficulties in identifying a proper defendant arise in respect of non-religious organisations?
21. Should the recommendation apply only to religious organisations?

Bravehearts would suggest that the recommendations apply to both property trusts (including private trusts) and to statutory trusts.

Bravehearts is aware of instances where identifying a proper defendant has occurred beyond religious contexts. An example of this discussed in the Royal Commission's Redress and Civil Litigation Report, via a submission by Slater and Gordon in relation to the litigation concerning Fairbridge Foundation, a secular organisation. In that case, Fairbridge denied that they ran the school and denied that they had care of its child residents. The Foundation instead nominated a multiplicity of individuals, groups of individuals, and institutions (other than itself) which it argued had the running of the school and the charge of the children at various times.

Ensuring the inclusion of all organisations, not just religious organisations, would mean that victims had an appropriate avenue for seeking recompense for harm suffered. We suggest that institutions should be required to nominate a 'proper defendant' for all claims. This would ensure that survivors are given the opportunity to make claims against responsible institutions and do not continue to be denied justice.

**Discussion question**

22. What limits, if any, should there be on the association between an institution and an associated trust?

See our response under Qs. 15-18.

**Discussion questions**

23. Would it be reasonable to require every institution working with children to incorporate, or to have an incorporated 'proper defendant'? What would the impacts of this be?
24. Should legislation similar to that proposed by Western Australia be adopted in the Territory? If so, what modifications, if any would you suggest and why?

See our response under Qs. 15-18.

Concluding comments

We believe that many organisations would need to undertake an audit of policies and procedures and implement any necessary changes. Likely, this would include cultural reform and specific trainings for many organisations.

It may be necessary for some organisations to be funded to build capacity and knowledge. We believe that the recommendations as handed down by the Royal Commission and implemented by State and Territory governments will have positive changes for the safety and protection of children and young people within organisational and institutional settings.

We thank you for the opportunity to provide this submission. Please contact us on [research@bravehearts.org.au](mailto:research@bravehearts.org.au) if any further information is required

Kind Regards,



Carol Ronken  
Director of Research

AGD Options Paper

Comments

1. Agreed with introduce a statutory duty of care provision which incorporates a non-delegable element and a reverse onus provision (the Proposed Duty).
2. Agreed with extending the Proposed Duty to related physical and psychological abuse?
3. Unsure
4. The Proposed duty of care should not apply to organisation's who do not provide children services.
5. No. An associate should be any person, staff member or volunteer working with children.
6. No. It's too difficult and too expensive to police.
7. No. If the abuse has occurred when staff or volunteers were at work or on duty, then the organisation is liable.
8. The Territory Government should develop legally binding standards of what would be "reasonable."
9. Yes.
10. No.
11. Organisation's must develop and maintain a risk assessment.
12. Yes.
13. Nil.
14. Unsure
15. Unsure
16. Unsure
17. Unsure
18. Unsure
19. Recommendation 94 should apply to all property trusts.
20. Unsure
21. The Recommendation should apply to all religious organisations only.
22. Is should be compulsory for unincorporated organisations to be incorporated under the Territory or Commonwealth associations ACT who provide children's services. The Territory Government should not fund any unincorporated organisation with tax payer's money.
23. Yes. All organisations working with children must be incorporated under the Territory or Commonwealth associations ACT. The Government should give unincorporated bodies who provide services to children and adults, 12 months to become incorporated or lose eligibility to receive government funding.
24. Yes. Legislation similar to that proposed by Western Australia be adopted in the Territory.

Submission to the  
Northern Territory  
Government's consultation in  
relation to

*'Options for the  
implementation in the  
Northern Territory of the civil  
litigation reforms  
recommended by the Royal  
Commission into Institutional  
Responses to Child Sexual  
Abuse'*

November 2018

## Table of Contents

1. Introduction .....	1
2. General comments on actions against institutions and the recommendations of the Royal Commission.....	3
i. Actions against institutions.....	3
ii. The recommendations of the Royal Commission .....	5
3. Duties and liability of institutions .....	8
General comments.....	8
Discussion questions.....	12
Proposed reform .....	12
Institutional associates .....	15
Reasonable steps .....	19
4. Identifying a proper defendant .....	21
General comments.....	21
Discussion questions.....	22
Proposed reform .....	22
Controls.....	24
All institutions? .....	25
Extent of association.....	26
Incorporation .....	26

## 1. Introduction

knowmore is a free legal service that was initially established in 2013 to assist people who were engaging with or considering engaging with the Royal Commission into Institutional Responses to Child Sexual Abuse ('the Royal Commission'). knowmore was established by and operates as a program of the National Association of Community Legal Centres (NACLC), with funding from the Australian Government, represented by the Attorney-General's Department.

From 1 July 2018 NACLC has been funded to operate knowmore to deliver legal support services to assist survivors of institutional child sexual abuse to access redress under the National Redress Scheme ('the NRS'). knowmore assists survivors by providing information and advice about the options available to them, including claims under the NRS, access to compensation through other schemes or common law rights and claims. Advice is also provided on key steps in the redress application process, including:

- a) prior to application so survivors understand eligibility requirements and the application process of the Scheme and their legal options;
- b) during completion of a survivor's application;
- c) after a survivor has received an offer of redress or refusal and elects to seek an internal review; and
- d) on the effect of signing a deed of release, including its impact on the prospect of future litigation.

knowmore operates as a national community legal centre, using a multidisciplinary model to provide trauma-informed, client-centred and culturally safe legal assistance to clients. knowmore has offices in Sydney, Melbourne and Brisbane and brings together lawyers, social workers, counsellors and Aboriginal and Torres Strait Islander engagement advisors to provide coordinated support to clients.

In its Royal Commission related work, from July 2013 to 31 March 2018 knowmore assisted 8,954 individual clients. The majority of those clients were survivors of institutional child sexual abuse. 24% of the clients assisted during our Royal Commission work identified as Aboriginal and/or Torres Strait Islander peoples.

In undertaking this work, knowmore travelled regularly to the Northern Territory to support clients residing there and to work with local legal and support services. We assisted 126 clients living in the Northern Territory. 61% of those clients identified as Aboriginal and/or Torres Strait Islander peoples.<sup>1</sup>

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<sup>1</sup> See knowmore, Service Snapshot (Infographic to 31 March 2018), attached to this submission, for further information about our clients residing in the Northern Territory.

In its work relating to the NRS, from 1 July to 31 October 2018 knowmore has completed intake processes and has assisted or is currently assisting 2,703 clients. 56% of these clients are people who have previously engaged with knowmore, and 44% are new clients. Further, 12% of the clients assisted to date have been identified as priority matters; clients are allocated priority where they are of advanced age and/or have identified immediate and serious health concerns such as a diagnosis of a terminal or life-threatening illness.<sup>2</sup>

Many of the clients knowmore has assisted have been seeking legal advice about their options, if any, to obtain financial and other redress in relation to sexual and other abuse they suffered as children in institutions. Some of these clients have had direct experience with the civil litigation system; usually as a potential litigant seeking advice about a possible claim. Very few have ever actually commenced civil proceedings; in many cases, this has been primarily due to the barriers presented by the previous laws about limitation periods, and the existing laws relating to the duty of institutions, and the identification of a proper defendant (and who may have means to satisfy any judgment), to sue.

knowmore does not represent clients in common law or civil claims relating to actions for compensation. We do provide referral services, and in circumstances where clients may have a viable civil claim and wish to investigate or pursue such a cause of action we advise clients about referral options to seek advice from an experienced personal injury lawyer familiar with the issues arising in cases of claims for institutional abuse. For that purpose, we have established a national panel of experienced private lawyers, who meet specific criteria that reflect their experience with and understanding of the needs of this client group.

In responding to the Options Paper, we have drawn on what we have learned, through our work, about the collective experience of our clients and their needs. We welcome the opportunity to participate in the Territory's consultation process to consider how justice can be provided to victims of institutional child abuse. The effecting of reform to the current law regarding the duty of institutions and other reforms as recommended by the Royal Commission around the identification of a proper defendant, will significantly assist survivors who are seeking to establish claims against institutions and their officials, and will facilitate the disposition of those claims on their merits.

We note the fundamental importance of ensuring that survivors/claimants of institutional child abuse are afforded meaningful opportunities to access justice and, most importantly, choice in how to pursue outcomes that are appropriate and important to them. As the Territory nears full participation in the NRS, it is important that these reforms be implemented soon. Given that the acceptance of an offer of monetary redress under the NRS requires a survivor to relinquish their rights in relation to any civil claim against a participating institution, it is important that survivors are provided with the best

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<sup>2</sup> See knowmore, Service Snapshot (Infographic 1 July to 31 October 2018), attached to this submission, for further information about our NRS related service delivery

information and advice possible about their legal rights before determining to pursue a claim under the NRS and to accept an offer of redress.

## 2. General comments on actions against institutions and the recommendations of the Royal Commission

### i. Actions against institutions

The Civil Litigation component of the Royal Commission's *Redress and Civil Litigation Report* outlines the options available to survivors of institutional child abuse to seek to recover damages through bringing civil claims. However, survivors bringing civil actions for institutional child abuse face many significant difficulties under the current law.

