

ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE

CONSULTATION PAPER: REDRESS AND CIVIL LITIGATION

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We are academics in the Law Faculty at the University of Technology, Sydney, who research in fields which intersect with some of the issues before the Royal Commission into Institutional Responses to Child Sexual Abuse. We welcome the opportunity to provide a submission in response to the Royal Commission's Consultation Paper published in January 2015. This submission addresses the issues in relation to civil litigation only, focussing on the specific issues in relation to which submissions have been invited on p. 232 of Chapter 10 of the Consultation Paper.

INTRODUCTION

Pursuant to the *Universal Declaration of Human Rights*¹ and the *International Covenant on Civil and Political Rights*², Australia has an international legal obligation to ensure effective remedies for survivors of human rights abuses. The deliberate physical and sexual abuse of children by those who should care for them is a most egregious form of human rights abuse and proper and adequate compensation for survivors is both a moral and a legal imperative.

A National Redress Scheme with Common Law Rights Preserved

We support the establishment of a single national redress scheme led by the Australian government and with the participation of State and Territory governments and non-government institutions. In addition to the availability of such a scheme, survivors of child sexual abuse in an institutional context ("survivors") should retain their rights (but be under no obligation) to sue perpetrators and/or the relevant institution(s) for damages at common law.

The common law of tort provides a pathway to compensation for survivors which should be available in addition to a statutory redress scheme. Survivors should not be required to make an election between a claim against the Scheme and a common law claim. Rather, a survivor who obtains a payment under the Scheme would be required to refund the payment upon recovery of common law damages in respect of the same abuse for which the scheme payment was received. There are various

¹ Article 8 *Universal Declaration of Human Rights*, UN GA RES 217A (III) UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

² *International Covenant on Civil and Political Rights* GA RES 2200A (XXI), opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

precedents for this type of arrangement in past and present Workers' Compensation statutes in various Australian jurisdictions³.

Advantages of a Claim in Tort

Tort law offers a remedy in damages which are significant and which have an incalculable vindicating effect for individual plaintiffs⁴. Tortious damages offer the possibility of an award which would be significantly larger than the maximum sums available pursuant to statutory compensation schemes which already exist⁵ or which might be established specifically to compensate survivors of child sexual abuse in an institutional context. Tort law provides justice for a survivor and punishment at least financially, of a perpetrator, especially in cases where no criminal prosecution has been brought or where it may have been unsuccessful. The possibility of an award of aggravated or exemplary damages against a defendant provides not only vindication and retribution but also must have a significant deterrent effect.⁶

Legal Obstacles to a claim in Tort

Whilst Tort law offers the prospect of suitable and valuable remedies for survivors of child sexual abuse in an institutional context, there are presently significant legal obstacles to a successful claim in tort at common law. Chief amongst these are:

- Expiration of limitation periods;
- The lack of a corporate entity that may be sued and/or the death, imprisonment, bankruptcy or impecuniosity of a perpetrator who would otherwise be defendant;
- The lack of available assets of perpetrators and some institutions to satisfy a judgment and
- The fact that under the current state of the common law of Australia, it is not clear when an action in tort will be available against an institution in relation to child sexual assault by an employee or independent contractor of an institution.

³ See for example *Workers Compensation Act 1951 (ACT)* ss 184-186.

⁴ For a discussion of vindication and tortious damages generally, see Witzleb, N and Carroll, R, "The Role of Vindication in Tortious Damages" (2009) 17 *Tort Law Review* 16.

⁵ Freckelton I., *Criminal Injuries Compensation Law, Practice and Policy*, LBC Information Services, Sydney, 2001.

⁶ *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118.

We submit that these legal obstacles should be addressed by specific, stand-alone legislative reform of particular aspects of the common law to be applied to child sexual abuse in an institutional context. Such reforms should be retrospective so as to provide the opportunity for just compensation to survivors of past abuse, as well as for future victims. Reforms of this nature are warranted, in our view, for several reasons.

- (i) First, the ongoing uncertainty about the scope of vicarious liability of institutions for child sexual abuse and/or the scope of any non-delegable duty of care owed by an institution following the decision of the High Court in *New South Wales v Lepore*⁷ should be resolved as soon as possible. Survivors of child sexual abuse who decide to pursue civil litigation, and their advisers, and also potential institutional defendants, should be able to know with as much clarity as possible, the nature and scope of potential liability arising out of a claim of child sexual abuse in an institutional context.
- (ii) Second, statutory reform can ensure that all relevant matters are addressed at once. A comprehensive suite of reforms is not available through development of the common law by the courts, as courts are necessarily restricted to determining only the issues in each case.
- (iii) Third, specific statutory reforms which are directed to clarifying and formulating the liability in tort of institutions for child sexual abuse in an institutional context would not alter the existing common law outside this specific context. There is no basis for altering the existing law outside this context.⁸
- (iv) Fourth, a stand-alone statutory regime would avoid unintended consequences which might result from reforms to existing civil liability

⁷ (2003) 212 CLR 511.

⁸There are precedents for specific statutory reforms to the common law of vicarious liability. For example, it was formerly the position at common law that the performance of a police officer's duties was in public service and not by reason of being an employee. As a result, at common law the State could not be held vicariously liable for tortious acts of a police officer.⁸ This has been reversed by legislation introduced in all jurisdictions (albeit not simultaneously) pursuant to which the State may be vicariously liable for torts committed by police officers whilst acting in the course of their duty. See Law reform (Vicarious Liability) Act 1983 (NSW) s 8; Police Service Administration Act 1990 (Qld) s 10.5; Police Regulation Act 1958 (Vic) s 123; Police Act 1998 (SA) s 65; Police Act 1982 (WA) s 137; Police Service Act 2003 (Tas) s 84; Police Service Administration Act 1978 (NT) s 148C; Australian Federal Police Act 1979 (CTH) s 64B.

legislation. In this regard we note that the Ipp reforms were not intended to address intentional torts⁹.

- (v) Finally, uniform statutory reform can be introduced in all states and territories, by agreement. The evidence before the Royal Commission has confirmed that sexual assault of children in an institutional context has been, and continues to be, a national problem. In our view, survivors should have the same rights and options regardless of the jurisdiction in which compensation or redress is sought or in which abuse occurred. Statutory reforms of or modifications to the common law of tort are of course, constitutionally within the powers of State and Territory Parliaments rather than the Federal Parliament. However, we hope that there would be cooperation between all State and Territory Attorneys General in order to achieve a national uniform approach to the assurance of pathways to compensation for survivors of institutional child sexual abuse.¹⁰

We have summarised our submissions and recommendations in an Executive Summary below. The Executive Summary is structured to respond to the six issues identified in the Consultation Paper. This is followed by detailed discussion of each of the submissions and recommendations. In this submission, we do not seek to propose draft legislation, but to identify issues relevant to setting the limits of the scope of such legislation.

Terms and Definitions

The Terms of Reference of the Letters Patent appointing the Royal Commission provide definitions of certain key concepts in relation to the scope of the inquiry which we have taken into account in making this submission, in particular the definitions of “institution” and “institutional context”. We note that these definitions, together with the definition of “official”, focus upon the provision by an entity of means by which adults have contact with children and by implication, the risk of abuse by adults of children. However, a related issue which arises in the discussion of child sexual abuse in an institutional context is the risk of harm to a

⁹ Commonwealth Review of the Law of Negligence: Final Report, 2002 (“the Ipp Report”), Recommendation 2 ([2.2]-[2.3])

¹⁰ We should endeavour not to repeat the experience of the tort law reforms (see *Civil Liability Act 2002* (NSW); *Civil Liability Act 2003* (Qld); *Civil Liability Act 1936* (SA); *Civil Liability Act 2002* (Tas); *Wrongs Act 1958* (Vic); *Civil Liability Act 2002* (WA); *Civil Law (Wrongs) Act 2002* (ACT); *Personal Injuries (Liabilities and Damages) Act 2003* (NT)) enacted by Australian Parliaments in 2002/3 following the Ipp Report (*Review of the Law of Negligence Final Report*, Commonwealth of Australia, Canberra, 2002) where uniformity was unfortunately not achieved, though in some instances, similar but not identical provisions were enacted.

child from another, usually older, child also under the control, supervision or guidance of the institution. In our view, this is a “related matter” which is an important dimension of the overall picture of child sexual abuse in an institutional context. However, except where specifically mentioned, the reforms suggested in this submission address the potential liability of an institution for child sexual abuse in an institutional context as defined by the Terms of Reference.

Secondly, the definition of “institution” as provided in the Terms of Reference is very broad and is not limited by reference to the nature of its responsibilities for the child. This definition has the potential to extend to a very wide range of entities whose responsibility for a child might be very different in nature to that of the institutions which have been the subject of successful claims in other common law jurisdictions to date. For example, this definition would arguably extend to a hairdresser, or a retail shop serving children, or a local sporting club providing sport training to children - entities which *do* provide the means for adults to have contact with children, but whose responsibility for the welfare of the child is very different to that of say a school, church or institution providing residential care.

The issues arising from Chapter 10 of the Consultation Paper on Civil Litigation raise this important policy question: where should the limits with respect to institutional liability for child sexual abuse in an institutional context be set? At one end of the spectrum, strict liability could be imposed upon institutions for any abuse which occurs in an institutional context, regardless of the nature of the alleged abuser’s role with respect to responsibility for children. At the other end of the spectrum, concepts such as whether the alleged abuser was acting within the “course of employment” can be employed to severely limit the scope of any institutional liability. In our submission, in light of the pervasiveness and extent of child sexual abuse in an institutional context in Australia which has come to light through the work of the Royal Commission, it will be important for governments to make this decision as a matter of public policy in light of the Royal Commission’s findings and recommendations, and clearly articulate that policy and its consequences. In our submission, any proposed reform to the existing law to give effect to that policy should identify as precisely as possible, though without limitation, the circumstances which may give rise to liability to institutional liability. If proposed reforms are expressed at too high a level of generality, or by adopting existing common law tests or concepts without defining them with sufficient particularity, the same uncertainty which currently exists at common law under Australian law may not be resolved by any proposed legislative reforms.

EXECUTIVE SUMMARY AND RECOMMENDATIONS

1. The options for reforming limitation periods and whether any changes should apply retrospectively

Submission 1.1: There should be uniform legislative reform in all states and territories to remove limitation periods for the commencement of civil proceedings in relation to child sexual abuse in an institutional context. Prejudice to a defendant's ability to properly defend proceedings caused by the effluxion of time is mitigated by the court's power to stay proceedings as an abuse of process if a fair trial is no longer possible by reason of delay.

Submission 1.2: Reforms to limitation periods should apply retrospectively.

2. The options for reforming the duty of institutions and whether any changes should apply retrospectively

Submission 2.1: Uniform legislative reforms should be enacted in all states and territories reforming the common law of vicarious liability and imposing vicarious liability upon an institution in relation to child sexual abuse in an institutional context in certain circumstances. Such reforms should be introduced by way of stand-alone legislation not by way of reforms to existing civil liability regimes in the states and territories, most of which do not apply to intentional torts such as sexual abuse. Such reforms should also expressly provide that they do not alter the existing common law in any other respect so as to preserve the common law of vicarious liability and non-delegable duties of care as they apply in other contexts. In broad terms, we submit that any reform to the vicarious liability of institutions for child sexual abuse in an institutional context under Australian law should be based upon the considerations underpinning liability as identified under English law in *Lister v Hesley Hall Limited*¹¹ and *Various Claimants v Catholic Child Welfare*¹² and under Canadian law in *Bazley v Curry*.¹³

Without limiting the scope of any such legislation, we submit that the scope of such vicarious liability should apply in circumstances where:-

- (a) the institution has assumed or been vested with responsibility for the physical welfare or spiritual, psychological or emotional guidance of a child

¹¹ [2001] UKHL 22

¹² [2012] UKSC 56; [2013] 2 AC 1.

¹³ [1999] 2 SCR 534.

