

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

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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.¹

¹ 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*² (*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

² (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*³ (*Bazley*) and *Jacobi v Griffiths*⁴ (*Jacobi*), adopted what is known as the 'close connection test'. See also the later decisions in *John Doe v Bennett*⁵ and *EB v Order of the Oblates of Mary Immaculate in the Province of British Columbia (EB)*.⁶ 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'.⁷
6. The House of Lords in *Lister v Hesley Hall Ltd*⁸ (*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)*,⁹ *JGE v The English Province of Our Lady of Charity and The Trustees of the Portsmouth Roman Catholic Diocesan Trust (JGE)*,¹⁰ *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)*.¹¹ See also on a related point, *Cox (Respondent) v Ministry of Justice (Appellant)*.¹²
7. In *Various Claimants*,¹³ 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*

³ [1999] 2 SCR 534 at 559.

⁴ [1999] 2 SCR 570 at 610.

⁵ [2004] 1 SCR 436 at 446.

⁶ [2005] 3 SCR 45.

⁷ *Ibid*, at [51].

⁸ [2002] 1 AC 215 at 224.

⁹ [2010] EWCA Civ 256.

¹⁰ [2011] EWHC 2871.

¹¹ [2012] UKSC 56.

¹² [2016] UKSC 10.

¹³ [2012] UKSC 56.

and the impressive leading judgment of Ward LJ.¹⁴ 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;¹⁵ 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)*.¹⁶

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.'¹⁷

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

¹⁴ [2012] EWCA Civ 938 at [19].

¹⁵ *Lister* [2002] 1 AC 215.

¹⁶ [2015] NSWCCA 262.

¹⁷ *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*.¹⁸ 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)*.¹⁹ 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*²⁰ (*Prince Alfred College*) unanimously endorses the majority approach in *Lepore*, applying the House of Lords decision in *Lloyd v Grace, Smith & Carroll & O'Dea*²¹ and a subsequent decision in *Morris v CW Martin & Sons Ltd*,²² 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.

¹⁸ [2011] EWHC 2871, [11].

¹⁹ [2016] UKSC 10.

²⁰ [2016] HCA 37.

²¹ [1912] AC 716.

²² [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.²³

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

²³ [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 one²⁴) where an institution has

²⁴ 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*,²⁵ 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 Inquiry²⁶ 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.²⁷
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 example²⁸) through the interest and earnings on its assets. Other institutions may struggle in this regard.

²⁵ [2011] EWHC 2871, [11].

²⁶ 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>.

²⁷ 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>>.

²⁸ 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.'²⁹

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.³⁰ 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'.³¹

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

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

³¹ 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.³² 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

³² 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

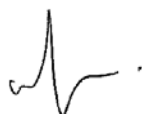
bear the cost and the institutions bear none in the absence of adequate insurance;
and

(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

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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.¹

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.²

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 test³ 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.⁴ 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.”⁶⁵

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.*⁶

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.⁷

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.⁸ 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.⁹

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.¹⁰

Canada

In Canada, residential schools were run for First Nations peoples in the 19th and 20th 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.¹¹ 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.¹²

The Common Experience Payment deadline passed in 2012.¹³ The Independent



Assessment Process deadline also passed in 2012.¹⁴ 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.¹⁵
- 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.¹⁶ 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."¹⁷
- 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.¹⁸

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 1995.¹⁹ 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 2016.²⁰

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.²¹ 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’.²²

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.²³

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.’²⁴

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.²⁵

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.²⁶
- 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.’²⁷

Catholic Church

- The Catholic Church’s Melbourne Response scheme currently caps victims’ compensation in Victoria at \$75,000.²⁸ While media report that the national equivalent, Towards Healing, has an unlimited cap,²⁹ 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.’³⁰

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.’³¹

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.’³²

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.³³

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.

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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

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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.¹

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, if 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:²

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.³ 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.⁴
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*,⁵ 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*⁶ 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*⁷ 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*.⁸ 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*,⁹ 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,¹⁰ *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.'¹¹

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,¹² 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.

REFERENCES

- ¹ Australian Lawyers Alliance (2012) <www.lawyersalliance.com.au>
- ² Compensation Advisory Committee, *Towards Redress and Recovery, Report to the Minister for Education and Science*, January 2002 at viii. Accessed at http://www.rirb.ie/documents/cac_report2002.pdf
- ³ Senate Community Affairs References Committee, *A report on Australians who received institutional or out-of-home care as children*, Parliament House, Canberra, 2004. Cited in Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper on Redress and Civil Litigation*, at 170.
- ⁴ Patrick Parkinson, Kim Oates, Amanda Jayakody, 'Study of Reported Child Sexual Abuse in the Anglican Church', (May 2009), at 5.
- ⁵ 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>
- ⁶ *Brisbane South Regional Health Authority v Taylor* [1996] HCA 25; 186 CLR 541.
- ⁷ *Briginshaw v Briginshaw* (1938) 60 CLR 336
- ⁸ *Salvation Army (South Australia Property Trust) v Graham Rundle* [2008] NSWCA 347
- ⁹ *State of NSW v Lepore* (2003) 212 CLR 511
- ¹⁰ *John Doe v Bennett* [2004] 1 SCR 436
- ¹¹ *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].
- ¹² *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



Lawyers

for the People

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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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.¹

¹ 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.² 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".³ It further

² Royal Commission, *Redress and Civil Litigation Report* (2015), 444.