Obviously the most straightforward option is to sue the perpetrator(s) of the abuse, for the tort of battery. However the reality facing survivors is that in many cases their perpetrator has no significant assets from which to satisfy a judgment. The frequent elapsing of considerable time between the occurrence of the abuse and the survivor being able to make an effective report and/or take action to seek justice for their experience,<sup>3</sup> also means that often the perpetrator is deceased by the time civil action is contemplated, leaving no significant estate.

Accordingly, to recover compensation survivors often need to look to the relevant institution. There are three primary approaches to establishing institutional liability in these cases, namely:

- bringing an action in negligence;
- bringing an action relying on the vicarious liability of the institution for the abuse committed by the perpetrator; and
- bringing an action for the breach of the institution's non-delegable duty to ensure third parties take reasonable care to prevent harm.

The Royal Commission identified and the Options Paper sets out some of the difficulties currently faced by child abuse plaintiffs in seeking to establish organisational/institutional liability. These may include:

- For actions in negligence – the plaintiff must prove they were owed a duty of care by the institution; that duty was breached through a failure to exercise reasonable care; and that breach caused the harm alleged. On the current state of the law, there may be difficulties in establishing that an organisation had a

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<sup>3</sup> The Royal Commission has found that the average time for a survivor of sexual abuse in an institutional context to make a disclosure is 22 years, with men taking longer than women to disclose. Royal Commission, *Interim Report*, June 2014, at p.6

duty of care to prevent abuse from occurring through the criminal conduct of others:

*The unpredictability of criminal behaviour is one of the reasons why, as a general rule, and in the absence of some special relationship, the law does not impose a duty to prevent harm to another from the criminal conduct of a third party, even if the risk of such harm is foreseeable.*<sup>4</sup>

- For actions founded on vicarious liability, legal responsibility is imposed on the institution for misconduct by another party, even if the institution is not itself at fault. However, under Australian law plaintiffs have found it difficult to establish vicarious liability outside the existence of a clear employer-employee relationship. This presents particular difficulties for survivors wishing to establish institutional/vicarious liability where their perpetrator was not an employee of the relevant institution (such as a volunteer or a minister of a religion). Additionally, a plaintiff must establish that the wrongful conduct occurred within the scope or course of the relevant employment (we will address these issues in further detail below).
- Non-delegable duties have traditionally been imposed in certain categories of relationship, requiring one party to take care for another's safety. For actions for breach of a non-delegable duty to prevent harm, Australian courts have shown a reluctance to include intentional criminal conduct within the scope of non-delegable duties. In the 2003 decision of *Lepore* (a case involving the sexual abuse of a student by a teacher), a majority of the High Court held that a school's non-delegable duty of care with respect to a pupil did not extend to the intentional criminal conduct of a teacher, in the nature of sexual abuse.<sup>5</sup> The High Court determined not to revisit this aspect of *Lepore* in the recent decision in *Prince Alfred College Incorporated v ADC* [2016] HCA 37.<sup>6</sup>

Beyond the difficulties attaching to the above specific causes of action, there are the more general barriers facing institutional child abuse plaintiffs, as the Options Paper acknowledges, namely:

- identifying a defendant to sue can also be difficult because the way an institution is structured may mean that there is no legal entity who is capable of being sued;
- even if an institution has 'legal personality', it may not have legal responsibility for the actions of the perpetrator of the abuse; and

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<sup>4</sup> *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254, per Gleeson CJ at [29]

<sup>5</sup> *New South Wales v Lepore* (2003) 212 CLR 511 at 534-535 [36]-[39], 598-601 [254]-[263], 609-610 [292]-[295], 624 [340]

<sup>6</sup> At [36]-[37]

- even if an institution is found to be liable, it may not have sufficient assets or insurance cover which extends to abuse.

## ii. The recommendations of the Royal Commission

The Royal Commission in its Report made seven recommendations (89 – 95) about enhancing the legal responsibility of institutions for child sexual abuse, ensuring there is someone to sue, and requiring relevant institutions to have insurance.

knowmore recommends that all of these recommendations should be implemented by the Northern Territory Government.

In considering implementation of the Royal Commission’s recommendations, two important matters must be noted.

First, the Commission released its final report on *Redress and Civil Litigation* in September 2015. This was an interim report, but it contained the Commission’s final recommendations on redress and civil litigation. The report addressed that part of the Letters Patent, which required the Commission to inquire into:

*What institutions and governments should do to address, or alleviate the impact of, past and future child sexual abuse and related matters in institutional contexts, including, in particular, in ensuring justice for victims ...*

The report made recommendations about the provision of effective redress to survivors through the establishment, funding and operation of a single national redress scheme. It also contained recommendations for reforms to civil litigation systems “to make civil litigation a more effective means of providing justice for survivors.”

The Commission’s final recommendations on civil litigation reform have been comprehensively informed by a huge amount of work and information. This body of work included:

- Numerous public hearings involving cases where survivors had sought to pursue claims for damages under existing arrangements and laws, including a case study involving institutions in the Northern Territory.
- Thousands of private sessions where survivors have explained their experiences of abuse and what they need for justice.
- The gathering of submissions following the release of four Issues papers - on the *Towards Healing* process of the Catholic Church; civil litigation; redress; and statutory victims of crime compensation schemes. These four papers resulted in the lodging of over 190 public submissions, representing a diverse range of interests and views.<sup>7</sup> Submissions were lodged by survivors; Governments; support services; institutions; lawyers; academics; industry groups and others.
- Holding roundtables to consult: “[F]rom September to November 2014 a series of private roundtables were held with invited participants to discuss redress and civil

<sup>7</sup> See <http://www.childabuseroyalcommission.gov.au/policy-and-research/our-policy-work/redress>

*litigation. Participants included representatives from survivor advocacy and support groups, government representatives, lawyers and insurers, legal academics, faith based organisations and community service organisations.”*<sup>8</sup>

- On 30 January 2015 a very detailed Consultation Paper was released, inviting further input from the community into the issues raised in the paper.
- In March 2015 a public hearing was held *“to enable invited persons and institutions to speak to their written submissions to the Royal Commission’s consultation paper and particular issues relevant to the Royal Commission’s work on redress and civil litigation.”*<sup>9</sup>

The above reflects the Commission’s efforts to obtain information from all relevant sources, across Australia, to inform its final report on redress and civil litigation reforms. All points of view were sought and represented in those processes. In our experience, the level of consultation and community engagement leading to the Commission’s final recommendations exceeds that undertaken by any previous Commission of Inquiry.

The Commission’s final recommendations are balanced and sound and have clearly been arrived at after prolonged and very careful consideration as to all of the impacts, upon all relevant stakeholders. In our submission, it follows that in considering and implementing reform in the Northern Territory, there should be no significant derogation from the recommendations of the Commission.

Secondly, the Options Paper raises the potential impacts of reform upon the provision of services by institutions to children<sup>10</sup>. That is, the proposed reforms may be seen by institutions as increasing the risks related to providing services, which in turn might lead to a reduction in services in order to limit that risk. We make two comments about this concern.

First, the Royal Commission’s recommendations are designed to provide an appropriate balance between the competing public policy interests of child protection and accessible service provision. This is particularly reflected in the crafting of recommendations 89 -91 inclusive, which relate to the imposition of non-delegable duties upon institutions, with only certain categories of institutions (as per recommendation 90), being the subject of the strict liability imposed by recommendation 89. The Royal Commission’s report addressed in some detail the reasons why this new statutory duty should not apply to other categories of institutions, specifically noting community-based and not-for-profit organisations, which are to be the subject of the reverse onus reform set out in recommendation 91. In considering the impact of these reforms on institutions, it must also be noted that the Royal Commission has recommended that these reforms operate with prospective, rather than retrospective, effect.

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<sup>8</sup> See <http://www.childabuseroyalcommission.gov.au/policy-and-research/our-policy-work/redress>

<sup>9</sup>Case Study 25: see <http://www.childabuseroyalcommission.gov.au/case-study/93e59a38-c3df-4528-b479-f0e83d4ff19a/case-study-25,-march-2015,-sydney>

<sup>10</sup> Options Paper, at p.10

Secondly, the extensive work of the Royal Commission over the past five years has exposed what can only be described as a national, catastrophic and completely unacceptable failure by Australian institutions to adequately protect vulnerable children from sexual abuse. It is fair to say that Australians aware of the Royal Commission's work have been appalled by its revelations and particularly the repeated exposure of conduct on the part of previously respected institutions and their officials that fell so far short of the community's expectations about the standards of care and protection that should be provided to children. Every day our legal service endeavours to provide assistance to the victims of this national failure, who carry with them a life-long legacy of complex trauma arising from their victimisation and which almost inevitably impacts adversely on multiple aspects of their lives, including their relationships, mental and physical health, financial status and employment.

Implementation of the Royal Commission's civil litigation reforms will obviously impose higher standards on institutions providing services to children. As such, resourcing demands around the adoption of improved practices and accountability, and possibly higher insurance premiums, will follow.