(or where a reasonable person would assume that the institution has assumed or been vested with such responsibility); and

- (b) a person who is relevantly connected to the institution,¹⁴ exercises authority, control or supervision over, or provides spiritual, psychological or emotional guidance to the child, in furtherance of the aims of the institution or in discharge of the responsibilities of the institution referred to in paragraph (i) or part thereof, and
- (c) where the role of the person described in (b) above within or on behalf of the institution materially and significantly enhances or exacerbates the risk of abuse of the child; and
- (d) that person sexually abuses the child.

In determining whether the role of the person within or on behalf of the institution materially or significantly enhanced or exacerbated the risk of abuse of the child in (c) above, the considerations identified in *Bazley v Curry*¹⁵ and applied in *Jacobi v Griffiths* are relevant.¹⁶ (The following suggestions are derived in large part from these cases). For example:

- i) the nature of the institution's responsibility for the physical welfare or spiritual, emotional or psychological guidance of a child;
- ii) the nature of the responsibility for the physical welfare or spiritual, psychological or emotional guidance of a child exercised by the alleged abuser and in particular,
 - (1) the extent of power conferred on the alleged abuser in relation to the child and
 - (2) whether it involved the alleged abuser in a position of trust, power and intimacy with the child.

¹⁴These legislative provisions would reform the common law of vicarious liability with respect to the liability of an institution for child sexual abuse in an institutional context, so that such liability is not limited to employees in the traditional sense, but extends to persons with a relevant connection to the institution, as defined. In our submission, the test applied under English law in *Various Claimants v Catholic Child Welfare* [2012] UKSC 56; [2013] 2 AC 1 should be the basis for determining whether such a relevant connection exists between the alleged abuser and the institution rather than a traditional test of employment.

¹⁵[1999] 2 S.C.R. 534.

¹⁶[1999] 2 S.C.R. 570, [41]-[43]. We note that in relation to *Jacobi v Griffiths*, we find the dissenting judgment of MacLachlin J more persuasive in the application of these factors to the facts of that case.

- iii) whether the role of the alleged abuser described in (ii) above could be said to further the aims of the institution;
- iv) the opportunity that this position afforded the alleged abuser to perpetrate the abuse;
- v) whether the wrongful act was related to intimacy inherent in the institution's enterprise and the opportunity for abuse it afforded;
- vi) the nature of the vulnerability of the child in the relationship with the alleged abuser due to age or emotional or psychological need of any kind or any other factors; and
- vii) any other relevant circumstances.

It would not be necessary to demonstrate all these factors.

Submission 2.2: Uniform legislative reforms should be enacted in all states and territories imposing a statutory non-delegable duty upon institutions to ensure that reasonable care is taken in the exercise of responsibility for the physical welfare or spiritual, psychological or emotional guidance of a child;

Submission 2.3: Uniform legislative reforms should be enacted in all states and territories imposing a statutory duty of care upon any institution or government entity or statutory authority having responsibility for the physical welfare or spiritual, psychological or emotional guidance of a children to remove or reduce the risk of sexual abuse of a child in respect of whom it has such responsibility by any person associated with the institution (including the risk of abuse by other children);

Submission 2.4: Uniform legislative reforms should be enacted in all states and territories imposing the availability of dual vicarious liability in appropriate cases in relation to child sexual abuse in an institutional context;

Submission 2.5: Uniform legislative reforms should be enacted in all states and territories providing that civil liability (tort reform) legislation limiting damages recoverable and otherwise altering the common law of negligence in Australian jurisdictions does not apply to tortious claims in respect of sexual abuse whether brought in negligence or any other tort. This includes the special provisions regarding public authority defendants;

Submission 2.6: Uniform legislative reforms should be enacted in all states and territories providing that Aggravated and Exemplary damages will be available in respect of any tortious liability for child sexual abuse in an institutional context;

Submission 2.7: Uniform legislative reforms should be enacted in all states and territories which enable courts to order that apologies be given by defendants to plaintiffs in any proceedings in respect of child sexual abuse;

Submission 2.8: The matter of a uniform package of reforms should be brought before the appropriate inter-governmental body such as the Council of Australian Governments (COAG) or such other body representing all states and territories.

Submission 2.9: The special provisions of Civil Liability Legislation in respect of claims against Public Authority Defendants should not apply in Child Sexual Abuse Cases against Institutional Defendants.

3. How to address difficulties in identifying a proper defendant in faith-based institutions with statutory property trusts

Submission 3.1: Make church or religious property trusts the 'proper defendant' to any claim in respect of child sexual abuse for which the church or religious body is alleged to be liable and make that 'proper defendant' liable for the tortious conduct of the perpetrators of the abuse and also for the negligent failures of the faith-based institutions to protect children in respect of whom they owed a duty of care.

Submission 3.2: Make the assets of church or religious property trusts available to meet liability of the church or religious body in respect of any claim for child sexual abuse in an institutional context.

4. Whether the difficulties in identifying a proper defendant arise in respect of institutions other than faith-based institutions and how these difficulties should be addressed

Submission 4.1: Require entities which have assumed or undertaken responsibility for the physical welfare or spiritual, psychological or emotional guidance of a child to be incorporated or to nominate an entity within existing corporate structures as a nominal defendant which must maintain adequate insurance and/or self-insure with declared assets against a claim for civil liability for child sexual abuse in an institutional context.

5. Whether governments and non-government institutions should adopt principles for how they will handle civil litigation in relation to child sexual abuse claims.

Submission 5.1: Require government and non-government institutions to adopt guiding principles designed specifically for civil claims for child sexual abuse in an institutional context.

6. Whether any changes may have adverse effects on insurance availability or coverage for institutions, including specific details of the adverse effects and the reasons for them

Submission 6.1: We recommend that the relevant industry representatives be consulted to determine with as much clarity as possible the manner in which the proposed changes are likely to impact upon the availability and affordability of insurance given the critical role that adequate insurance is likely to play in any civil proceedings of the nature contemplated in these submissions.

7. Further general submissions

Submission 7.1 Consideration should be given to recommendations with respect to improving the availability of legal aid and ensuring proper funding of community legal centres to assist with bringing proceedings. In this regard, we note that these issues are dealt with comprehensively in the submissions in response to the Royal Commission's Issue Paper No. 5: Civil Litigation, released 6 December 2013.

Submission 7.2 Establish a dedicated list in the courts with practice directions aimed to make any common law proceedings arising from allegations of child sexual abuse in an institutional context as straight forward as possible.

Submission 7.3 All children should be given age-appropriate education about inappropriate sexual advances, grooming behaviours and information about their rights and practical means to contact a nominated person if they feel at risk or have suffered harm.

Submission 7.4 Recommend an analysis of measures taken in other courts in relation to proceedings arising from sexual violence to see if there are particular processes which could be adopted to improve the delivery of justice in civil litigation for survivors of child sexual abuse in an institutional context.

Submission 7.5 Recommend government funding for the drafting of a publicly available guide for survivors about the process of commencing civil litigation in respect of child sexual abuse in an institutional context.

DETAILED SUBMISSIONS

These submissions respond to the six particular issues raised by the Consultation Paper on p 232 in relation to Civil Litigation.

1. The options for reforming limitation periods and whether any changes should apply retrospectively

Submission 1.1 There should be uniform legislative reform in all states and territories to provide that limitation periods for the commencement of civil proceedings in relation to child sexual abuse should be removed.

Submission 1.2 Reforms to limitation periods should apply retrospectively.

1.1 We note that in Victoria legislation has been passed to remove limitation periods in relation to cases of child sexual abuse and that the New South Wales Department of Justice has released a Discussion Paper, "Limitation periods in civil claims for child sexual abuse" in January 2015 in relation to reforms to limitation periods.

1.2 We support the removal of limitation periods for the reasons developed in the submissions made in response to the Royal Commission's Issues Paper No 5: Civil Liability released on 6 December 2013 ("Issues Paper No. 5"). We note that there is precedent for the complete removal of limitation periods in respect of tortious liability for personal injury in the *Dust Diseases Tribunal Act 1989 (NSW)*, s 12A, which concerns claims for damages for dust related diseases including asbestos related illness.

1.3 We submit that parallel reforms should be introduced in all states and territories to ensure that survivors of child sexual abuse in an institutional context throughout the country have the benefit of the same provisions.

1.4 One of the chief concerns identified as a potential disadvantage of reforms to remove limitations periods entirely for claims of child sexual abuse is the risk that delay will prejudice the ability of a defendant to properly defend proceedings where critical evidence has been lost or key witnesses are no longer available. However, we note that the removal of the limitation period would not abrogate the statutory power of courts to stay, by order, any proceedings before the court, either permanently or until a specified day: see for example *Civil Procedure Act 2005 (NSW)*, s 67. The Supreme Court has inherent power to stay proceedings which are an abuse of process: *Jago v District Court of NSW* (1989) 168 CLR 23. Proceedings may be stayed permanently, as an abuse of process, where there cannot be a fair trial due to delay in commencing the proceedings: *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256.

1.5 As noted in the NSW Government Discussion Paper: Limitation periods in civil claims for child sexual abuse”, January 2015, this inherent power of the courts mitigates this concern about disadvantage to institutional defendants. We support the recommendation in that Discussion Paper that “Given that long delays are typical in these cases, it may be preferable that a court’s decision to hear or not hear a claim is based on [the court’s power to stay proceedings], rather than on a technical issue regarding whether the statutory period has expired and whether any exceptions may apply.”¹⁷

2. The options for reforming the duty of institutions and whether any changes should apply retrospectively

Available Causes of Action at Common Law

2.1 There are several tortious causes of action at common law which would be available to survivors, depending on the circumstances of their cases.

2.2 Survivors clearly have a cause of action against the individual perpetrators of sexual abuse in the tort of battery. Survivors will also have been subjected to physical threats which would give rise to claims in tort for assault and, in some instances survivors may have been falsely imprisoned by the perpetrators. However in most cases the perpetrator, even if still alive and traceable, will not have any or sufficient assets to meet an award of damages. In that case the survivor may seek to establish liability in the relevant institution which either employed the perpetrator or

¹⁷ At 11.

which delegated its responsibility for the welfare of the child to another person or organisation (“the Institution”) in order to recover compensation.

2.3 There are several possibilities here:

- (a) Establish that the Institution is **vicariously liable** for the intentional tort of **trespass to person** (assault, battery, false imprisonment) committed by the perpetrator
- (b) Establish that the Institution owed a **non-delegable duty of care** in the tort of negligence to children in its care and that the acts of the perpetrator constituted a breach of the non-delegable duty of care causing damage to the child
- (c) Establish that the Institution is liable in the **tort of negligence** because it owed a duty of care to the children in its care to avoid the risk of sexual abuse and that it breached that duty of care by failing to take proper precautions against the risk thereby causing damage to the child.

2.4 As the many submissions to the Commission have recognised, there are problems inherent in bringing any of the above claims in respect of institutional child sexual abuse. We make the following submissions as to reform of existing law to facilitate successful claims and fair access to tortious damages by survivors.

Vicarious Liability

Submission 2.1 Uniform legislative reforms should be enacted in all states and territories providing for vicarious liability of an institution for child sexual abuse in an institutional context in certain circumstances. Such reforms should be introduced by way of stand-alone legislation not by way of reforms to existing civil liability regimes in the states and territories, most of which do not apply to intentional torts such as sexual abuse. Such reforms should also expressly provide that they do not alter the existing common law in any other respect so as to preserve the common law of vicarious liability and non-delegable duties of care as they apply in other contexts. In broad terms, we submit that any reform to the vicarious liability of institutions for child sexual abuse in an institutional context under Australian law should be broadly based upon the considerations underpinning liability as identified under English law in *Various Claimants v Catholic Child Welfare*¹⁸ and under Canadian law in *Bazley v Curry*.¹⁹

¹⁸ [2012] UKSC 56; [2013] 2 AC 1.

¹⁹ [1999] 2 SCR 534.

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Without limiting the scope of any such legislation, we submit that the scope of such vicarious liability should apply in circumstances where:-

- (a) the institution has assumed or been vested with responsibility for the physical welfare or spiritual, psychological or emotional guidance of a child (or where a reasonable person would assume that the institution has assumed or been vested with such responsibility); and
- (b) a person who is relevantly connected to the institution, exercises authority, control or supervision over, or provides spiritual, psychological or emotional guidance to the child, in furtherance of the aims of the institution or in discharge of the responsibilities of the institution referred to in paragraph (i) or part thereof, and
- (c) where the role of the person described in (b) above within or on behalf of the institution materially and significantly enhances or exacerbates the risk of abuse of the child; and
- (d) that person sexually abuses the child.