³ 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.⁴

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,⁵ with the NSW reforms passed in 2016⁶ being substantively similar. The same reforms should be implemented in all jurisdictions across Australia.

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

⁵ *Limitation of Actions (Child Abuse) Bill 2015* (Vic).

⁶ *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.⁷ 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.⁸
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

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

⁸ 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.⁹
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,¹⁰ 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

⁹ 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.

¹⁰ *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 Phillips; *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.'¹¹
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

¹¹ 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,¹² others have refrained from providing this assurance.¹³ 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'.¹⁴ The trust can also be joined in any action against those people for injuries arising from sexual abuse.¹⁵
33. All other jurisdictions have different legislation establishing or regulating trusts that hold property on behalf of the Roman Catholic Church.¹⁶ We support the passage of this Bill in NSW and similar legislation in all other jurisdictions.

¹² 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>.

¹³ 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>.

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

¹⁵ *Ibid*, proposed s18(1).

¹⁶ 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]'.¹⁷ 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."¹⁸ It also recommends that, in the period prior to the establishment of a redress scheme, deeds of release should not be required.¹⁹ It

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.

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

¹⁸ Royal Commission, *Redress and Civil Litigation Report* (2015), 259.

¹⁹ 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,¹ 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.²

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 years³, which coincides neatly with an Anglican Queensland survey producing similar results.⁴ 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 Victoria⁵ and then NSW⁶ 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.⁷ 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*⁸. 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 2019.⁹ 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.¹⁰ 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.¹¹ 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.¹² 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.¹³ 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*¹⁴ 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.¹⁵ 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.¹⁶ The defendant appealed successfully to the High Court.¹⁷

10. At first instance, Vanstone J accepted that the appropriate approach was that of Gleeson CJ in *State of NSW v Lepore*.¹⁸ 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?'¹⁹

Vicarious Liability and the Catholic Church

20. In *Trustees of the Roman Catholic Church v Ellis*²⁰, 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*²¹ 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”.²²
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.”²³

“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.”²⁴

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.²⁵ 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*²⁶, 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].²⁷

29. In *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church*²⁸, 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*²⁹, 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.³⁰
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.”³¹
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)*³², 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*³³ and *TB v State of NSW*³⁴ (Below: *TB and DC v State of NSW & Anor*³⁵), 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.³⁶

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.³⁷ 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.

¹ 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.

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

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

⁴ 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.

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

⁶ 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.

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

⁸ (1996) 186 CLR 541.

⁹ Legal Services Direction - time-barred child abuse claims, 4 May 2016.

¹⁰ ACT Justice and Community Safety Legislation Amendment Bill 2017.

¹¹ Limitation Amendment (Child Abuse) Bill 2017 (NT).

¹² Limitation of Actions Institutional Child Sexual Abuse) Amendment Bill 2016 (SA).

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

¹⁴ [2016] HCA 37.

¹⁵ [2015] SASC 12 (Vanstone J).

¹⁶ [2015] SASCFC 161.

¹⁷ [2016] HCA 37.

¹⁸ (2003) 212 CLR 511 at [40-54].

¹⁹ Oxford University Commonwealth Law Journal 25 May 2017.

²⁰ [2007] NSWCA 117.

²¹ [2011] NSWSC 1216 (Hoeben J).

²² Speech by the Hon. Justice Peter McClellan AM to the Triennial Assembly of the Uniting Church in Australia, on 15 July 2015.

²³ Sydney Catholic Archdiocese “The *Ellis* Decision - A Re-statement of the Law”, [undated], available at https://www.sydneycatholic_org/4/justice/royalcommission/ellis.asp.

²⁴ *Ibid.*

²⁵ Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2014 (NSW)

²⁶ [2015] VSC 499 (Rush J).

²⁷ 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.

²⁸ [2010] EWCA Civ 256.

²⁹ [2011] EWHC 2871 (QB).

³⁰ 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.

³¹ [2012] UKSC 56 at [86] and [87].

³² [2016] UKSC 10.

³³ [2016] NSWCA 198.

³⁴ [2016] NSWCA 198.

³⁵ [2015] NSWSC 575 (Campbell J).

³⁶ *New South Wales v DC & Anor* [2017] HCA 22 (14 June 2017).

³⁷ €300,000 is approximately AU\$434,000 at current exchange rates.