However, as the Royal Commission noted, "*legal duties are important for prescribing the standard that the community requires of institutions.*"<sup>11</sup> If the implementation of enhanced duties and higher standards forces some institutions out of delivering services to children, because they unwilling to now invest the time and resources in meeting the standards the community expects to protect our children, we suggest that is no bad thing.

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<sup>11</sup> Royal Commission, Redress and Civil Litigation Report (2015), at p. 56

### 3. Duties and liability of institutions

#### General comments

Tracing the liability of the institution in child abuse matters is one of the many hurdles faced by survivors. As the law currently stands in Australia it is unclear and needs a legislative framework to clarify and ensure stronger protections for children to afford survivors justice, and to properly hold institutions accountable for the harm that arises from abuse connected to them.

The Options Paper notes the decisions of the High Court in the cases of *Lepore*<sup>12</sup> and *Prince Alfred College*<sup>13</sup>. In considering whether the Northern Territory should adopt the Royal Commission's recommendations for a new non-delegable duty (recommendations 89 and 90), it is useful to consider the current state of the common law in light of the High Court's decision in *Prince Alfred College* and the implications of that decision for actions brought by institutional child abuse plaintiffs.

While the appeal in *Prince Alfred College* was determined on the limitations/extension of time issue,<sup>14</sup> the plurality (French CJ, Kiefel, Bell, Keane and Nettle JJ) considered that it was appropriate to consider the issue of the institution's vicarious liability because it was both relevant to the extension of time issue, and as the existing state of the law was impacted by the differing judgments in *Lepore*. The plurality reviewed the relevant authorities and suggested that the 'relevant approach' was as follows:<sup>15</sup>

*In cases of the kind here in question, the fact that a wrongful act is a criminal offence does not preclude the possibility of vicarious liability. As Lloyd v Grace, Smith & Co shows, it is possible for a criminal offence to be an act for which the apparent performance of employment provides the occasion. Conversely, the fact that employment affords an opportunity for the commission of a wrongful act is not of itself a sufficient reason to attract vicarious liability. As Deatons Pty Ltd v Flew demonstrates, depending on the circumstances, a wrongful act for which employment provides an opportunity may yet be entirely unconnected with the employment. Even so, as Gleeson CJ identified in New South Wales v Lepore and the Canadian cases show, the role given to the employee and the nature of the employee's responsibilities may justify the conclusion that the employment not only provided an opportunity but also was the occasion for the commission of the wrongful act. By way of example, it may be sufficient to hold an employer vicariously liable for a criminal act committed by an employee where, in the commission of that*

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<sup>12</sup> *New South Wales v. Lepore* (2003) 212 CLR 511

<sup>13</sup> *Prince Alfred College Incorporated v. ADC* (2016)HCA 37

<sup>14</sup> The High Court holding that there was no basis to allow an extension of the limitation period

<sup>15</sup> At [80] – [81]

*act, the employee used or took advantage of the position in which the employment placed the employee vis-à-vis the victim.*

*Consequently, in cases of this kind, the relevant approach is to consider any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim. In determining whether the apparent performance of such a role may be said to give the "occasion" for the wrongful act, particular features may be taken into account. They include authority, power, trust, control and the ability to achieve intimacy with the victim. The latter feature may be especially important. Where, in such circumstances, the employee takes advantage of his or her position with respect to the victim, that may suffice to determine that the wrongful act should be regarded as committed in the course or scope of employment and as such render the employer vicariously liable.*

Turning to the facts of the particular case, the plurality said:<sup>16</sup>

*In the present case, the appropriate enquiry is whether Bain's role as housemaster placed him in a position of power and intimacy vis-à-vis the respondent, such that Bain's apparent performance of his role as housemaster gave the occasion for the wrongful acts, and that because he misused or took advantage of his position, the wrongful acts could be regarded as having been committed in the course or scope of his employment. The relevant approach requires a careful examination of the role that the PAC actually assigned to housemasters and the position in which Bain was thereby placed vis-à-vis the respondent and the other children.*

In a separate judgment Gageler and Gordon JJ also allowed the appeal, on the basis that an extension of time should not have been granted. Their joint judgment also addressed how the plurality's 'relevant approach' will be applied in future cases:<sup>17</sup>

*We accept that the approach described in the other reasons as the "relevant approach" will now be applied in Australia. That general approach does not adopt or endorse the generally applicable "tests" for vicarious liability for intentional wrongdoing developed in the United Kingdom or Canada (or the policy underlying those tests), although it does draw heavily on various factors identified in cases involving child sexual abuse in those jurisdictions.*

*The "relevant approach" described in the other reasons is necessarily general. It does not and cannot prescribe an absolute rule. Applications of the approach must and will develop case by case. Some plaintiffs will win. Some plaintiffs will lose. The criteria that will mark those cases in which an employer is liable or where there is no liability must and will develop in accordance with ordinary common law methods.*

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<sup>16</sup> At [84]

<sup>17</sup> At [130]-[131]

*The Court cannot and does not mark out the exact boundaries of any principle of vicarious liability in this case.*

As such, while the High Court has now provided some guidance about the ‘relevant approach’ to be followed in future cases, particularly where survivors of institutional child sexual abuse seek to hold an institution vicariously liable for the criminal acts of an employee, it is clear that no absolute rule has been prescribed and that the issue of vicarious liability will be determined on the facts and evidence of each case. As Gageler and Gordon JJ noted:<sup>18</sup>

*The course of decisions in this Court<sup>19</sup> and the courts of final appeal in the United Kingdom and in Canada reveals that decisions concerning vicarious responsibility for intentional wrongdoing are particularly fact specific. Decisions in the United Kingdom<sup>20</sup> and Canada<sup>21</sup> recognise that resolution of each case will turn on its own particular facts and that existing cases provide guidance in the resolution of contestable and contested questions. The overseas decisions also expose a difficulty in undertaking any analysis by reference to generalised "kinds" of case. Why? Because the "[s]exual abuse of children may be facilitated in a number of different circumstances."<sup>22</sup>*

Also, in the *Prince Alfred College* case the appellant school, in resisting the respondent plaintiff’s application for an extension of time, argued that because of the length of the delay in commencing proceedings and consequential deficiencies in the evidence it could not properly defend the claim against it. The plurality decided, following its identification of the ‘relevant approach’ to the issue of the appellant’s vicarious liability, that a determination as to liability could not be made in the case, for those reasons.

Their judgment makes it very clear that in future historical cases, even after the limitation barrier has been removed, that in applying the High Court’s ‘relevant approach’ to determining issues of liability courts will need to be highly cognisant of any forensic disadvantage arising for the defendant due to the passage of time and loss of evidence.

In looking at the implications of the High Court’s decision for survivors, it is anticipated that despite the guidance provided by the High Court as to the relevant approach in these cases,

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<sup>18</sup> At [128]

<sup>19</sup> See *Deatons Pty Ltd v. Flew* (1949) CLR at 381 – 382; [1949]HCA 60

<sup>20</sup> *Dubai Aluminum Co Ltd v. Salaam* [2003] 2AC at 378 [26] cited in *Mohamud v. Wm Morrison Supermarkets plc* [2016] AC 677 at 692

<sup>21</sup> *Bazely v. Curry* [1999]2SCR 534 at 545[15] cited in *Jocabi v. Griffiths* [1999] 2SCR570 at 590[31], *John Doe v. Bennett* [2002] 1SCR436 at 445[20] and *EB v. Order of the Oblates of Mary Immaculate in the Province of British Columbia* [2005] 3SCR 45 at 69[38].

<sup>22</sup> *Various Claimants v. Catholic Child Welfare Society* [2013] 2AC1 at 26[85]

survivor plaintiffs will continue to face difficulties in establishing vicarious liability on the part of institutions for a number of reasons, including:

- in cases outside a strict employer-employee relationship;<sup>23</sup>
- uncertainty around whether the facts of their case fall within those where a court may hold the institution vicariously liable; and
- in historical cases where it might be expected that defendant institutions will readily be able to identify forensic disadvantage in assembling evidence in their defence such as evidence about the nature of the role assigned to the employee, the nature of the relationship between the employee and the victim, and the features of that relationship, particularly the ability of the employee to achieve intimacy with the victim.

On the first point, many knowmore clients have reported being abused by persons associated with institutions, but who were not formally employed by the institution. For example, priests and other church personnel are often not employed by their church. Volunteers and contractors such as cleaners or support workers as well as other participants or residents of the institution are not employees. These categories of persons who are associated with institutions have been consistently identified by knowmore's clients as perpetrators of abuse. This constitutes an insurmountable hurdle in the ability of survivors to hold institutions liable for injuries arising from child abuse by such perpetrators.