These legislative provisions would reform the common law of vicarious liability with respect to the liability of an institution for child sexual abuse in an institutional context, so that such liability is not limited to employees in the traditional sense, but extends to persons with a relevant connection to the institution, as defined. The legislative reforms should set out a statutory test to guide courts as to the circumstances in which the relevant closeness of connection between the person and the institution exists. In our submission, the test applied under English law in *Various Claimants v Catholic Child Welfare*²⁰ should be the basis for determining whether such a relevant connection exists between the alleged abuser and the institution rather than a traditional test of employment.

In our submission the issues which are relevant to (c) above should be based the considerations underpinning liability as identified under Canadian law in *Bazley v Curry*²¹ and applied in *Jacobi v Griffiths*.²² (The following suggestions are derived in large part from these cases). For example, that determination might include consideration of the following:

- viii) the nature of the institution's responsibility for the physical welfare or spiritual, emotional or psychological guidance of a child;

²⁰ [2012] UKSC 56; [2013] 2 AC 1.

²¹ [1999] 2 SCR 534.

²² [1999] 2 S.C.R. 570. We note that in relation to *Jacobi v Griffiths*, we find the dissenting judgment of MacLachlin J more persuasive in the application of these factors to the facts of that case.

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- ix) the nature of the responsibility for the physical welfare or spiritual, psychological or emotional guidance of a child exercised by the alleged abuser and in particular,
 - (1) the extent of power conferred on the alleged abuser in relation to the child and
 - (2) whether it involved the alleged abuser in a position of trust, power and intimacy with the child.
- x) whether the role of the alleged abuser described in (ii) above could be said to further the aims of the institution;
- xi) the opportunity that this position afforded the alleged abuser to perpetrate the abuse;
- xii) whether the wrongful act was related to intimacy inherent in the institution's enterprise and the opportunity for abuse it afforded;
- xiii) the nature of the vulnerability of the child in the relationship with the alleged abuser due to age or emotional or psychological need of any kind or any other factors; and
- xiv) any other relevant circumstances.

It would not be necessary to demonstrate all these factors.

2.5 Vicarious liability is an instance of strict (no-fault) liability.²³ The law holds one party responsible for the conduct of another despite the fact that the first party is free of blameworthiness or fault of any kind. Justifications for it vary. Lord Reid observed in *Imperial Industries Ltd v Shatwell*, that “[t]he doctrine of vicarious liability has not grown from any very clear logical or legal principle but from social convenience and rough justice.”²⁴ In *Lister v Heselley Hall Ltd*, Lord Millet noted that, “It is best understood as a loss-distributing device.”²⁵ The doctrine has been recognised as “having its basis in a combination of policy considerations.”²⁶ As noted by Lord Phillips in *Various Claimants v Catholic Child Welfare Society*, “the policy objective underlying vicarious liability is to ensure, in so far as it is fair, just and

²³ JG Fleming, *The Law of Torts* (Law Book Co, 8th ed, 1992) 366.

²⁴ [1965] AC 656, 685.

²⁵ *Lister v Heselley Hall Limited* [2001] UKHL 22, [65].

²⁶ JG Fleming, *The Law of Torts*, (LBC Information Services, 9th ed, 1998) 410.

reasonable, that liability for tortious wrong is borne by a defendant with the means to compensate the victim. Such defendants can usually be expected to insure against the risk of such liability.”²⁷ In other words, if a loss must be borne by an innocent plaintiff or an innocent employer, the latter is better placed to meet (and prevent) the loss.²⁸

2.6 In the context of child sexual abuse in an institutional context, the relevant policy question is whether, as between the survivor of child sexual abuse in an institutional context on the one hand, and the institution in which the abuse occurred on the other, the loss should be borne by the survivor or the institution if the perpetrator cannot be found or is impecunious. There is no doubt that the question of institutional liability for sexual abuse of its employees, agents and independent contractors raises difficult questions of public policy. Institutions which have breached no duty and had no knowledge of, or involvement in, the acts of the perpetrator stand to bear the financial burden of the perpetrator’s unauthorised conduct. However it is our submission that where the abuse is proven on the balance of probabilities to have occurred, policy *generally* favours the loss being borne by the institution which will usually have the capacity to pay (if the perpetrator cannot) either from its insurance or recourse to assets, subject to what is said below. It is our submission that institutions are better placed to arrange for adequate insurance to meet potential liability, to take proactive steps to avoid some harm from occurring, and to be able to respond more quickly to facts which put it on notice of a potential problem. None of these will ever be within the reach of children in such a relationship with an institution.

2.7 However, courts have consistently held that mere opportunity to commit a tort does not suffice to impose no-fault liability for any abuse which occurs in an institutional context.²⁹ Case law in this area in other jurisdictions has taken the path that liability requires some connection between the abuser and the institution, and connection between the role of the abuser within the organisation and the abuse. We support some similar limitation upon liability.

2.8 It is our submission that legislative reform will be the most effective way of defining afresh the types of relationships between abusers and institutions which are accepted as giving rise to institutional liability and the circumstances in which liability should be found. However, we stress that the existing common law of

²⁷ [2013] 2 AC 1, 15 [34].

²⁸ Queensland Law Reform Commission Discussion Paper on *Vicarious Liability*, July 1995.

²⁹ *Jacobi v Griffiths* [1999] 174 DLR (4th) 45.

vicarious liability should not be affected except in relation to child sexual abuse in an institutional context.

2.9 Below we discuss briefly some of the limitations faced by the common law Australia in dealing with these issues which support, in our view, the need for legislative reform.

Limitations on scope – the nature of the employment relationship

2.10 Firstly, under Australian law, the types of relationships which attract the operation of the doctrine are currently limited. Vicarious liability traditionally arises in two recognised classes: (i) in the context of an employer/ employee relationship and (ii) in a principal/ agent relationship. It does not extend to liability for the wrongdoing of independent contractors: *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 44. As noted by Leeming JA in *Day v The Ocean Beach Hotel Shellharbour Pty Ltd*:³⁰

... until the High Court otherwise determines, the distinction between independent contractors and employees is a “basic proposition” and a “central conception” of the law relating to vicarious liability, which is “too deeply rooted to be pulled out: *Sweeney* at [12] and [33].³¹

2.11 This also raises particular problems within the context of religious organisations (see *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis*,³²) where the relationship of a priest or religious official to the parish or diocese or other church entity often falls outside the traditional employment paradigm.

2.12 There have been developments in other jurisdictions in relation to the determination of the relevant connection in the relationship between the abuser and the institution. For example, in a number of recent English and Canadian decisions dealing with the liability of clergy, courts have found relationships “akin to” employment which sufficed for the purposes of establishing the vicarious liability of the church or diocesan body, notwithstanding the lack of a traditional employment relationship between it and the priest perpetrator.³³

³⁰ (2013) 85 NSWLR 335, [14].

³¹ The reference to ‘*Sweeney*’ is to *Sweeney v Moylan Nominees Pty Ltd* [2006] HCA 19; (2006) 226 CLR 16.

³² (2007) 70 NSWLR 565,

³³ See for example *Maga v 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*

2.13 Another example of an area which does not fall within traditional ambit of the employment relationship is foster care, which is dealt with differently in different jurisdictions. In New Zealand it has been held that the state can be vicariously liable for the negligence of foster parents on the basis that foster parents act as a form of agent of the state, the state being the principal having a duty to children in foster care.³⁴ In Canada foster care is not regarded as within the scope of vicarious liability³⁵ and in England it has traditionally not been accepted as falling within the scope of vicarious liability, although there have been academic calls for reform. However, as noted by Morgan:

changes in employment practices and occupation are such that there are a range of occupational activities between [the two extremes of employees on one side and independent contractors on the other] and it is artificial to attempt to squeeze every occupation into one of the two categories.³⁶

2.14 There have been suggestions for reform of the employer/ employee requirement for vicarious liability in Australia to extend it to independent contractors but they have not met with success to date under Australian law. In *Northern Sandblasting Pty Ltd v Harris*³⁷ and in *Hollis v Vabu Pty Ltd*³⁸ McHugh J proposed that the rule be reformulated so that it extends to the tortious acts of independent contractors as agents for the organisation as principal. However these have not been accepted by a majority in the High Court.

The course of employment

2.15 Secondly, the range of wrongful acts of an employee for which an institution might be liable has been traditionally limited to those which occur *during the course of employment*.³⁹

Portsmouth Roman Catholic Diocesan Trust [2011] EWHC 2871; *Various Claimants v Catholic Child Welfare* [2012] UKSC 56; [2013] 2 AC 1.

³⁴ *S v Attorney General* [2003] 3 NZLR 450, cited by Paula Case in *Compensating Child Abuse in England and Wales* (Cambridge University Press, 2007) 110.

³⁵ See *EDG v Hammer* [2003] 2 SCR 459; *KLB v British Columbia* [2003] 2 SCR 403; and *MB v British Columbia* [2003] 2 SCR 477, cited by Morgan in P Morgan, "Ripe for reconsideration: Foster carers, context and vicarious liability" (2012) 20 *Torts Law Journal* 110, 142.

³⁶ P Morgan, "Ripe for reconsideration: Foster carers, context and vicarious liability" (2012) 20 *Torts Law Journal* 110.

³⁷ (1997) 188 CLR 313, 366-367.

³⁸ [2001] HCA 44; (2001) 207 CLR 21.

³⁹ The question whether wrongful acts can be regarded as being within the course of employment is commonly approached by reference to what is known as the "Salmond test" – the formulation applied in Salmond, *Law of Torts*. In *New South Wales v Lepore*, Gleeson CJ referred to this test as being to the effect that: ... an employer is liable even for unauthorised acts if they are so connected with

2.16 The question of how to deal with sexual misconduct which is so clearly disconnected from any authorised act has vexed courts. In *New South Wales v Lepore*,⁴⁰ the only Australian High Court authority on the question in this specific context of child sexual abuse in an institutional context, three of the six judges who considered the question appeared to accept that child sexual abuse by employees who had responsibility for the welfare of children might, in certain cases, be found to be conduct which had occurred within the course of their employment (Gleeson CJ, Kirby J and Gaudron J) whilst three judges did not (Gummow and Hayne JJ in a joint judgment, and Callinan J). Although the reasons differed, Gleeson CJ, Gaudron and Kirby JJ all approved a version a “sufficient connection” test: requiring that there is a connection between the impugned act and the acts which the alleged perpetrator was employed to do.⁴¹

2.17 Despite the differences between the judgments, it has been accepted that the decision in *Lepore* still requires a court to examine the “closeness of connection” between the impugned acts and the employment: see for example *Ryan v Ann St Holdings*⁴²; *Blake v JR Perry Nominees Pty Ltd*.⁴³ However in the context of child sexual abuse in an institutional context, subsequent Australian consideration of the different reasons for judgment given in *New South Wales v Lepore* has tended not to find that sexual assaults committed by employees of institutions have had the relevant closeness of “connection” to fall within the scope of employment. The cases demonstrate a reluctance by the courts to find that sexual abuse can have any relevant “connection” with the employment. The approach taken in the cases seems more closely aligned with that of Gummow, Hayne and Callinan JJ in *New South Wales v Lepore*.

2.18 In *Withyman v State of New South Wales*,⁴⁴ a case concerning a sexual relationship between a teacher and an intellectually handicapped student in a school (although not a minor), it was found by Allsop P (with whom Meagher and Ward JJA agreed) that:

authorised acts that they may be regarded as modes – although improper modes – of doing them, but the employer is not responsible if the unauthorised and wrongful act is not so connected with the authorised act as to be a mode of doing it, but is an independent act.

⁴⁰ (2003) 212 CLR 511

⁴¹ This interpretation of the judgments of Gleeson CJ, Gaudron and Kirby JJ was applied by Harrison AsJ in *JK v State of New South Wales* [2014] 1084 at [25].