While the reforms currently under consideration are to operate prospectively and will therefore not at this time assist for claims based on historical circumstances, the above reasons support the need for legislation to be enacted. In recommending the creation of this new form of statutory strict liability for institutions, the Royal Commission in its report very aptly noted the priorities applied in property law:

*“The principle in relation to property was recognised centuries ago when, in *Hern v Nichols*, Sir John Holt said ‘somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger’.<sup>24</sup> In our opinion, it is time the same principle applied to the care of children.”<sup>25</sup>*

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<sup>23</sup> In the United Kingdom and in Canada courts have expanded institutional liability beyond employees to others who have relationships which are ‘sufficiently analogous’ or ‘akin’ to employment: *Woodland v. Essex County Council* [2013]UKSC 66

<sup>24</sup> *Hern v Nichols* (undated c.1700) 1 Salk 289

<sup>25</sup> Royal Commission, *Redress and Civil Litigation Report* (2015), at p.491

## Discussion questions

### Proposed reform

#### **1. What are your views on adopting a statutory duty of care that incorporates a non-delegable element and a reverse onus provision as opposed to the two distinct duties recommended by the Royal Commission?**

We note the Options Paper indicates the Department's preference at this time to approach reform in a manner consistent with the Victorian legislation. It follows from the above discussion that we support the full implementation of the Royal Commission's recommendations (89 & 90) for the prospective imposition of a non-delegable duty of care/strict liability on the categories of institutions identified by the Royal Commission.

However, we acknowledge that this aspect of the Commission's recommendations has not been adopted in other jurisdictions to date. Instead, as Question 1 indicates, the approach taken has been to implement a single statutory duty of care provision applying to all relevant institutions, incorporating a non-delegable duty and a reverse onus provision that provides a defence where the institution can prove it took reasonable steps to prevent the abuse.

While we support full implementation of the Commission's recommendations, including the imposition on a non-delegable duty and strict liability upon those institutions considered to be of 'high risk', if that approach is not taken by the Territory we would support an approach consistent with the other jurisdictions.

#### **2. What are your views on the proposal to extend the proposed duty to related physical and psychological abuse?**

We support the position foreshadowed in the Options Paper that the proposed duty should extend to related physical and psychological abuse. The recommendations of the Royal Commission were necessarily limited by the Letters Patent issued to it, which for present purposes, restricted it to the context of considering child sexual abuse occurring in institutional settings.<sup>26</sup>

However, as the Letters Patent specifically acknowledged, child sexual abuse "*may be accompanied by other unlawful or improper treatment of children, including physical assault, exploitation, deprivation and neglect.*" Further to this, the Royal Commission has since recognised that "*...in particular instances, other unlawful or improper treatment, such as physical abuse or neglect, or emotion or cultural abuse, may have accompanied the sexual abuse.*"<sup>27</sup> Indeed, the evidence in so many of the Royal Commission's public

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<sup>26</sup> See generally the discussion at pp. 99-102 of the Royal Commission's *Redress and Civil Litigation Report* (2015)

<sup>27</sup> Royal Commission *Redress and Civil Litigation Report* (2015), at p.5

hearings<sup>28</sup> has established both the prevailing brutality and the frequency of multiple forms of abuse in many Australian institutions entrusted with the care of children.

This is the reported experience of the majority of our survivor clients. Our work reflects that the sexual abuse of children in many institutions, especially residential homes, rarely occurred in isolation of physical and emotional abuse and that at times, the boundaries between different forms of abuse often overlapped. Some of our clients have spoken of institutional cultures where extreme physical abuse and degradation of children created a culture which in turn facilitated the occurrence of sexual abuse.

We have also spoken to clients who suffered extreme physical and emotional abuse in residential homes and other institutional settings, but who did not experience sexual abuse within the Royal Commission's Terms of Reference.

However, the majority of clients who have reported surviving sexual abuse also report enduring physical and emotional abuse; in many institutions, particularly residential home settings, it seems rare for sexual abuse to have occurred in isolation of other mistreatment.

This reality needs to be recognised in the steps now being taken to enhance survivors' access to justice, by being inclusive of all of the forms of abuse they suffered. Other appropriate aims of law reform in this context should be to ensure consistency in the relevant laws applying to institutional child abuse claims, and to promote the disposition of claims by allowing plaintiffs to pursue all aspects of their experience of abuse in the one action. It is somewhat trite to note that forcing potential plaintiffs to pursue separate remedies or actions for differing forms of abuse will be inherently and highly re-traumatising, and lead to the likely litigation of challenging issues around causation and assessment of loss and damages.

Accordingly, we submit that reform should encompass all forms of child abuse – including sexual, physical, psychological/emotional and cultural abuse – and that civil litigation reforms should adopt a broad definition of child abuse – at a minimum consistent with the approach taken by the Territory in the *Limitation Amendment (Child Abuse) Act 2017*.

### **3. What financial or associated impacts would the Proposed Duty have on Territory institutions, such as the cost and availability of insurance and the ability to provide services to children?**

There will of course be impacts for institutions if reforms are implemented. However, the Commission in its report noted the following, in relation to limiting the application of the recommended new non-delegable duty and strict liability:

*“We consider it undesirable to impose the liability on non-for-profit institutions that are not providing particularly high-risk services because the risk of liability, or the*

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<sup>28</sup> Such as Case Study 7 involving the Parramatta Training School for Girls and the Institution for Girls in Hay, as noted at p.13 of the Discussion Paper

*cost of insuring against it, may force them to cease providing services and activities for children. Many community-based not-for-profit or volunteer institutions offer opportunities for children to engage in cultural, social and sporting activities.”<sup>29</sup>*

That passage, and others in the Commission’s *Redress and Civil Litigation* report, illustrates the consideration given by it to the financial and associated impacts upon institutions currently providing services to children. The Commission’s recommendations were crafted in a way that balanced those impacts with the need for reform to better protect children and to afford justice to those who were abused as children.

A possible outcome of introducing legislation impacting upon the liability of institutions, including imposing a reverse onus of proof, is that for institutions offering services to children, insurance premiums may be increased. Obviously insurance availability in this area will depend on typical factors such as the risks arising and claims histories; that is, institutions that adopt effective child safety practices should be rewarded with less expensive insurance coverage. As the Royal Commission in its report noted:

*The significant financial consequences that may flow if the standard is not met create powerful incentives for institutions and their insurers to take steps to ensure that abuse is prevented. Changes to the duties of institutions do more than provide an additional or more certain avenue for victims of abuse to seek compensation after institutional child sexual abuse has occurred. Changes to the duties of institutions are critical measures for preventing institutional child sexual abuse occurring in the first place.<sup>30</sup>*

The proposed reforms may mean that some smaller institutions will no longer be able to offer services and this may well impact the community. However, as we have outlined above, the public interest is in ensuring that all organisations delivering services to children do so safely.

#### **4. Are there any organisations to which the Proposed Duty should not apply? If so, why?**

Recommendation 91 of the Royal Commission states:

*Irrespective of whether state and territory parliaments legislate to impose a non-delegable duty upon institutions, state and territory governments should introduce legislation to make institutions liable for institutional child sexual abuse by persons associated with the institution unless the institution proves it took reasonable steps to prevent the abuse. The ‘reverse onus’ should be imposed on all institutions including those institutions in respect of which we do not recommend a non-delegable duty be imposed.*

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<sup>29</sup> Royal Commission *Redress and Civil Litigation Report* (2015) at p.491

<sup>30</sup> Royal Commission, *Redress and Civil Litigation report* (2015), at p.494

We are of the view that the Royal Commission’s recommendation should be adopted. No organisation providing services to children should be exempted. Application of the duty to all such institutions will help to drive heightened awareness of the need to protect children from all forms of abuse, and also the implementation of processes and procedures to ensure that reasonable steps have been taken to prevent child abuse.

#### Institutional associates

### **5. Should there be any limitation on who may be considered an associate of an institution?**

The Royal Commission’s Recommendation 92 stated:

*For the purposes of both the non-delegable duty and the imposition of liability with a reverse onus of proof, the persons associated with the institution should include the institution’s officers, office holders, employees, agents, volunteers and contractors. For religious organisations, persons associated with the institution also include religious leaders, officers and personnel of the religious organisation.*<sup>31</sup>

knowmore supports the Royal Commission’s recommendation. We recognise the special position of trust a perpetrator may attain through their association with an institution. For many of our clients, the perpetrators of their abuse were not direct employees of an institution, but were associated with the institution in other capacities, such as those captured by recommendation 92. It has been our experience that often perpetrators gain trust and credibility as a result of their relationship with an organisation, which they in turn use to facilitate opportunities to offend.

Organisations represent those associated with them as trustworthy individuals.<sup>32</sup> In some cases, parents only entrust their children to a non-government organisation because of this special relationship of trust.<sup>33</sup>

We agree with the Royal Commission’s observation that “*child sexual abuse can occur within any institution where there are children and a motivated perpetrator. Some perpetrators will actively try to manipulate institutional conditions to create an opportunity to sexually abuse. Institutions can take certain actions to reduce risk factors and enhance protective factors. These involve considering the role of an institution’s policies, climate, culture and norms.*”<sup>34</sup>

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<sup>31</sup> Royal Commission, *Redress and Civil Litigation Report* (2015), at p.77

<sup>32</sup> Parliament of Victoria, *Betrayal of Trust, Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations*, November 2013, p.544

<sup>33</sup> Parliament of Victoria, *Betrayal of Trust, Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations*, November 2013, p.544

<sup>34</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, *Literature Review, Risk Profiles for Institutional Child Sexual Abuse*, October 2016, p.9

Extending liability to all persons associated is necessary to strengthen such protective measures.

Adopting recommendation 92 would acknowledge the institution's responsibility in creating relationships of trust not confined to direct employment, and clarify a legal duty to take appropriate safeguards to minimise the risk of abuse that arises because of this.<sup>35</sup> We submit that the non-delegable duty and the reverse onus of proof reform should extend to all persons associated with an institution, as defined above. This is crucial to recognise the institution's responsibility and to create a 'deterrent' effect. Increasing responsibility of institutions in this manner would:

- Clarify the liability of institutions for all parties.<sup>36</sup>
- Provide clearer compensation options for those who have suffered abuse.
- Create cultural change in institutions through a motivation to adopt stronger preventative measures, due to the financial incentive to meet requirements of insurance and the more stringent duty to show reasonable precautions were taken (the reverse onus of proof).
- Shift the financial burden from communities and survivors to the institutions responsible.<sup>37</sup>

We noted in an earlier submission that an objective of law reform in this context should be "*... to ensure the cost of child abuse is fairly borne by those who were responsible for that harm.*"<sup>38</sup>

We also note the expansive approach taken in the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018 (Cth)* in determining the relevant circumstances for when an institution should be considered primarily or equally responsible for an abuser having contact with a child – see section 15(4) of that Act, which provides:

***Relevant circumstances for determining responsibility***

- (4) *Without limiting the circumstances that might be relevant for determining under subsection (2) or (3) whether an institution is primarily responsible or equally responsible for the abuser having contact with the person, the following circumstances are relevant:*
- (a) *whether the institution was responsible for the day-to-day care or custody of the person when the abuse occurred;*
  - (b) *whether the institution was the legal guardian of the person when the abuse occurred;*
  - (c) *whether the institution was responsible for placing the person into the institution in which the abuse occurred;*

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<sup>35</sup> Law Council of Australia, submission to the Royal Commission on Issue Paper 5, Civil Litigation, 25 March 2014, p.16

<sup>36</sup> knowmore, Response to Consultation Paper, Issues Paper 5, Redress and Civil Litigation, 17 March 2014, p. 25

<sup>37</sup> knowmore, Response to Consultation Paper, Issues Paper 5, Redress and Civil Litigation, 17 March 2014, p.18

<sup>38</sup> knowmore, Response to Consultation Paper, Issues Paper 5, Redress and Civil Litigation, 17 March 2014, p.4

- (d) *whether the abuser was an official of the institution when the abuse occurred;*
- (e) *whether the abuse occurred:*
  - (i) *on the premises of the institution; or*
  - (ii) *where activities of the institution took place; or*
  - (iii) *in connection with the activities of the institution;*
- (f) *any other circumstances that are prescribed by the rules.*

*Note: When determining the question whether an institution is responsible for abuse of a person, the circumstances listed in this subsection are relevant to that question, but none of them on its own is determinative of that question.*

## **6. Should liability extend to acts of abuse committed by children under the care, control or supervision of institutions? Why or why not?**

In our view, yes, for the reasons noted above. Institutions should bear the onus of providing a safe environment for children over whom they are exercising care, supervision or authority.

In Volume 2 of its Final Report the Royal Commission said the following about institutional settings where children sexually harmed other children:

*Most of the children with harmful sexual behaviours we heard about in private sessions harmed other children in institutions where they had the opportunity to be with other children unsupervised. For example:*

- *Sixty-three per cent of survivors indicated they were the target of another child's harmful sexual behaviour in historical residential and foster care or contemporary out-of-home care*
- *Eighteen per cent of survivors indicated that they were targeted in a school*
- *Twelve per cent of survivors told us they were sexually abused by another child in a youth detention setting.*

*Research we commissioned also indicates that most children with harmful sexual behaviours knew their victims.<sup>39</sup>*

In Volume 11 of its Final Report the Commission noted:

*'Among those who indicated the approximate age of the person or persons who abused them (62.3 per cent), more than two-thirds (71.9 per cent) said they were*

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<sup>39</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report, Volume 2 – Nature and Cause*, at p.106

*abused by adults and two in five (41.1 per cent) said they were abused by other children.’<sup>40</sup>*

Given these findings about prevalence, we submit the liability should extend to acts of abuse committed by children under the care, control or supervision of institutions upon other children.

We note that if the indicated approach of adopting a statutory duty of care provision which incorporates a non-delegable duty and a reverse onus is implemented, it will be a question of fact in child abuse cases as to whether the institution took reasonable steps to prevent the child abuse alleged. Those reasonable steps (as explained below) will vary depending on the institution and the ‘associate’ involved and their relationship to the child victim.

**7. How closely associated should an institution and a perpetrator need to be to result in potential liability? For example, should an institution be liable for abuse committed by an employee or volunteer in their own home, against a child met through the institution?**

The term ‘associated with’ should be non-exhaustively defined in legislation. We suggest that the definition of ‘associated with’ should be defined broadly for the following reasons:

- In our experience the scope of institutions and scenarios where an organisation is responsible for a perpetrator having contact with a child is broad.<sup>41</sup>
- Claims should not be excluded due to a novel or unexpected category of relationship.<sup>42</sup>
- So that institutions cannot avoid liability through delegation of the care, supervision or authority of a child to third parties.<sup>43</sup>
- So that the financial burden of child abuse is not unfairly borne by the victim and the community.<sup>44</sup>

We can unfortunately point to many cases disclosed by our clients which would fall within the example noted in this question. It is common for offenders to use their connection and status within an institution to groom and otherwise manipulate children and to in turn facilitate offending in a variety of settings, such as outside the institution.

Despite a legislated definition, it will be possible for an institution to dispute responsibility in any specific case where it is considered that the facts of the institution’s relationship with the alleged abuser and the circumstances of the abuse should not found institutional

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<sup>40</sup> Royal Commission, *Final Report, Volume 11 Historical residential institutions*, at p.78

<sup>41</sup> knowmore, Response to Consultation Paper, Issues Paper 5, Redress and Civil Litigation, 17 March 2014, p.17

<sup>42</sup> Explanatory Memorandum, Wrongs Amendment (Organisational Child Abuse) Bill 2016 (Vic), p.4

<sup>43</sup> Explanatory Memorandum, Wrongs Amendment (Organisational Child Abuse) Bill 2016 (Vic), p.4

<sup>44</sup> knowmore, Response to Consultation Paper, Issues Paper 5, Redress and Civil Litigation, 17 March 2014, p.18

responsibility. These types of cases are likely to turn on their own facts, and do not therefore in any event lend themselves to ready definitional resolution.<sup>45</sup>

We note that the amending Victorian legislation included the qualification that the reverse onus liability does not apply to abuse committed in circumstances “wholly unrelated” to the perpetrator’s association with an institution – see s.91(6) of the *Wrongs Act 1958 (Vic)*.

Again, in seeking to discharge the reverse onus, the inquiry into what are ‘reasonable steps’ on the part of the institution may also assist in resolving cases where there is less proximity.

#### Reasonable steps

- 8. What would be the benefit and/or implications of defining the term ‘reasonable steps’ in legislation?**
- 9. If the recommendation is adopted, would it be useful to develop guidelines or industry standards about what is considered to be reasonable?**
- 10. Would it be appropriate for a definition of reasonable steps to be graduated according to the type of service provided? If so, on what basis?**

The Royal Commission advised that *“the steps that are reasonable for an institution will vary depending upon the nature of the institution and the role of the perpetrator in the institution. For example, more might be expected of a commercial institution than a community-based voluntary institution. Similarly, more might be expected of institutions in relation to employees than contractors.”*<sup>46</sup>

In *Prince Alfred College*, Gageler and Gordon JJ referred to the difficulties in generalising, given how the sexual abuse of children may be facilitated in numerous and different circumstances:

*“Decisions in the United Kingdom and Canada recognise that resolution of each case will turn on its own particular facts and that existing cases provide guidance in the resolution of contestable and contested questions.”*<sup>47</sup>

Also, as noted above, depending on the nature of the relationship between the relevant organisation and the perpetrator, the burden of proving reasonable precautions may be different.

Victoria and New South Wales have both taken the approach of providing a non-exhaustive list of factors that may be taken into account by the court in determining if reasonable steps were taken by an institution to prevent the abuse. We favour this approach. It provides guidance without limiting the capacity of a court to consider appropriate factors in the

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<sup>45</sup> knowmore, Submission to the Victorian Government on the Creation of a Redress Scheme for Institutional Child Abuse, 2015, p. 17 See: <http://knowmore.org.au/resources/other-submissions/>

<sup>46</sup> Royal Commission, *Redress and Civil Litigation Report* (2015), at p.56

<sup>47</sup> *Prince Alfred College Incorporated v. ADC* [2016] HCA 37 [128]

specific case. We do not support defining the term ‘reasonable steps’ in legislation. Such an approach is unlikely to be helpful, given that the proposed reform will apply to all institutions (and therefore a wide variety of circumstances).