⁴² (2006) 2 Qd R 486, [18] per Williams JA.

⁴³ [2010] VSC 272, [68] per J Forrest J

⁴⁴ [2013] NSWCA 10.

[143] That the children at the school were or may have been more emotionally vulnerable than ordinary school students may perhaps be accepted. But the enterprise of teaching and guiding the young, even using gentle and forgiving familiarity does not create a new ambit of risk of sexual activity. Sexual activity is as divorced and far from the gentle caring teacher's role as it is from the stern, detached disciplinarian's. The connection and nexus was not such as to justify imposition on the State for Ms Blackburn's apparently, out of character, sexual misconduct. The school did not create or enhance the risk of such by her duties.

2.19 *A, DC v Prince Alfred College Incorporated*⁴⁵ concerned claims of sexual abuse of a student by a teacher in a school boarding house. Vanstone J applied the above dictum from *Withyman* and found at [175] that, "although it may be accepted that when rostered on duty overnight [the teacher] had a role which involved responsibility for an overall supervision of the boarding house, that is very far from amounting to a duty to engage in intimate physical behaviour with a student." She concluded that:

.. the ordinary relationship was not one of intimacy and the sexual abuse was so far from being connected to [the teacher]'s proper role that it could neither be seen as being an unauthorised mode of performing an authorised act, nor in pursuit of the employer's business, nor in any sense within the course of [the teacher]'s employment. I find that the defendant did not, by means of any proven requirement of [the teacher], create or enhance the risk of [the teacher] sexually abusing the plaintiff. Liability on [the basis of vicarious liability] is not made out.⁴⁶

2.20 These cases appear to focus on distinguishing the nature of the abuse from the authorised acts with the effect of severing the connection with employment, rather than examining the issues of power, control, vulnerability and authority and the abuse of it which in other jurisdictions have been used to establish the relevant connection. We turn now to consider briefly the developments in this regard in other jurisdictions which have taken a broader view of the scope for institutional liability than was discussed in *Lepore* or applied since.

Comparison with development of the law in England and Canada

⁴⁵ [2015] SASC12.

⁴⁶ [179].

Royal Commission into Institutional Responses to Child Sexual Abuse

Submission on issues raised in Chapter 10 of the Consultation Paper, January 2015

Allison Silink and Pam Stewart

2.21 In Canada, *Bazley v Curry*⁴⁷ clarified the common law with respect to the circumstances in which vicarious liability may be imposed upon an institution for sexual abuse of a child by an employee and remains the leading authority on vicarious liability in this context. (It was considered by the High Court in *Lepore* without disapproval by Gleeson CJ⁴⁸ although it was not applied by any judge.) That case concerned a boy in a residential institution for emotionally troubled children who was abused by a child care worker employed in the facility. McLachlin J in giving judgment for the court, set out the policy factors which should guide a court in determining whether liability should be imposed in cases of unauthorized intentional wrong which were not covered by direct precedent. These focused upon the creation or enhancement of risk of abuse by the institution. Her Honour held that vicarious liability is generally appropriate where there is a significant connection between “the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer’s desires”.

2.22 Her Honour set out a range of subsidiary factors which were relevant to determining the sufficiency of the connection between the employer’s creation or enhancement of the risk and the wrong complained of. These included:

- (a) the opportunity that the enterprise afforded the employee to abuse his or her power;
- (b) the extent to which the wrongful act may have furthered the employer’s aims (and hence be more likely to have been committed by the employee);
- (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer’s enterprise;
- (d) the extent of power conferred on the employee in relation to the victim;
- (e) the vulnerability of potential victims to wrongful exercise of the employee’s power.⁴⁹

2.23 Her Honour held further that:

there must be a strong connection between what the employer was asking the employee to do (the risk created by the employer’s enterprise) and the wrongful act. It must be possible to say that the employer significantly increased the risk of

⁴⁷ [1999] 174 DLR (4th) 45. For a more detailed discussion of the judgment see Peter Cane, “Vicarious Liability for Sexual Abuse” (2000) 116 *Law Quarterly Review* 21.

⁴⁸ *New South Wales v Lepore* (2003) 212 CLR 511, 541-542.

⁴⁹ [1999] 2 S.C.R. 534, [41].

the harm by putting the employee in his or her position and requiring him to perform the assigned tasks. The policy considerations that justify imposition of vicarious liability for an employee's sexual misconduct are unlikely to be satisfied by incidental considerations of time and place. For example, an incidental or random attack by an employee that merely happens to take place on the employer's premises during working hours will scarcely justify holding the employer liable.⁵⁰

2.24 In our view these are relevant considerations which might inform the matters which a court might be directed to take into account in a statutory formulation of a test for vicarious liability in this context.

2.25 *Bazley v Curry* was applied by Lord Steyn in the House of Lords in *Lister v Hesley Hall*.⁵¹ That case concerned the liability of the defendant which ran a school for maladjusted boys arising from the abuse by a warden employed by the school of a child at the school. The case focussed attention upon the connection between the responsibility vested in the perpetrator for the welfare of children and how the abuse constituted a breach of that responsibility. The school was found liable. In that case, Lord Millett observed:

In the present case the warden's duties provided him with the opportunity to commit indecent assaults on the boys for his own sexual gratification, but that in itself is not enough to make the school liable. The same would be true of a groundsman or the school porter. But there was far more to it than that. The school was responsible for the care and welfare of the boys. It entrusted that responsibility to the warden. He was employed to discharge the school's responsibility to the boys. For this purpose the school entrusted them to his care. He abused the special position in which the school had placed him to enable it to discharge its own responsibilities, with the result that the assaults were committed by the very employee to whom the school had entrusted the care of the boys.⁵²

2.26 In our submission, this focus upon the nature and extent of the *responsibility for the welfare or spiritual guidance of the child* which has been entrusted to the perpetrator as satisfying the requirement for a connection between the wrongdoing and the employment or other relationship is the most persuasive basis for the imposition of liability upon an institution.

2.27 The Supreme Court recently clarified the test for the imposition of vicarious liability of institutional defendants under English law the Supreme Court in *Various*

⁵⁰ [1999] 2 S.C.R. 534, [42].

⁵¹ [2001] UKHL 22

⁵² *Ibid*, [82] per Lord Millett.

*Claimants v Catholic Child Welfare*⁵³ but in a way that still draws on the sufficiency of the connection between the relationship of employment and the impugned act through the prism of the responsibility entrusted to the perpetrator by the institution. The case concerned the vicarious liability of two diocesan defendants and a Roman Catholic lay institute for the sexual abuse by brothers of the institute who were teachers in a Roman Catholic boys residential school.

2.28 Lords Phillips delivered the judgment of the court. The current test to apply was held to involve (i) considering the relationship of D1 and D2 to see whether it is one that is capable of giving rise to vicarious liability. (ii) an examination of the connection between D2 and the act or omission of D1. “What is critical at the second stage is the connection that links the relationship between D1 and D2 and the act or omission of D1.”⁵⁴ It was the defendant’s case that the necessary closeness of connection was established by the fact that the institute sent the brothers to the school to further the purpose of the institute, “clothed with the status of members of the institute, and thereby significantly increased the risk that brothers would sexually abuse the children to whom they were in close proximity.”⁵⁵ This, combined with the vulnerability of the boys in the school to an abuse of the authority they had by reason of their status as teachers, led to the finding of vicarious liability on the part of the institute who sent the brothers to the school.⁵⁶ Again, it appears that the abuse of the very responsibility for the welfare of children which had been given to the perpetrator underpinned the liability.

Comment

2.29 It has been noted in academic commentary that the “closeness of connection” test favoured by the High Court in *Lepore* and consistently applied in these other common law jurisdictions has not produced consistency of reasoning in the courts as the formula is used to different ends by different judges. Giliker has concluded:

There is a need, therefore to move away from vague terminology. Mere reference to ‘risk’ or ‘connection’ is unlikely by itself to resolve the question before the court. What is needed is a more concrete point of reference.⁵⁷

⁵³ [2012] UKSC 56; [2013] 2 AC 1.

⁵⁴ *Ibid* [21].

⁵⁵ *Ibid* 24].

⁵⁶ *Ibid* 26-27 [85]-[91].

⁵⁷ P Giliker, “Making the right connection: Vicarious liability and institutional responsibility” (2009) 17 *Torts Law Journal* 35, 42.

2.30 In our submission, the most straightforward approach to resolving the uncertainty is to adopt a legislative solution which spells out clearly and unambiguously the circumstances which are to be taken into account, and which, if found, would point to, the existence of vicarious liability.

Non-Delegable Duty of Care

Submission 2.2 Uniform legislative reforms should be enacted in all states and territories imposing a statutory non-delegable duty upon institutions to ensure that reasonable care is taken in the exercise of responsibility for the physical welfare or spiritual, psychological or emotional guidance of a child.

2.31 A further duty which arises for consideration in this context is the scope of a non-delegable duty of care. Non-delegable duties of care have been described as a “sub-species of negligence law”.⁵⁸ They have evolved to circumvent the restriction on vicarious liability to employment relationships in the context of liability in negligence. In certain circumstances (such as schools *vis a vis* students, employers *vis a vis* employees, and hospitals *vis a vis* patients) the law recognises a duty to ensure that reasonable care is taken which cannot be avoided by delegating such tasks to independent contractors. Negligence of the independent contractor will be sheeted home to the principal.⁵⁹

2.32 However, the application of a non-delegable duty to intentional torts such as sexual abuse involves a different process of reasoning.⁶⁰ The deliberate sexual abuse of a child is not easily equated with traditional conceptions of a failure to ensure that reasonable care is taken of the child which do not turn on intentional wrongdoing. In *New South Wales v Lepore*, only McHugh J decided that a non-delegable duty of care was attracted in the circumstances of intentional wrong-doing.⁶¹ Gleeson CJ on the other hand, observed that:⁶²

⁵⁸ J Murphy, “The liability basis of common law non-delegable duties – A reply to Christian Witting” (2007) 30 *University of New South Wales Law Journal* 86.

⁵⁹ See for example *Commonwealth v Introvigne* (1982) 150 CLR 258.

⁶⁰ For a more detailed discussion of this issue see P Giliker, “Making the right connection: Vicarious liability and institutional responsibility” (2009) 17 *Torts Law Journal* 35, 46.

⁶¹ See McHugh J at [136]; Gleeson CJ at [38], Gummow and Hayne JJ at [265]; Callinan J at [339] agreeing with Gleeson CJ. Kirby J did not rule on the question but suggested that his approach would be the same as that in relation to vicarious liability, which did in his Honour’s view extend to intentional wrongdoing.

⁶² (2003) 212 CLR 511 at [31]

Intentional wrongdoing, especially intentional criminality, introduces a factor of legal relevance beyond a mere failure to take care. Homicide, rape, and theft are all acts that are inconsistent with care of person or property, but to characterise them as failure to take care, for the purposes of assigning tortious responsibility to a third party, would be to evade an issue.

2.33 As Giliker notes, vicarious liability, on the other hand, *has* been recognised on a number of occasions and in different contexts as applying to intentional torts such as fraud, assault and theft.⁶³

2.34 However, there is significant academic support for the use of a non-delegable duty to render liable employees and independent contractors for a failure to ensure that reasonable care is taken where that failure comprises an intentional act of harm.⁶⁴

2.35 The nature of a non-delegable duty has been analysed by Beuermann, who has argued that the term “conferred authority strict liability” better explains non-delegable duties in terms of the conferred authority of the employer on an independent contractor to control the activities of an employee and that so understood, it clearly would include in its scope intentional torts.⁶⁵ The view that non-delegable duties should not apply to intentional torts was criticised by Foster⁶⁶ with reference to cases such as *Nationwide News Pty Ltd v Naidu: ISS Security Pty Ltd v Naidu* [2007] NSWCA 377, in relation to which it was argued that it was an “odd result” that the employer would have been liable if the intentional act had been committed by an employee but was not liable as the relevant act was committed by an independent contractor.

2.36 Stevens has argued that “liability for deliberate abuse follows *a fortiori* from liability for want of care.”⁶⁷ The argument is that:

[...]liability for the breach of a primary duty cannot be avoided by showing that the breach was gross. It is as if a seller of ginger beer could escape liability if it could be

⁶³ P Giliker, “Making the right connection: Vicarious liability and institutional responsibility” (2009) 17 *Torts Law Journal* 35, 48.

⁶⁴ J Wangmann, “Liability for Institutional Child Sexual Assault: Where Does Lepore Leave Australia?” (2004) 28 *Melbourne University Law Review* 169.

⁶⁵ C Beuermann, “Tort law in the employment relationship: A response to the potential abuse of an employer’s authority” (2014) 21 *Torts Law Journal* 169.

⁶⁶ Neil Foster in a conference paper entitled “*Convergence and Divergence in Non-Delegable Duties, UK and Australia*”, delivered at the Obligations VII conference in Hong Kong, July 2014.

⁶⁷ R Stevens, *Torts and Rights* (Oxford University Press, 2007) 122-123 (referred to by Neil Foster in a conference paper entitled “*Convergence and Divergence in Non-Delegable Duties, UK and Australia*”, delivered at the Obligations VII conference in Hong Kong, July 2014).

shown that it had been deliberately poisoned by the manufacturer. If the duty assumed is a duty that care will be taken, this is breached when the duty is abused.

2.35 The logic is compelling and it is clearly an option. One possible answer to it though, is that the point is not that liability could or should be avoided altogether by showing that the breach of the non-delegable duty was of an intentional and possibly criminal nature, but rather that it ought to be caught by a different form of liability at law than by means of a non-delegable duty with its focus upon negligence.

2.37 There is nonetheless considerable force to the criticisms of the limitations on the scope of non-delegable duties, in much the same way as it has been argued in this submission that the scope of vicarious liability is ripe for clarification and extension in certain respects to ameliorate present limitations. Under both traditional models, there are cases which fall between the cracks. Whilst it would be possible to achieve the same ultimate end (institutional liability for child sexual abuse) by means of an expanded non-delegable duty, in our view the conceptual underpinnings of non-delegable duties in negligence and the firm view taken by the High Court against its use for intentional torts render it presently a less suitable vehicle for reform in this area. We accept that either model could potentially be developed to achieve a clearer basis for the imposition of institutional liability than currently exists under Australian law. However in our submission, reforms to the law of vicarious liability, long recognised as extending to intentional torts, is presently a better vehicle for establishing the liability of an institution for child sexual abuse for the reasons developed in relation to Submission 2.1.

A Statutory Duty of Care

Submission 2.3 Uniform legislative reforms should be enacted in all states and territories imposing a statutory duty of care upon any institution or government entity or statutory authority having responsibility for the physical welfare or spiritual, psychological or emotional guidance of a children to remove or reduce the risk of sexual abuse of a child in respect of whom it has such responsibility by any person associated with the institution (including the risk of abuse by other children).

2.38 The Commission has pointed to uncertainty at common law about when an institution would be subject to a duty of care in respect of the risk of child sexual abuse⁶⁸ where the case does not fall within one of the well-established categories of

⁶⁸ Royal Commission into Institutional Responses to Child Sexual Abuse *Consultation Paper on Redress and Civil Litigation*, 10.3, p208.

duty of care⁶⁹. The imposition of a duty of care at common law depends on reasonable foreseeability by the defendant that harm of the same general kind might come to a person or class of persons of whom the plaintiff is one.⁷⁰ In addition, the plaintiff must establish that there exist some salient features of the case which having regard to past cases, would mitigate in favour of imposition of a duty of care⁷¹. In cases of child sexual abuse it may be difficult for a plaintiff to establish that a duty of care should be imposed, especially in the case of defendants which are statutory or public authorities where the common law⁷² and also state and territory statutes⁷³ have developed special considerations relating to the duty of care question. Similarly in cases where the plaintiff's damage consists of purely psychiatric harm, some state and territory statutes impose special considerations relating to duty of care.⁷⁴

2.39 One way to avoid any uncertainty about the duty of care question would be a legislative statement (which would operate independently of established principles of common law on the duty of care question) that would set out specific instances in which a duty of care of an institution, government entity or statutory authority will arise in relation to child sexual abuse cases. These instances of the duty of care would not be an exhaustive statement of the circumstances in which a duty of care would arise but would enable a survivor to satisfy the duty of care requirement for a cause of action in negligence where his or her case fell within a specific duty situation set out in the statutory provision.

2.40 The identification of the particular instances in which a duty of care would be imposed might include a statement that an institution owes a duty of care in the tort of negligence to remove or reduce the risk of sexual abuse of a child in its care or control by an adult person associated with the institution. In this regard we support the submission by the Law Council of Australia at [64] referring to findings of the Report of the Victorian Parliament Family and Community Development Committee's Inquiry into the Handling of Child Abuse by Religious and other

⁶⁹ There are many well-established duty categories, in particular school and pupil: *NSW v Lepore* (2003) 212 CLR 511, 564 (McHugh J); *Commonwealth v Introvigne* (1982) 150 CLR 258, 260 (Mason J).

⁷⁰ *Chapman v Hearse* (1961) 106 CLR 112

⁷¹ *Sullivan v Moody* (2001) 207 CLR 562.

⁷² *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; *Crimmins v Stevedoring Industry finance Committee* (1999) 200 CLR 1

⁷³ *Civil Liability Act 2002* (NSW), Pt 5; *Civil Liability Act 2003* (Qld), Pt 3; *Civil Liability Act 2002* (Tas), Pt 9; *Wrongs Act 1958* (Vic), Pt XII; *Civil Liability Act 2002* (WA), ss 5U-5Z; *Civil Law (Wrongs) Act 2002* (ACT) Chapter 8.

⁷⁴ See *Civil Liability Act 2002* (NSW), Pt 3; *Civil Liability Act 2002* (Tas) Pt 8; *Civil Liability Act 1936* (SA), s 33; *Wrongs Act 1958* (Vic), Pt XI; *Civil Liability Act 2002* (WA), s 5S; *Civil Law (Wrongs) Act 2002* (ACT), Pt 3.2.

Organisations⁷⁵ in relation to the nature and content of the duty.⁷⁶ There should be no requirement for the plaintiff to establish reasonably foreseeability at the duty of care enquiry or that there existed any further salient features in the relationship between plaintiff and defendant. An institution should be very broadly defined so that religious or faith based institutions are included and a person associated with the institution might include an officer, office holder, employee, manager, owner, volunteer, contractor, agent or other associate of the organisation.

2.41 This suggestion is influenced by the recently enacted Victorian Criminal law reform 'failure to protect' offence⁷⁷ which imposes a duty on persons within an organisation to remove or reduce the risk of a sexual offence against a child by an adult associated with the institution if they are aware that there is a substantial risk that an offence may occur. This reform was in response to the report of the Victorian *Betrayal of Trust: Inquiry into the handling of child abuse by religious and other non-government organisations*⁷⁸ We do not suggest that the proposed duty of care in tort should be in the same strict terms as the Victorian legislation, given that the legislation creates a criminal offence punishable by a term of imprisonment. But we submit that a definitive statement setting out when a duty of care in tort would be imposed on an institution would avoid some of the uncertainty which currently surrounds the issue at common law.

2.42 Further we submit that any legislative provision imposing such a duty of care should be retrospective because though the provision is designed to remove doubt about the duty issue, in many cases institutions would on ordinary common law principles have owed a duty of care in any event.⁷⁹

2.43 The question of what would constitute breach of such a duty and what response reasonableness would require of an institutional defendant should be left to the common law. We note that at common law the reasonableness of the response is to be judged having regard to what the defendant knew or ought to have known *at the time* of the abuse. We would also submit that causation issues should be determined according to the common law.

⁷⁵ Tabled in the Victorian Parliament on 13 November 2013.

⁷⁶ Submission in response to Issues Paper 5 by the Law Council of Australia, 25 March 2014.

⁷⁷ Enacted by the *Crimes Amendment (Protection of Children) Act 2014* (Vic) which inserts a new s 49 C into the *Crimes Act 1958* (Vic)

⁷⁸ 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*, November 2013 available at <http://www.parliament.vic.gov.au/fcdc/article/1788>

⁷⁹ See for example *SB v New South Wales* (2004) 13 VR 527

Dual Vicarious Liability

Submission 2.4 Uniform legislative reforms should be enacted in all states and territories imposing the availability of dual vicarious liability in appropriate cases in relation to child sexual abuse in an institutional context.

2.44 A related issue is the question of *dual vicarious liability*. Under Australian common law, it is not possible for two parties to be vicariously liable for a defendant's wrong.⁸⁰ The position is otherwise in England.⁸¹ It has been accepted by the Supreme Court that a defendant may have a relationship with more than one entity in the position of an employer (or deemed liable for the acts of the defendant) so as to make it just that more than one party is vicariously liable for the defendant's wrong.

2.45 In *Various Claimants v Catholic Child Welfare Society*,⁸² the Supreme Court accepted that there were two parties who should be found vicariously liable for the sexual abuse of children in a Roman Catholic boys residential school. At trial, two diocesan bodies responsible under statute for managing the residential school were found vicariously liable for the abuse committed by brother teachers at the school. On appeal, the only issue was whether "the institute", a lay Roman Catholic order to whom the diocesan bodies had left it to appoint the headmaster and teachers, could also be vicariously liable. The Supreme Court accepted that it was "fair, just and reasonable" for the institute to share vicarious liability for the sexual abuse which had occurred with the diocesan defendants.⁸³

2.46 Paula Case suggests the example of a nursery nurse who abuses children during a temporary placement. In such a case, vicarious liability could potentially be imposed upon the nursery which employed her and the agency that supplied the nursery with the predatory worker.⁸⁴ As the author notes, the sharing of liability is not determined solely by reference to the degree of control exercised by each

⁸⁰ *Oceanic Crest Shipping Company v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626 applied in *Day v The Ocean Beach Hotel Shellharbour Pty Ltd* [2013] NSWCA 250 per Leeming JA [23]-[33].

⁸¹ See *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA 1151 approved in *Hawley v Luminar Leisure Ltd* [2006] EWCA Civ 18 referred to by Paula Case in *Compensating Child Abuse in England and Wales* (Cambridge University Press, 2007) 110.

⁸² [2013] 2 AC1.

⁸³ *Ibid* 27, [94].

⁸⁴ Paula Case, *Compensating Child Abuse in England and Wales* (Cambridge University Press, 2007), 110.

employer but whether it is 'just' in all the circumstances that both employers be vicariously liable.⁸⁵

2.47 In *Day v The Ocean Beach Hotel Shellharbour Pty Ltd* Leeming JA noted that there were statutory forms of dual vicarious liability under Australian law,⁸⁶ but that short of statutory reform, the acceptance of dual vicarious liability under the common law of Australia would have to come from the High Court.⁸⁷

2.48 In our submission, any statutory reforms to vicarious liability of institutions for child sexual assault should also include the recognition that where the court considers that it is fair, just and reasonable, it may find more than one institutional defendant vicariously liable for the wrongful acts.

Civil Liability (tort reform) Legislation in Australian Jurisdictions should not apply to Child Sexual Abuse Cases.

Submission 2.5 Uniform legislative reforms should be enacted in all states and territories providing that civil liability (tort reform) legislation limiting damages recoverable and otherwise altering the common law of negligence in Australian jurisdictions does not apply to tortious claims in respect of sexual abuse whether brought in negligence or any other tort. This includes the special provisions regarding public authority defendants.

2.49 All Australian jurisdictions have enacted some reform of the common law of tort since 2002,⁸⁸ though the legislation is by no means uniform.⁸⁹ These reforms were chiefly concerned with aspects of liability in negligence and imposed severe limitations on personal injury damages recoverable. The reforms across Australian jurisdictions exclude certain causes of action from the reform legislation⁹⁰ and in NSW for example, the exclusions include those where liability arises from:

⁸⁵ *Hawley v Luminar Leisure Ltd* [2006] EWCA Civ 18.

⁸⁶ Leeming JA at [25] referred to s 917C of the Corporations Act (Cth) as an example pursuant to which multiple holders of Australia financial services licences may be liable for the conduct of a single authorised representative.