This approach has also been adopted in the Private Members Bill introduced into the Queensland Parliament by Greens MP Michael Berkman on 31 October 2018.<sup>48</sup>

What amounts to ‘reasonable steps’ will be informed by the existing law of negligence in the context of the circumstances of the particular case. Guidance can be drawn from existing case law about negligence, including decided cases of institutional child abuse. For example, in *Lepore*, McHugh J suggested the following as reasonable steps:

- implementing systems to provide early warning of possible offences;
- random and unannounced inspections to deter misconduct;
- prohibiting adults from being alone with a child; and
- encouraging children and adults to notify authorities or parents about any signs of aberrant or unusual behaviour.<sup>49</sup>

There are precedents in other legislation for the approach of providing a non-exhaustive list of factors as guidance, in the context of determining whether reasonable steps were taken by an entity such as might avoid vicarious liability. See for example the *Racial Discrimination Act 1975 (Commonwealth)*;<sup>50</sup> the *Disability Discrimination Act 1992 (Commonwealth)*;<sup>51</sup> and the *Sex Discrimination Act 1984 (Commonwealth)*.<sup>52</sup>

#### **11. How could it be ensured that ‘reasonable steps’ were actually effective to improve the safety of children?**

The Commission has already published a significant body of material<sup>53</sup> which will be useful to guide institutions about the implementation of effective child safety practices. The Royal Commission’s work should continue to inform the development of both practice and the law in these cases. Entities such as the National Office of Child Safety and the National Centre for Excellence will be able to play significant roles in guiding best practice and in monitoring and reporting on the safety of children.

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<sup>48</sup> Civil Liability (Institutional Child Abuse) Amendment Bill 2018 (Queensland), clause 49D(4)

<sup>49</sup> *NSW v Lepore* [2003]HCA 4 at [164]

<sup>50</sup> See sections 18A and 18E

<sup>51</sup> See section 123

<sup>52</sup> See section 7B

<sup>53</sup> See, for example, the report *Key Elements of Child Safe Organisations: Research Study*, published by the Commission in July 2016; and the various pieces of work referred to on its website:  
<http://www.childabuseroyalcommission.gov.au/policy-and-research/our-policy-work/making-institutions-child-safe.aspx>

## 4. Identifying a proper defendant

### General comments

The existing problems confronting many survivors in both identifying the proper defendant to sue, and/or having an institution make assets available to meet an award of damages in a civil action, have been addressed at length in the Royal Commission's report.

Consistent with what we have said already in this submission, and in relation to the forms of abuse to be covered, we strongly support reforming legislation being drafted in terms that do not arbitrarily or unjustly exclude some survivors from being able to effectively bring claims against relevant institutions. Such a situation would be unjust in also holding only some institutions with responsibilities relating to children, and not some others, to the new duties recommended by the Royal Commission.

Accordingly, legislation enacting the Commission's recommendations must be drafted in such a way that that it enables survivors to bring a civil action against all institutions that will bear the onus of the new duties that are proposed, and for those bodies to be required to put forward a proper defendant with the capacity to meet any judgment.

From our work with clients who have sought redress from a very wide range of institutions, including in recent years, we would be concerned with any proposals that may leave the assumption of legal liability by an institution, when facing an abuse claim, dependent upon a voluntary choice by the institution to put forward a proper defendant or to choose whether or not to assist the plaintiff to identify the correct defendant. If this is the case, we predict that the outcome will be, in some cases, an unwillingness by some institutions to volunteer or identify a legal person to be the defendant, and who in turn has assets to meet any eventual judgment.

We have already seen some instances of institutions (including religious bodies) continuing, notwithstanding public exposure through the Royal Commission's hearings, to exhibit reluctance to deal with and accept claims from survivors. This includes actions that could only be described as obfuscation, in responding to potential plaintiffs' efforts to have the correct defendant identified or confirmed.

Nor should the reforming legislation stop at simply providing for the nomination by the institution of an associated legal person who is capable of being sued, for the purposes of any claim and any liability incurred. This would seem to leave open the possibility of a natural person nominating as the proper defendant, but who may lack the means to satisfy a judgment. It does not compel, as explained below, the provision of assets held by another arm of the relevant organisation (such as the property trust associated with a religious body), to be made available to meet the organisation's liability.

Simply put, we expect that if liability is left to a matter of voluntary assumption, some institutions will ultimately do what they can to avoid liability – either to protect assets, or to compel claims to be resolved (to its perceived advantage), outside the framework of a formal claim for damages.

In summary, the ability of a survivor to bring a claim should not be dependent upon the institution's co-operation in providing a defendant. Nor should the victim/plaintiff be put through the expense, delay and trauma of having to investigate to identify the correct defendant. Fairness requires the onus to identify and provide a defendant be upon the institution. The amending legislation should not replicate past power imbalances to the detriment of survivors. This position is also consistent with the Commission's recommendation 98, regarding the development of model guidelines by both government and non-government institutions expecting to receive civil claims for institutional child sexual abuse.

## Discussion questions

### Proposed reform

#### **12. Should the Royal Commissions 'proper defendant' recommendation be adopted?**

The Royal Commission's relevant recommendation (# 94) was as follows:

*State and territory governments should introduce legislation to provide that, where a survivor wishes to commence proceedings for damages in respect of institutional child sexual abuse where the institution is alleged to be an institution with which a property trust is associated, then unless the institution nominates a proper defendant to sue that has sufficient assets to meet any liability arising from the proceedings:*

- a. The property trust is a proper defendant to the litigation*
- b. Any liability of the institution with which the property trust is associated that arises from the proceedings can be met from the assets of the trust.*

This recommendation should be adopted. The outcome of this reform will be that survivors are able to sue a readily identifiable entity that has the financial capacity to meet a claim arising from institutional child sexual abuse. Given the current state of the law,<sup>54</sup> legislative reform is needed to effect change. The Law Council of Australia in its submission to the Royal Commission's Issues Paper 5 noted that faith based associations often behave as a legal entity, and their associated bodies will often have significant assets in property trusts and enjoy the benefit of succession, whereas individual perpetrators within the organisation typically have few assets of their own so that a civil claim against them would be unlikely to produce meaningful compensation for a survivor of child sexual abuse.<sup>55</sup>

#### **13. How would the proposed reforms impact your organisation?**

(Not applicable)

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<sup>54</sup> *Trustees of the Roman Catholic Church v Ellis and Anor* [2007] NSWCA 117

<sup>55</sup> Law Council of Australia, Submission Number 29 to the Royal Commission into Institutional Responses to Child Sexual Abuse, Civil Litigation: Issues Paper 5, 21 March 2014

#### 14. Should a different model/approach be adopted? If so, what should it look like?

As noted in the Options Paper, Western Australia has taken the approach in its *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018 (WA)* to specifically address the continuity of organisations, in order to link historical institutions to current entities. The Explanatory Memorandum to that Bill noted:<sup>56</sup>

*The operation of the provisions under sections 15F and 15G links an institution that existed at the time of the accrual of the cause of action with an institution as it is currently to provide continuity in law in the absence of perpetual succession.*

This is a particularly relevant issue for survivors in Western Australia, given the number of missions and institutions run by interdenominational religious organisations. For example, Sister Kate's Children's Cottage Home, which operated from 1934 to 1980, was run by non-denominational management committees, then the Presbyterian Church, and later the Methodist Church while being funded by the Aborigines Department.<sup>57</sup>

The factual situation relating to the transition of institutions from the control of one entity to another can be challenging for survivors and provides uncertainty for our client group, particularly Aboriginal clients, in identifying a proper defendant. knowmore has assisted many Aboriginal clients who were forcibly removed from their families and country and placed in missions, which over time were run by multiple unincorporated care providers and organisations that changed their name over time, such as the Australian Aborigines Mission, an organisation that then changed to the United Aborigines Mission. The United Aborigines Mission and Aborigines Inland Mission also operated missions in the Northern Territory. We suspect continuity of institutions in identifying a proper defendant will become an important issue in the Northern Territory where historically significant numbers of children were removed. Accordingly, we recommend that the Territory considers the value in adopting similar continuity provisions to those contained in the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018 (WA)*.

We also note that a Bill just introduced by the Queensland Government (on 15 November 2018) contains similar continuity provisions – see Clause 330 of the *Civil Liability and Other Legislation Amendment Bill 2018 (Queensland)*.

It must be borne in mind too that under the relevant provisions of the legislation establishing the National Redress Scheme, it may not be possible for a survivor to obtain any redress for abuse suffered in a 'defunct' institution that does not have a current representative institution which is participating in the NRS. A 'defunct' institution (which is a government or non-government institution which no longer exists), can only participate in the NRS if it has a representative, who must have agreed to the defunct institution participating and agreed to be its representative.<sup>58</sup> It is therefore possible for a survivor, who experienced abuse in a non-government institution that is now defunct, to not be able

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<sup>56</sup> At p.8

<sup>57</sup> See the detail provided on the Find and Connect website - <https://www.findandconnect.gov.au/guide/wa/WE00684>

<sup>58</sup> See Part 5-1 of the National Redress Scheme for Institutional Child Sexual Abuse Act 2018 (Cth)

to sustain a redress claim. The ‘funder of last resort’ provisions in the legislation will not assist that survivor, in the sense of making the relevant government the funder of redress, unless the survivor can identify factual circumstances which point to that government having equal responsibility with the defunct institution for that abuse.<sup>59</sup>

We would hope that any current institution with links to a historical institution would become a representative of that past institution for the purposes of participating in the NRS. However, this requires first that the current institution itself is participating in the NRS (and this is voluntary for NGOs) and secondly that it agrees to such representation. In these circumstances, it may be important to provide in the legislation relating to civil claims for child abuse the means to establish continuity of institutions so that at least the survivor may pursue a civil claim, where there may be no access to the NRS.