⁸⁷ *Ibid* [33]

⁸⁸ The reform legislation was based on the recommendations of The Commonwealth Review of the Law of Negligence, Panel of Eminent Persons: *Commonwealth Review of the Law of Negligence: Final report*, 2 October, 2002.

⁸⁹ *Civil Liability Act 2002* (NSW); *Civil Liability Act 1936* (SA); *Civil Liability Act 2003* (QLD); *Civil Liability (Wrongs) Act 2002* (ACT); *Personal Injuries (Liabilities and Damages) Act 2003* (NT); *Civil Liability Act 2002* (Tas); *Wrongs Act 1958* (Vic); *Civil Liability Act 2002* (WA).

⁹⁰ In S.A. the legislation applies only to "accidents caused wholly or in part by negligence or some other unintentional tort": *Civil Liability Act 1936* (SA) s. 51(a) (ii). In Queensland the *Civil Liability Act 2003* (QLD) applies to "any civil claim for damages or harm" so that apparently the intentional torts are not excluded though it has been argued that the relevant provisions can be interpreted otherwise: Cockburn, T & Madden, B, "Intentional Torts to the Person, Compensation for Injury and

“an intentional act that is done by the person with the intent to cause injury or death or that is sexual assault or other sexual misconduct committed by the person”.⁹¹

2.50 So in NSW, a plaintiff's claim in respect of a sexual battery against a perpetrator will not be subject to the very significant restrictions on personal injury compensatory damages imposed by Part 2 of the NSW Act or the prohibition on the award of exemplary, punitive and aggravated damages in s 21 of the NSW legislation which applies in respect of negligent conduct alone. In Tasmania, Victoria and Western Australia the position is similar to that in NSW.⁹²

2.51 An important issue is whether the restrictions imposed by the legislation would apply in a case where an institutional defendant is sued on the basis that it is vicariously liable for a deliberate sexual battery committed by another. A claim against that other person is clearly excluded from the operation of the legislation in NSW by virtue of s 3B(1)(a). The wording of the section might suggest that only the liability of the perpetrator is excluded because of the reference to “an intentional act that is done *by the person...* that is sexual assault *committed by the person*” (emphasis added). However, the NSW Court of Appeal interpreted the section quite differently in *Zorom Enterprises Pty Ltd V Zabow & Ors*. There the Court held that s. 3B(1) “does not differentiate in its operation between direct and vicarious liability” and applies to exclude the operation of the *Civil Liability Act 2002* (NSW) where a defendant is held to be vicariously liable for the intentional tort of an employee.⁹³ The position in other Australian jurisdictions may remain somewhat uncertain.

2.52 In the case of a claim in negligence for breach of a duty of care by a survivor against an institutional defendant, the substantial restrictions on personal injury compensatory damages imposed by the civil liability legislation would apply. As submitted to the Commission by the NSW Bar Association⁹⁴ and the Australian

the *Civil Liability Acts – Recent cases and Contemporary Issues*” (2007) 18 *Insurance law Journal* 1. Similar approaches apply in *Civil Liability (Wrongs) Act 2002* (ACT), s. 93 and *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s. 4(1). Provisions in *Civil Liability Act 2002* (Tas), s. 3B(1)(a) and *Wrongs Act 1958* (Vic), s. 28C (2)(a) & 28LC(2)(a) and *Civil Liability Act 2002* (WA), s.3B(1) all take an approach similar to the NSW legislation excluding intentional acts done with intent to cause injury.

⁹¹ *Civil Liability Act 2002* (NSW), s. 3B (1) (a).

⁹² *Civil Liability Act 2002* (Tas), s. 3B(1)(a); *Wrongs Act 1958* (Vic), s. 28C (2)(a) & 28LC(2)(a); *Civil Liability Act 2002* (WA), s.3B(1).

⁹³ [2007] NSWCA 106 at [13]–[14] per Basten JA (McColl & Campbell JJA agreeing).

⁹⁴ NSW Bar Association submission to Royal Commission into Institutional Responses to Child Sexual Abuse, 31st March 2014, p. 5.

Lawyers Alliance⁹⁵ various Australian jurisdictions restrict compensatory damages by imposing caps on damages for economic and non-economic loss, gratuitous services, and interest as well as thresholds for general damages. These would produce major inconsistencies and inequality resulting in under-compensation in many cases and differential compensation across Australia.

2.53 For these reasons we submit that there should be a clear statutory statement that state civil liability legislation will not apply in respect of any claim (be it in trespass to person or negligence, or any other cause of action) for damages by survivors in respect of institutional child sexual abuse. Common law principles concerning liability and the assessment of damages should apply to these cases. In particular, in respect of the discount rate, we note that the Ipp report⁹⁶ and a NSW Legislative Council Report⁹⁷ both recommended a discount rate of 3% which reflects the High Court's decision at common law in *Todorovic v Waller*.⁹⁸

Aggravated and Exemplary Damages should be Available in Child Sexual Abuse Cases

Submission 2.6 Uniform legislative reforms should be enacted in all states and territories providing that Aggravated and Exemplary damages will be available in respect of any tortious liability for child sexual abuse in an institutional context.

2.54 As child sexual and physical abuse is such a despicable abuse of human rights, survivors should be able to pursue aggravated and exemplary damages awards in battery claims against perpetrators. They are able to do so at present in claims for sexual battery and other intentional torts, though without statutory reform, aggravated and/or exemplary damages will not ordinarily be available in claims against institutional defendants where the cause of action is in the tort of negligence because of the relevant provisions of tort reform legislation.

2.55 Civil liability legislation⁹⁹ in various Australian jurisdictions prohibits the award of aggravated and exemplary damages in claims in respect of negligently

⁹⁵ Australian Lawyers Alliance, *Obstacles in the Way of Bringing Common Law Claims*, submission to Royal Commission into Institutional Responses to Child Sexual Abuse, 28th February, 2014, p. 23-25.

⁹⁶ Commonwealth of Australia, *Review of the Law of Negligence, Final Report* (2 October, 2002).

⁹⁷ Parliament of NSW, NSW Legislative Council, General Purpose Standing Committee no 1, *Report on personal injury compensation legislation* (Report no 28) 2005, p. xxii

⁹⁸ (1981) 150 CLR 402

⁹⁹ The Commonwealth Review of the Law of Negligence, Panel of Eminent Persons, *Review of the Law of Negligence Report*, 2 October 2002 (The Ipp Report) (<http://revofneg.treasury.gov.au>) 13.165, recommended a provision which would abolish exemplary and aggravated damages in respect of negligently caused personal injury and such a provision was enacted in *Civil Liability Act 2002* (NSW) s21, *Civil Liability Act 2003* (Qld) s 52 Qld, *Personal Injuries (Liabilities & Damages) Act 2003* (NT)

caused harm, though there is no such prohibition with regard to claims for deliberate harm,¹⁰⁰ except in the Northern Territory where no exemplary or aggravated damages may be awarded for personal injury.¹⁰¹

2.56 We submit that the Commission should consider whether aggravated and exemplary damages should be available against institutional defendants in respect of future negligence cases and also cases where an institutional defendant is vicariously liable for the tort of another. A legislative provision allowing an award of aggravated and/or exemplary damages against institutions in cases of child sexual abuse would be necessary given some of the present restrictions under existing state legislation. Such a provision might allow an award of these damages on established common law principles.

2.57 Aggravated damages are general damages awarded to compensate a plaintiff who has been treated in a "high handed, malicious, insulting or oppressive way"¹⁰² or who has been subjected to humiliation¹⁰³ and emotional distress.¹⁰⁴ Aggravated damages are provided by way of compensation for injury which may be intangible, resulting from the circumstances and manner of the defendant's wrongdoing.¹⁰⁵ Exemplary damages are punitive damages. Whereas aggravated damages focus on the humiliation and emotional distress of the plaintiff, exemplary damages focus on the reprehensible conduct of the defendant and are awarded as punishment retribution and deterrence.¹⁰⁶

2.58 Leading High Court authority on the nature and purpose of exemplary damages is to be found in *Uren v John Fairfax & Sons Limited*¹⁰⁷ and *Australian Consolidated Press Ltd v Uren*.¹⁰⁸ The High Court has held that exemplary damages may be awarded where a defendant's conduct is "high handed, insolent, vindictive or malicious" or where the defendant has displayed a "contumelious disregard of the plaintiff's rights".¹⁰⁹ The High Court has stressed that there must be evidence of positive conduct on the part of the defendant "in contumelious disregard of

and *Competition and Consumer Act 2010* (Cth) s 87ZB. The award of exemplary damages is also prohibited in NSW by the *Workers Compensation Act 1987* (NSW) in respect of workplace injuries and the *Motor Accidents Compensation Act 1999* (NSW) s 144 in respect of motor accident claims.

¹⁰⁰ *Civil Liability Act 2002* (NSW), s. 21; *Civil Liability Act 2003* (Qld), s. 52.

¹⁰¹ *Personal Injuries (Liabilities and damages) Act 2003* (NT), s 19.

¹⁰² *Broome v Cassell & Co Ltd* [1972] AC 1027, 1085.

¹⁰³ *Lamb v Cotogno* (1987) 164 CLR 1, 8.

¹⁰⁴ *State of NSW v Corby* [2010] NSWCA 27.

¹⁰⁵ *NSW v Ibbett* (2006) 229 CLR 638, 646 – 7 (Gleeson, CJ, Gummow, Kirby, Heydon & Crennan JJ).

¹⁰⁶ *Whitfield v De Lauret & Co Ltd* (1920) 20 CLR 71, 81 (Isaacs J).

¹⁰⁷ (1966) 117 CLR 185.

¹⁰⁸ (1966) 117 CLR 185.

¹⁰⁹ *Uren v John Fairfax & Sons Limited* (1966) 117 CLR 118, 129 (Taylor J).

another's rights"¹¹⁰ before an award of exemplary damages would be made. Exemplary damages have been awarded in many different tortious causes of action in Australia including in cases of battery¹¹¹ and false imprisonment.¹¹² The High Court has held that an award of both aggravated and exemplary damages is permissible and does not amount to a 'double punishment' where the quantum of each is not excessive, because the two are different in kind.¹¹³

2.59 Whether it would be appropriate to legislate for the award of aggravated and exemplary damages in respect of past abuse claims in the tort of negligence is a difficult question, not least because there would then be the potential to increase damages awards very significantly where the number of claims would also increase dramatically in the event that the suggested reforms regarding abolition of limitation periods and identification of defendants are implemented.

2.60 The possibility of such damages awards in respect of future cases would however be a powerful deterrent and incentive for institutions to ensure as far as possible that future child sexual abuse does not take place.

Apologies

Submission 2.7 Uniform legislative reforms should be enacted in all states and territories which enable courts to order that apologies be given by defendants to plaintiffs in any proceedings in respect of child sexual abuse.

2.61 There is growing recognition of the value of an apology in civil proceedings especially where the plaintiff has suffered a violation of human rights.¹¹⁴

2.62 Whilst the common law courts do not have power to order apologies, one might be given on settlement of a claim. At common law, admissions of regret or apologies will not necessarily constitute admissions of liability.¹¹⁵ Parliaments clearly

¹¹⁰ *Uren v John Fairfax & Sons Limited* (1966) 117 CLR 118, 154 (Windeyer J).

¹¹¹ *Henry v Thompson* [1989] 2 Qd R 412.

¹¹² *AW v State of NSW* [2005] NSWSC 543. For commentary see Cockburn, T & Madden, B, "Intentional Torts to the Person, Compensation for Injury and the Civil Liability Acts - Recent Cases and Contemporary Issues" (2007)18 *Insurance Law Journal* 1.

¹¹³ *NSW v Ibbett* (2006) 229 CLR 638 [35]-[36]. (Gleeson CJ, Gummow, Kirby, Heydon & Crennan JJ).

¹¹⁴ Vines, P., "The power of apology: mercy, forgiveness or corrective justice in the civil liability arena?" (2007) 1 *Public Space: The Journal of Law and Social Justice* Art 5; Carroll, R., "You can't order sorrow, so is there any value in an ordered apology? An analysis of ordered apologies in Anti-discrimination cases" (2010) 33 *UNSW Law Journal* 360; Brown, C, "Apology legislation: Oiling the wheels of tort" (2009) 17 *Tort L Rev* 127; Wheeler, C., *The Power of Sorry*, Paper delivered to Judicial Commission of NSW Seminar, 16 February, 2011, NSW Government Publication, NSW Ombudsman, 2011.