## Controls

### **15. Should the consent of the nominee be required before it can be named a proper defendant?**

This is appropriate, in our view. The Victorian and New South Wales’ Acts provide for the appointment of an entity, with consent, as a proper defendant for an organisation.

### **16. Should nomination be limited by the nature of the association between the institution and the nominee?**

In our submission the provisions around nomination should not be overly prescriptive. The Royal Commission has framed its recommendations in a way that allows institutions choice around how they provide a proper defendant. The requirement for a property trust to be the deemed or default proper defendant should be sufficient to incentivise institutions to consider who the proper defendant to an action should be (and to so identify that defendant).

### **17. How can victims obtain access to justice where consent of a nominee is not provided to name an alternative proper defendant?**

The reforming legislation should provide, as recommended by the Royal Commission, that if no suitable proper defendant is identified and appointed by an organisation within a reasonable period<sup>60</sup> after notice of a claim is served on the relevant organisation, then the trustees of an associated trust may be appointed as the proper defendant for the organisation.

### **18. Are there any other controls that you think are necessary?**

The New South Wales and Victorian Acts contain provisions to ensure that trustees of an associated trust, when appointed as the proper defendant, have:

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<sup>59</sup> See Part 6-2 of the National Redress Scheme for Institutional Child Sexual Abuse Act 2018 (Cth)

<sup>60</sup> For example, 120 days as specified in the New South Wales Act – s. 6N of the Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018 (NSW)

- an indemnity for costs;
- a limit on liability to no more than the value of the trust; and
- an immunity from suit for breach of trust (for acting in accordance with their obligations as the proper defendant).<sup>61</sup>

Both Acts also contain a declaration as to Corporations legislation displacement provisions.<sup>62</sup>

We would also favour the inclusion of an anti-avoidance provision of the type set out in the New South Wales legislation, to address the situation where an organisation seeks to restructure an associated trust in a way to avoid the trust property being applied to satisfy liability in a child abuse claim.<sup>63</sup>

All institutions?

**19. Should recommendation 94 apply to all property trusts (including private trusts), or to statutory trusts only?**

In our submission, yes. The implementation of this recommendation should be extended to all trusts connected with the organisation. There is little point in compelling organisations to provide a proper defendant if there will be no assets available to satisfy any judgment and a restricted approach will simply encourage organisations to take steps to evade liability and safeguard trust assets through alternate, non-accessible structures.

The term ‘associated trust’ should be defined broadly in the legislation, as is the case in the New South Wales and Victorian Acts, to address all situations where an institution may directly or indirectly control or influence the property, distribution, management and affairs of a trust.

**20. Do the difficulties in identifying a proper defendant arise in respect of non-religious organisations?**

Yes, the issue may arise with unincorporated associations, regardless of whether the association is a religious organisation or not. For reasons of confidentiality we will not herein set out details of such institutions, but we are happy to elaborate in future consultations.

**21. Should the recommendation apply only to religious organisations?**

No. There is no reason to exempt non-religious organisations. If the Royal Commission’s recommendations about the liability of institutions are adopted it follows that Parliament should also ensure that those reforms have practical effect and that no institution can avoid liability (in appropriate cases where liability is established).

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<sup>61</sup> See, for example, section 6P of the Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018 (NSW)

<sup>62</sup> See, for example, section 6P(5) of the Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018 (NSW)

<sup>63</sup> Section 6N(2)(b) of the Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018 (NSW)

The proposed reform will help drive compliance with expected standards of care and protection on the part of such organisations in their delivery of services to children. It will ensure that the deterrent function of the reforms can be fulfilled and that all institutions are encouraged to be proactive and preventative in their approach to managing the risks around delivering services to children.

#### Extent of association

**22. What limits, if any, should there be on association between an institution and an associated trust?**

See our answer to question 19 above.

#### Incorporation

**23. Would it be reasonable to require every institution working with children to incorporate, or to have an incorporated ‘proper defendant’? What would the impacts of this be?**

We note the observations made by the Royal Commission around not being satisfied that it was appropriate to recommend that any particular institutions should be incorporated and insured,<sup>64</sup> given the potential impacts for smaller community based and non-commercial organisations.

In response to Issues Paper 5 the Law Council of Australia submitted that associations receiving government funding should be required to incorporate (so as to provide a proper defendant), as a requirement for receiving that funding. We agree with this submission.<sup>65</sup> It is not unduly onerous to create an eligibility requirement for government funding that the association be incorporated. While this may exclude some organisations from the ability to compete for funding we do not believe this to be unduly onerous given the gravity of the harm sought to be addressed by these reforms.

One relevant consideration is that if every institution working with children were required to incorporate then the impact on small, non-commercial, community groups may effectively inhibit their operation, thereby significantly reducing the amount of activities and opportunities available to children at a community level. Another related impact would be the privatisation of these community groups as this important community function is driven to corporations with sufficient funds; i.e. out of the hands of community. Privatisation of these kinds of groups would reduce their accessibility (e.g. they may price-out community members reliant on free or cheaper services) and impede their ability to respond to the specific and nuanced needs of their community.

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<sup>64</sup> Royal Commission *Redress and Civil Litigation Report* (2015), at p.511

<sup>65</sup> Law Council of Australia, Submission Number 29 to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Civil Litigation: Issues Paper 5* (21 March 2014), at p.16

We submit it is not necessary to require incorporation of all relevant organisations. If there are appropriate requirements around the availability of a proper defendant and the existence of a deemed defendant, then there is sufficient incentive for an association to incorporate to provide a proper defendant, or otherwise make one available. The requirement is that there be an available legal entity to answer a claim; incorporation is merely one way to achieve this. As noted, institutions should retain discretion around this point, especially since incorporation has traditionally been a means of limiting liability. This would allow the law to be coercive and regulatory without being prescriptive and inflexible.

However, we support the Royal Commission's recommendation 95, that the Northern Territory Government should consider whether there are any unincorporated bodies that it funds directly or indirectly to provide children's services, and whether they should be required to maintain insurance that covers their liability in respect of institutional child abuse claims. This should be a mandatory consideration for Government in advancing funding to any organisation.

In our view, recommendation 95 is founded on sound policy principles. In funding bodies to provide services for children, Government should rightly be concerned that such bodies have a capacity to meet any liability incurred through those activities. The child victim should not be the party to bear any default arising from how the body is structured and whether it is insured or not.

In this context, we also note Recommendation 26.1 of the *Betrayal of Trust* report of the Victorian Parliament,<sup>66</sup> which was as follows:

*That the Victorian Government consider requiring non-government organisations to be incorporated and adequately insured where it funds them or provides them with tax exemptions and/or other entitlements.*

Recommendation 26.2 of that report was

*That the Victorian Government work with the Australian Government to require religious and other non-government organisations that engage with children to adopt incorporated legal structures.*

If an institution is not prepared to take steps in relation to its structure and insurance coverage that would enable it to meet any liability for child abuse arising from its provision of services to children, it should not in any way be engaged or supported by Government.

There are a multitude of examples in society where Government prescribes certain prerequisites, through legislation, for the delivery of services to members of the public. The underlying policy rationale is principally to ensure the protection of the public. One such example is the legal profession; legal services can only be provided by qualified and accredited persons, who submit to compliance obligations, who practice in one form of a

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<sup>66</sup> Family and Community Development Committee, Parliament of Victoria *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013)

limited number of structures set out in the legal profession legislation, and who hold compulsory insurance to cover claims of professional negligence. Surely no lesser standards should be imposed on those bodies seeking Government funding or exemptions to provide services to children?

In this context, we would urge that the Northern Territory Government also takes steps to ensure that any NGO funded by it to engage with children is a participating institution for the purposes of the NRS.

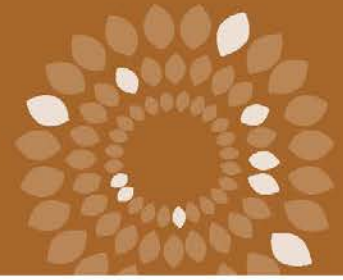
**24. Should legislation similar to that proposed by Western Australia be adopted in the Territory? If so, what modifications, if any would you suggest and why?**

Yes – see our answer to question 14 above.

# knowmore

## Data Snapshot – Northern Territory

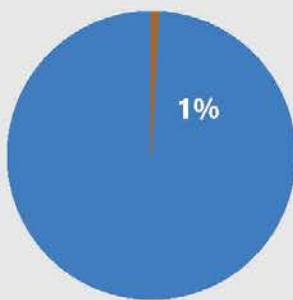
as at 31 March 2018



**knowmore** is an independent service giving free legal advice to people who are considering telling their story or providing information to the Royal Commission into Institutional Responses to Child Sexual Abuse.