¹¹⁵ *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317.

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acknowledge the worth of an apology as one in a suite of remedies available in various kinds of civil proceedings¹¹⁶ and in most Australian jurisdictions an apology in a negligence claim will not be admissible as an admission of liability.¹¹⁷

2.63 A statutory requirement for apologies in cases of child sexual abuse in an institutional context might be considered. A court ordered apology may not have the same value to a survivor as a genuine apology freely given which would no doubt be of considerable value by way of recognition and vindication. Nevertheless a court or statute mandated apology might serve a worthwhile purpose.

2.64 On balance, we would support the enactment of a provision that would enable a court to order that an apology be given.

Referral to COAG

Submission 2.8: The matter of a uniform package of reforms should be brought before the appropriate inter-governmental body such as the Council of Australian Governments (COAG) or such other body representing all states and territories.

2.65 In our submission, it is important that the findings and recommendations of the Royal Commission are taken to the appropriate inter-governmental body such as the Council of Australian Governments (COAG) or such other body representing all states and territories to ensure that due consideration is given to implementing uniform reforms in all states and territories.

Public Authority Defendants

Submission 2.9: The special provisions of Civil Liability Legislation in respect of claims against Public Authority Defendants should not apply in Child Sexual Abuse Cases against Institutional Defendants.

2.66 In all Australian jurisdictions, excepting South Australia and the Northern Territory, civil liability legislation makes special provision with regard to the liability

¹¹⁶ By way of examples, apology orders are available pursuant to: *Anti-Discrimination Act 1997* (NSW), s 108(2); *Anti-Discrimination Act 1991* (Qld), s 209(1); *Federal Court Act 1976* (Cth), s 23 (in federal anti-discrimination cases); *Privacy and Personal Information Protection Act 1998* (NSW), s 55 (2)(e).

¹¹⁷ *Civil Liability Act 2002* (NSW), s 69; *Civil Liability Act 2003* (Qld), s 72; *Civil Liability Act 1936* (SA), s 75; *Civil Liability Act 2002* (Tas), s 7; *Wrongs Act 1958* (Vic), s 14J; *Civil Liability Act 2002* (WA), s 5AH; *Civil Law (Wrongs) Act 2002* (ACT), s 14; *Personal Injuries (Liabilities and Damages) Act 2003* (NT), s 13.

in negligence¹¹⁸ of public authorities though there are significant jurisdictional differences. The effect of these provisions is generally to restrict the circumstances in which public authorities will be subject to a duty of care in negligence and to set out specific principles which the Courts must take into account when considering whether to impose a duty of care on an authority or whether an authority is in breach of a duty of care. Those principles include that an authority's functions are limited by financial and other resources; that the general allocation of resources is not open to question; that the functions required of an authority are to be determined by reference to its broad range of activities; and that authorities may rely on compliance with general procedures as evidence of proper exercise of functions.¹¹⁹ It has been judicially recognised that in some cases these provisions produce the same result as the application of common law principles would produce¹²⁰ but that is not so in all cases.

2.67 It will be the case that some Institutional defendants in negligence claims in respect of Child Sexual Abuse will be public authorities within the definitions in the various civil liability statutes. In NSW for example the definition of a *public or other authority* includes, amongst others, a government department, or a public health organisation or any public or local authority constituted by or under an Act.¹²¹

2.68 In order to avoid differential treatment of institutional defendants which are statutory authorities across Australian jurisdictions it would be desirable to provide that the relevant civil liability legislation does not apply to institutional defendants in cases of child sexual abuse which should be subject to Australian common law.

¹¹⁸ *Civil Liability Act 2002* (NSW), Pt 5; *Civil Liability Act 2003* (Qld), Pt 3; *Civil Liability Act 2002* (Tas), Pt 9; *Wrongs Act 1958* (Vic), Pt XII; *Civil Liability Act 2002* (WA), ss 5U-5Z; *Civil Law (Wrongs) Act 2002* (ACT), Ch 8. In South Australia s 42 of the *Civil Liability Act 1936* (SA) applies to road authorities only. In the Northern Territory, there is no specific applicable civil liability legislation.

¹¹⁹ *Civil Liability Act 2002* (NSW), s 42; *Civil Liability Act 2003* (Qld), s 35; *Civil Liability Act 2002* (Tas), s 38; *Wrongs Act 1958* (Vic), s 83; *Civil Liability Act 2002* (WA), s 5W; *Civil Law (Wrongs) Act 2002* (ACT), s 110.

¹²⁰ *Roads and Traffic Authority of New South Wales v Refrigerated Roadways Pty Ltd* [2009] NSWCA 263 at [188] per Campbell JA.

¹²¹ *Civil Liability Act 2002* (NSW), s.41.

3. How to address difficulties in identifying a proper defendant in faith-based institutions with statutory property trusts

Submission 3.1: Make church or religious property trusts the ‘proper defendant’ to any claim in respect of child sexual abuse for which the church or religious body is alleged to be liable and make that ‘proper defendant’ liable for the tortious conduct of the perpetrators of the abuse and also for the negligent failures of the faith-based institutions to protect children in their care.

Submission 3.2: Make the assets of church or religious property trusts available to meet liability of the church or religious body in respect of any claim for child sexual abuse in an institutional context.

3.1 The decision of the NSW Court of Appeal in *Trustees of the Roman Catholic Church v Ellis & Anor* [2007] NSWCA 117 illustrates well the difficulties facing survivors of child sexual abuse suffered at the hands of persons associated with unincorporated religious bodies, in identifying a proper defendant with sufficient assets to meet a judgment. In that case the plaintiff failed in his claim against The Trustees of the Roman Catholic Church for the Archdiocese of Sydney.¹²² The Court of Appeal held that:

The fact that the Trustees hold property for and on behalf of “the Church”, including property devoted to various charitable trusts, cannot be inverted into the proposition that the Trustees (and the funds they administer, many of them on specific charitable trusts) can be rendered subject to all legal claims associated with Church activities. (At [149] per Mason JA, Ipp & McColl JJA agreeing).

3.2 As the Commission has detailed in its *Consultation Paper on Redress and Civil Litigation*,¹²³ there are many instances of cases where survivors are unable to find a suitable entity to sue in respect of abuse suffered. The chief problems encountered are:

- The individual perpetrator of the abuse may be unidentifiable or deceased or have no assets

¹²² He also sued the Archbishop of Sydney and the alleged abuser who died in 2004 (after proceedings were commenced). It was held by the Court of Appeal that an action could not be maintained against the Archbishop in his personal capacity as he was not serving at the time of the abuse, he was not a representative of the Archdiocese and nor was he a corporate entity: *Trustees of the Roman Catholic Church v Ellis & Anor* [2007] NSWCA 117 at [78] per Mason JA, Ipp & McColl JJA agreeing. The proceedings were not continued against the estate of the deceased alleged abuser.

¹²³ Royal Commission into Institutional Responses to Child Sexual Abuse, its *Consultation Paper on Redress and Civil Litigation*, 10.5, p 220, available at childabuseroyalcommission.gov.au

- The institution at which the abuse took place may no longer exist
- The institution may be an unincorporated association. This is particularly so in the case of faith-based institutions¹²⁴
- Even if incorporated, the institution itself may not hold any assets

3.3 It does seem manifestly unjust that survivors of abuse in church and faith-based institutions have no opportunity to recover compensation at common law from long established religious groups which clearly have very significant assets that are unavailable to meet a judgment. Yet these same churches and institutions have the benefit of succession in relation to property ownership under state and territory legislation¹²⁵. It should be a straightforward matter for a survivor to identify and sue a corporate entity that has the financial capacity to meet claims of institutional child sexual abuse.

3.4 We support the proposals set out in the Commission's *Consultation Paper on Redress and Civil Litigation*:¹²⁶

That state and territory legislation conferring on religious bodies the benefit of succession in relation to property ownership be amended to provide that any liability of the religion or religious body that the property trust is associated with for child sexual abuse in an institutional context can be met from the assets of the trust and that the trust is a proper defendant to any litigation involving claims of child sexual abuse for which the religion or religious body is alleged to be liable.

3.5 If the property trusts are to be made the 'proper defendants' to any proceedings against faith-based organisations there will need to be corresponding legislation making those defendants liable for the tortious conduct of the perpetrators of the abuse and also for the negligent failures of the faith-based institutions to protect children in their care. This is so because the perpetrators would not be employees or even persons known to the trust or over whom the trust

¹²⁴ The Commission stated that it had not been given examples of difficulties in suing because of a lack of an appropriate corporate defendant in situations involving unincorporated associations other than faith-based organisations: *Consultation Paper on Redress and Civil Litigation*, 10.5, p223.

¹²⁵ For example, see *Anglican Church of Australia Trust Property Act 1917* (NSW); *Roman Catholic Church Trust Property Act 1936* (NSW); *Christian Israelite Church Property Trust Act 2007* (NSW); *Anglican Trusts Corporation Act 1884* (Vic); *Coptic Orthodox Church (Victoria) Property Trust Act 2006* (Vic); *Presbyterian Trusts Act 1890* (Vic); *Roman Catholic Trusts Act 1907* (Vic); *The Salvation Army (Victoria) Property Trust Act 1930* (Vic).

¹²⁶ *Consultation Paper on Redress and Civil Litigation*, 10.4 p224.

had any control. Similarly the trusts would not have had any knowledge or control over the conduct or day to day administration in the institutions. The legislation must ensure that the problem that confronted Mr Ellis is removed: that the mere fact that the Trustees held property on behalf of the church did not render them liable for legal claims associated with Church activities.¹²⁷

3.6 An additional method of enabling a plaintiff access to trust property for satisfaction of a judgment would be to enact a provision to give a plaintiff a charge in respect of a judgment debt over real property held by a trust on behalf of a faith based defendant organisation. Such a provision could be modelled on those which have long existed in favour of Local Councils in respect of local government rates.¹²⁸ Though, simply providing for the charge without more, would not resolve the need to provide a proper entity to sue.

3.7 We would draw attention to *The Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2014 (NSW)*¹²⁹ which in summary provides that:

1. A plaintiff in civil proceedings relating to sexual abuse by a member of the Church's clergy, a Church official or a Church teacher, whilst the plaintiff was in the care of the Church, may join as a defendant in those proceedings:
 - The body corporate established under the *Roman Catholic Church Trust Property Act 1936*
 - The relevant Bishop, and other officials, in their capacity as trustees of Church trust property in that diocese, and
 - Subject to regulations, a body corporate established under the *Roman Catholic Church Communities' Lands Act 1942 (NSW)* which employed the abusing teacher or clergy member or that was trustee of land of a community of which the clergy member or teacher or official was part.
2. The relevant body corporate and its trustees are jointly and severally liable as if they were the member of the Church's clergy, the Church official or the Church teacher against whom the he proceedings were also brought.

¹²⁷ *Trustees of the Roman Catholic Church v Ellis & Anor* [2007] NSWCA 117, [149] per Mason JA, Ipp & McColl JJA agreeing.

¹²⁸ See for example *Local Government Act 1993 (NSW)*, s 550.

¹²⁹ A non-government bill introduced by Mr. David Shoebridge MLC. Lapsed on Prorogation on 08/09/2014 and Restored to Business Paper on 09/09/2014.

3. The court may extend the application of the provisions to a plaintiff who was not at the time of the abuse under the care of the Church, but was so closely connected with the Church that the court believes it would be just to render the Church liable for the abuse, if proven.
4. Notice of intention to join the relevant parties to proceedings must be given to those parties.
5. The provision applies retrospectively¹³⁰.

3.8 The Bill further provides that judgment debts relating to sexual abuse by Church clergy, officials or teachers may be required to be paid from Trust funds¹³¹.

3.9 Whilst the NSW bill deals solely with liability of the Catholic Church, we would suggest that a general provision of this type would be appropriate to all cases of faith-based institutions.

3.10 We note that the Commission has recognised that some religious organisations might prefer that legislation enable them to establish a kind of 'nominal defendant' to be the proper defendant to any claims of child sexual abuse against the particular religion or any of its religious bodies and require that that entity meet any claims, including from the assets of the relevant property trusts if required.¹³² Whilst such a requirement would achieve the desired result, it relies on compliance by the relevant organisations. If they were reluctant or tardy, plaintiffs would be disadvantaged.

3.11 We submit that legislation making church or religious property trusts the 'proper defendant' in cases of child sexual abuse is the surest way to preclude the problems illustrated by the *Ellis* case. Such legislation should be retrospective.

3.12 We note that the Commission has suggested that for the future, states and territories should as a matter of policy not enact legislation to give unincorporated bodies the benefit of succession "unless provision is made to ensure that the assets

¹³⁰ *The Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2014 (NSW)*, clause 18.

¹³¹ *The Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2014 (NSW)*, clause 19.

¹³² *Consultation Paper on Redress and Civil Litigation*, 10.5, p224.

associated with the unincorporated bodies will remain available for meeting any damages awards, at least for child sexual abuse.”¹³³ We support this suggestion.

4. Whether the difficulties in identifying a proper defendant arise in respect of institutions other than faith-based institutions and how these difficulties should be addressed

Submission 4.1: Require entities which have assumed or undertaken responsibility for the physical welfare or spiritual, psychological or emotional guidance of a child to be incorporated or to nominate an entity within existing corporate structures as a nominal defendant which must maintain adequate insurance and/or self-insure with declared assets against a claim for civil liability for child sexual abuse in an institutional context.

4.1 Where any association is unincorporated there will be difficulty in identifying a proper entity to sue in the event of sexual abuse by a perpetrator connected to the association. Whilst many associations will be smaller and less hierarchically organised than their faith based counterparts, they are no less responsible for the well-being of children in their care or control.

4.2 The lack of a corporate entity to sue is however, only the threshold problem. In the case of many associations (particularly small groups, sporting or other clubs for example) there may be no assets which would be available to meet a judgment, even if there were an entity to be sued.

4.3 We note that the Commission refers to the recommendation of the Parliament of Victoria Family and Community Development Committee in its *Betrayal of Trust Report* which is in the following terms:

That the Victorian Government consider requiring non-government organisations to be incorporated and adequately insured where it funds them or provides them with tax exemptions and/or other entitlements.¹³⁴

4.4 A statutory requirement for incorporation of non-government organisations that have a role in the care of children is a way of ensuring that survivors of abuse have the capacity easily to identify and sue a corporate entity. As noted in the

¹³³ Ibid.

¹³⁴ 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*, November 2013, p.536 available at <http://www.parliament.vic.gov.au/fcdc/article/1788>

submission from the Truth Justice and Healing Council dated 15 April 2014 in relation to Issues Paper 5, such an entity would be the nominal defendant for the particular institution.

4.5 Of course, incorporation does not guarantee that the entity has the financial capacity to satisfy judgments in cases of child sexual abuse. The obvious solution here is to require that such entities carry adequate insurance against liability for child sexual abuse by employees or other associates or volunteers of the organisation. We note that such a proposal has been considered by the Commission and that one identified disadvantage of compulsory incorporation and insurance is that people may be deterred from forming small informal associations “potentially losing the various sporting, cultural and other activities they provide in the community.”¹³⁵ Perhaps there is scope to except small organisations of a particular type (sporting and other clubs with small memberships, for example) from the requirement for compulsory insurance or of limiting the insurance requirement to specific types of organisations which provide children’s services, as suggested by the Commission.¹³⁶

4.6 It is our submission that there should be a requirement for incorporation of non-government organisations that are funded by government or provided with tax exemptions and/or other entitlements. There should also be a requirement for organisations which engage in the care and protection of children to be adequately insured against civil liability for child sexual abuse. Adequate insurance carries the added benefit that from the perspective of the successful plaintiff, recourse to assets of the defendant is less of an issue.

5. Whether governments and non-government institutions should adopt principles for how they will handle civil litigation in relation to child sexual abuse claims.

Submission 5.1: Require government and non-government institutions to adopt guiding principles designed specifically for civil claims for child sexual abuse in an institutional context.

¹³⁵ *Consultation Paper on Redress and Civil Litigation*, 10.5, p224.

¹³⁶ *Ibid.*

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5.1 The adoption of model litigant policies by government and non-government institutions with respect to civil claims for child sexual abuse in an institutional context would be a positive development.

5.2 The Victorian *Common Guiding Principles for responding to civil claims involving allegations of child sexual abuse*¹³⁷ and the NSW *Guiding Principles for Government Agencies Responding to Civil Claims for Child Sexual Abuse*¹³⁸ are both instructive examples that might be more widely adopted.

5.3 The adoption of such model litigant policies would avoid the worst aspects of adversarial litigation in child sexual abuse case where inevitably there will be a power imbalance between the parties. At best, the adoption of such policies and principles would guide and inform institutions and their lawyers in the conduct of litigation toward a more respectful, sensitive and cooperative approach.

5.4 We note that the Australian Productivity Commission recommended in its 2014 Report *Access to Justice Arrangements* that governments, their agencies and lawyers should adhere to model litigant obligations and that compliance should be monitored and enforced.¹³⁹ The Productivity Commission did not however consider that general model litigant rules should apply to non-government litigants.¹⁴⁰ We note however that the Victorian and NSW Guiding Principles in sexual abuse cases, mentioned above, are more detailed than the kind of general obligations under consideration by the Productivity Commission.

5.5 It is our submission that guiding principles designed specifically for civil claims for child sexual abuse, along the lines of those now in use in NSW and Victoria, would be advantageous if adopted by both government and non-government institutions.

¹³⁷ *Common Guiding Principles for responding to civil claims involving allegations of child sexual abuse*, State Government of Victoria, Melbourne, 2014, referred to in Royal Commission *Consultation Paper on Redress and Civil Litigation*, 10.5, p232.

¹³⁸ NSW Government *Guiding Principles for Government Agencies Responding to Civil Claims for Child Sexual Abuse*, New South Wales Government, Sydney, 2014 referred to in Royal Commission *Consultation Paper on Redress and Civil Litigation*, 10.5, p232.

¹³⁹ Productivity Commission, *Access to Justice Arrangements*, Canberra, 2014, p 442. Referred to in Royal Commission *Consultation Paper on Redress and Civil Litigation*, 10.5, p224

¹⁴⁰ Ibid.

6. Whether any changes may have adverse effects on insurance availability or coverage for institutions, including specific details of the adverse effects and the reasons for them

Submission 6.1: We recommend that the relevant industry representatives be consulted to determine the manner in which the proposed changes are likely to impact upon the availability and affordability of insurance given the critical role that adequate insurance is likely to play in any civil proceedings of the nature contemplated in these submissions.

6.1 Undoubtedly, some of the changes suggested above are likely to have an impact on the cost of insurance for institutions which provide any type of child care, as well as schools and many other organisations. A statutory requirement that certain institutions carry insurance against liability for child abuse will naturally increase their running and administrative costs.

6.2 It may be difficult and expensive to obtain insurance in the open market to cover the risk of liability for child sexual abuse. Nevertheless, we submit that the provision of viable pathways to compensation for future victims of child sexual abuse justifies the imposition of the cost of insurance.

6.3 We note that some submissions to the Commission raised the question of difficulties associated with insurance against criminal liability.¹⁴¹ Naturally individual perpetrators could not be so insured for public policy reasons. But corporate entities or trustees that may be vicariously or otherwise liable in respect of abuse of children in their care by workers, volunteers, clergy or others should be able to obtain insurance in respect of that type of liability. For example, workers compensation insurance and third party motor vehicle insurance policies also cover civil liability in respect of acts that may also constitute criminal acts.

6.4 Further, a requirement to hold an insurance policy would be a powerful incentive for any organisation to ensure that there were proper systems and safeguards in place to satisfy an insurer as to compliance, to avoid claims on a policy and to keep premiums to the minimum.

¹⁴¹ NSW Bar Association, *Submission to Royal Commission into Institutional Responses to Child Sexual Abuse, Issues Paper 5: Civil Litigation*, 31 March 2014.

7. Further general submissions

Access to Justice Issues

Submission 7.1 Consideration should be given to recommendations with respect to improving the availability of legal aid and ensuring proper funding of community legal centres to assist with bringing proceedings. In this regard, we note that these issues are dealt with comprehensively in the submissions in response to the Royal Commission's Issue Paper No. 5: Civil Litigation, released 6 December 2013.

7.1 As the submissions made to the Royal Commission in response to Issues Paper 5 make plain, lack of legal aid is a significant barrier to commencing proceedings for many survivors. Consideration should be given to recommendations with respect to the improving the availability of legal aid and ensuring proper funding of community legal centres to assist with bringing proceedings.

Case Management and Procedural Approaches to Protect the Vulnerable

Submission 7.2 Establish a dedicated list in the courts with practice directions aimed to make any common law proceedings arising from allegations of child sexual abuse in an institutional context as straight forward as possible.

7.2 Even where some of the major legal obstacles to a claim in tort can be eliminated or ameliorated by statutory reforms (as discussed above), survivors may often suffer personal difficulties by virtue of the very nature of a common law claim in the adversarial system. Unless a claim is settled before trial, inevitably the survivor will be cross-examined with associated discomfort and perhaps even re-traumatisation. A plaintiff will need to be steeled to see the often lengthy civil litigation process through to a conclusion.

7.3 We do not think that the traditional process of giving evidence and of cross-examination of witnesses should be altered and we note that already the courts have considerable scope to protect vulnerable witnesses by way of restricting public access, refusing to allow publication of information, the use of some written statements in evidence. We do suggest that in appropriate cases a plaintiff's oral

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evidence might be given via alternative means (for example by 'video link') so that the plaintiff is not required to be physically in the court room.¹⁴²

7.4 However, we support establishing a dedicated list in the courts with practice directions aimed to make any common law proceedings arising from allegations of institutional liability for child sexual abuse as straight forward as possible.

Public Education

Submission 7.3 All children should be given age-appropriate education about inappropriate sexual advances, grooming behaviours and information about their rights and practical means to contact a nominated person if they feel at risk or have suffered harm.

7.5 Children should be given age-appropriate education about inappropriate sexual advances, information about their rights and practical means to contact a nominated person if they feel at risk or have suffered harm.

Special Practices for Sexual Abuse Cases

Submission 7.4 Recommend an analysis of measures taken in other courts in relation to proceedings arising from sexual violence to see if there are particular processes which could be adopted to improve the delivery of justice in civil litigation for survivors of child sexual abuse in an institutional context.

7.6 The submissions made to the Royal Commission by survivors who have attempted to pursue civil litigation make plain how confusing, confronting and difficult the process of litigation has been for them. Efforts need to be made to learn from those experiences and to draw from them ways in which to improve the process of litigation. We accept that an adversarial system is always going to pose challenges for litigants in terms of the inherently stressful nature of adversarial proceedings, however, we would support the investigation of measures taken in other courts in relation to proceedings arising from sexual violence to see if there are particular processes which could be adopted to improve the delivery of justice in civil litigation for survivors of institutional child sexual abuse.

¹⁴² The issue of cross examination of vulnerable witnesses has been comprehensively considered by the Australian Law Reform Commission in the 2006 *Uniform Evidence Law Report* (ALRC Report 102) 2006.

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Guide to Commencing Civil Proceedings for Survivors

Submission 7.5 Recommend government funding for the drafting of a publicly available guide for survivors about the process of commencing civil litigation in respect of child sexual abuse in an institutional context.

7.7 We recommend government funding for the drafting of a publicly available guide for survivors about the process of commencing civil litigation in respect of institutional child sexual abuse. It should address, at a minimum, the nature of court proceedings and contain relevant resources, links, contacts and information to allow survivors to make a better informed decision about commencing proceedings. It would be useful if such a guide could contain a practical set of instructions about commencing proceedings if a party is not able to obtain legal representation.

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We would be happy to address any of these submissions in any further detail if it would assist the Royal Commission.

Allison Silink

Pam Stewart

9 March 2015.