This snapshot provides data about our clients living in the Northern Territory

### Our clients



knowmore began providing services to the public on 8 July 2013 – as at 31 March 2018, we've helped:



**126**

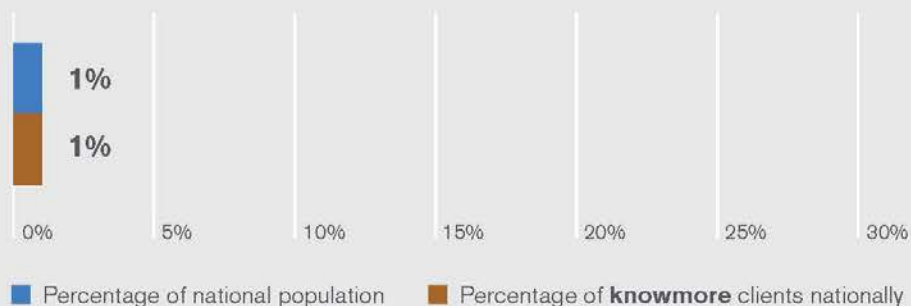
knowmore Northern Territory clients



**8954**

Total number of knowmore clients

### State representation



Percentage of national population living in NT

Against

Percentage of knowmore clients living in NT

■ Percentage of national population ■ Percentage of knowmore clients nationally



**48%**

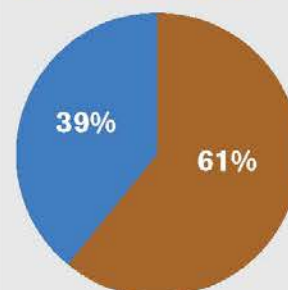
Identified as female



**52%**

Identified as male

### Aboriginal and Torres Strait Islander clients



■ Identify as Aboriginal or Torres Strait Islander People

#### Brisbane office

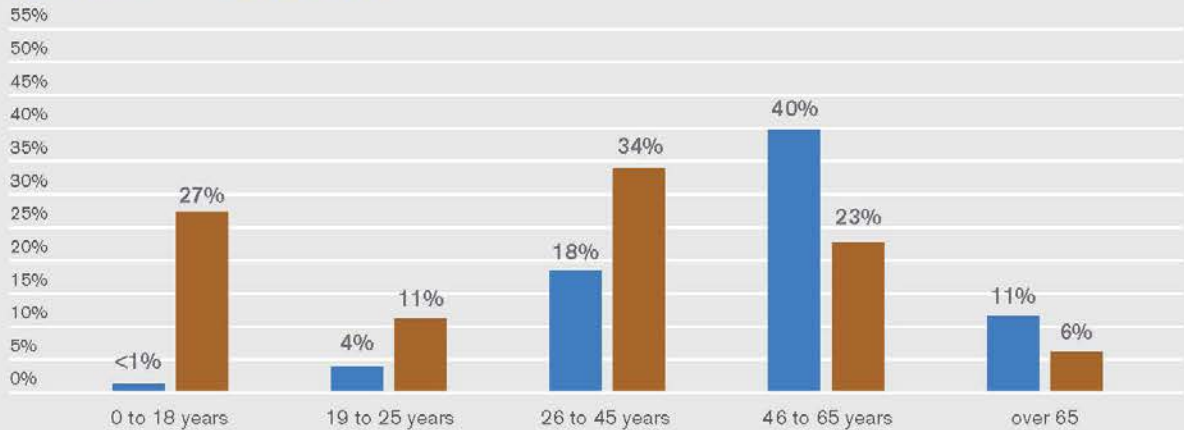
Suite 1, Level 16, 141 Queen St, Brisbane QLD 4000  
PO Box 2151, Brisbane QLD 4001

FREECALL: 1800 605 765

info@knowmore.org.au  
www.knowmore.org.au



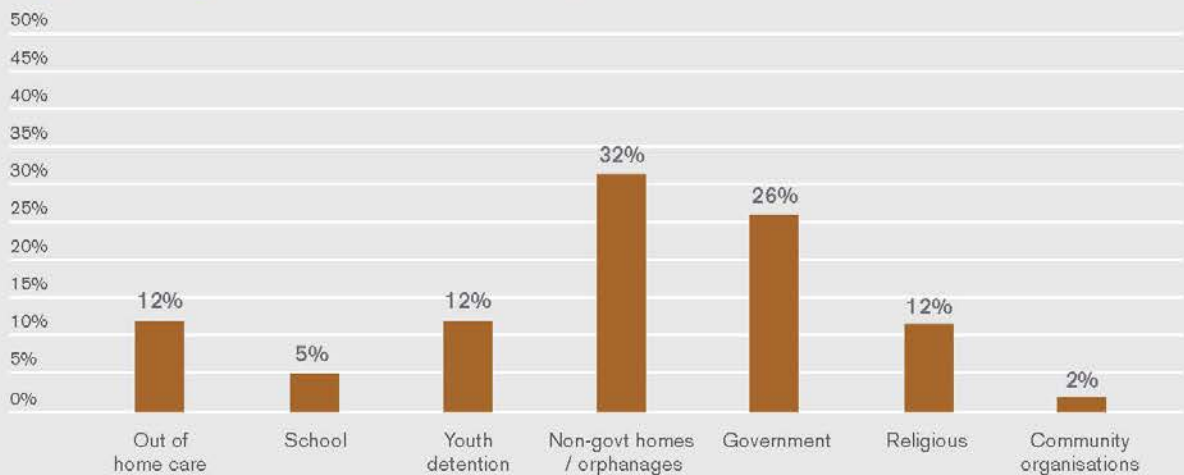
### Our clients – Age groups



Percentage of Northern Territory based **knowmore** clients per age group

Against percentage of Northern Territory population per age group

### Institutions in the Northern Territory where our clients report experiencing childhood sexual abuse



**Out of home care:** care provided to children who could not be cared for by their parents, including foster care

**School:** State and private primary and secondary schools

**Youth detention:** facilities run by the state government for people under 18yrs

**Non-govt homes/orphanages:** homes run mainly by religious organisations

**Government:** Government departments and agencies

**Religious:** Religious settings including churches and church run activities such as camps

**Community Organisations:** Organisations providing recreational activities to children

# knowmore National Redress Scheme

1 July 2018 – 31 October 2018

## Total calls and clients

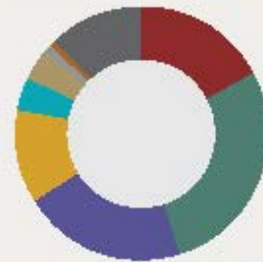


**7843**  
Total 18 000 calls  
nationally (637  
in first two days)



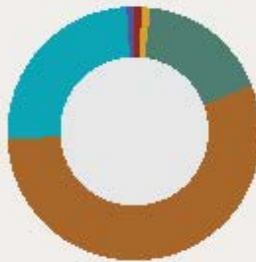
**2703**  
clients (intake  
completed)  
**44%**  
new clients

## Calls came from



NSW	17%
QLD	28%
VIC	21%
WA	12%
SA	5%
TAS	3%
ACT	1%
NT	1%
International/Other	12%

## Age As at 16 October 2018



0-18	<1%
19-25	1%
26-45	17%
46-65	56%
66-85	25%
86+	<1%

## Our clients



**12%**  
priority clients



**23%**  
identify as Aboriginal  
and/or Torres Strait  
Islander



**32%**  
identified  
as female



**68%**  
identified  
as male

**knowmore** free legal help  
for survivors

1800 605 762 | [knowmore.org.au](http://knowmore.org.au)

<sup>\*</sup> No longer Priority Clients

Clients are allocated priority where they are of advanced age, and/or have identified immediate and serious health concerns such as a diagnosis of terminal cancer or other life-threatening illnesses.

# knowmore National Redress Scheme

1 July 2018 – 31 October 2018

## Service delivery

Lawyers and paralegals



37

Social workers/counsellors



6

Aboriginal and Torres Strait Islander  
engagement advisors



6

Intake and client services staff



11

### Brisbane

Level 20, 144 Edward Street

Brisbane QLD 4000

PO Box 2151

Brisbane QLD 4001

### Sydney

Level 7, 36 College Street

Sydney NSW 2000

PO Box 267, Darlinghurst

Sydney NSW 1200

### Melbourne

Level 15, 607 Bourke Street

Melbourne VIC 3000

PO Box 504, Collins Street West

Melbourne VIC 8007

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[@knowmorecomms](https://www.instagram.com/knowmorecomms)

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for survivors

1800 605 762 | [knowmore.org.au](http://knowmore.org.au)

knowmore is a program of National Association of Community Legal Centres ABN67 757 001 303 ACN 163101737.  
NACLC acknowledges the traditional owners of the lands across Australia upon which we live and work. We pay deep respect to Elders past and present.  
Image inspired by original artwork by Dean Bell depicting knowmore's connection to the towns, cities, missions and settlements within Australia.