

## TORT LAW REFORM TO IMPROVE ACCESS TO COMPENSATION FOR SURVIVORS OF INSTITUTIONAL CHILD SEXUAL ABUSE

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### I INTRODUCTION

The Australian Royal Commission into Institutional Responses to Child Sexual Abuse ('Royal Commission') was established in early 2013 and the extent of historical and continuing child sexual abuse in institutional contexts in Australia is coming to light through its work. The Royal Commission has emphasised the difficulties which many survivors of such sexual abuse ('survivors') have had in obtaining redress or tortious compensation for their abuse. The Royal Commission has recently delivered a report on redress and civil litigation which is final in relation to these issues: *Redress and Civil Litigation Report*.<sup>1</sup> The Commissioners concluded that:

We are satisfied that our society's failure to protect children across a number of generations makes clear the pressing need to provide avenues through which survivors can obtain appropriate redress for past abuse. It also highlights the importance of improving the capacity of the civil litigation systems to provide justice to survivors in a manner at least comparable to that of other injured persons so that those who suffer abuse in the future are not forced to go through the experiences of those who have sought redress to date.<sup>2</sup>

To address this need to provide avenues of redress and improve the capacity of civil litigation to provide justice to survivors, the Royal Commission has recommended the implementation of a national redress scheme which would include monetary payments to survivors of past institutional child sexual abuse

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1 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) ('*Redress and Civil Litigation Report*').

2 Ibid 5.

(‘past abuse survivors’),<sup>3</sup> and other statutory reforms. For example, the scheme would introduce new statutory liabilities for institutions which would provide avenues for civil compensation for future survivors of institutional child sexual abuse (‘future abuse survivors’), but not for past abuse survivors.<sup>4</sup>

Whatever reform results, tort law will clearly continue to play an important role in providing access to civil compensation for both past and future survivors. Either it will be the only option available (for future survivors to whom the redress scheme will not apply, or for all survivors if a redress scheme is not implemented)<sup>5</sup> or it may be a preferred course for some survivors. Civil proceedings in tort can lead to remedies in damages which are real and substantial, and can have a very significant vindicating effect for a plaintiff,<sup>6</sup> affirming the survivor’s story and punishing perpetrators and responsible institutions. There is also the prospect of awards of compensation in amounts potentially far greater than those which may be available under a redress scheme. There are also identified drawbacks of tort law as a means of compensation. Chief among these are the costs and delays of the litigation process, the difficulty of assessing damages for future needs, and the uncertainties inherent in the court

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3 The proposed redress scheme is intended to be a national scheme funded by relevant institutions with state and federal government funding as a last resort. It is estimated that it would cost approximately \$4.3 billion, modelled on meeting claims by up to 60 000 existing survivors: *ibid* 33. The Turnbull Government has announced that it will ‘lead the development of a national approach to redress’ and that it will ‘soon’ commence discussions with the states and territories: George Brandis and Christian Porter, ‘Developing a National Approach to Redress for Survivors of Institutional Child Sexual Abuse’ (Joint Media Release, 29 January 2016).

4 *Redress and Civil Litigation Report*, above n 1, 6.

5 It is instructive that nearly 20 years after the report by the Human Rights and Equal Opportunity Commission unequivocally recommended redress for members of the Stolen Generations, there is still no joint national compensation fund for members of the Stolen Generations: Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) recs 14–16 (‘*Bringing Them Home Report*’). Only Tasmania has legislated for compensation of the Stolen Generations: *Stolen Generations of Aboriginal Children Act 2006* (Tas). In SA the Stolen Generations (Compensation) Bill 2014 (SA) is under consideration. In NSW there is a current Legislative Council Inquiry into Reparations for the Stolen Generations. Submissions closed on 31 March 2016 and the Committee is expected to table a report in mid-2016: Parliament of New South Wales, *Reparations for the Stolen Generations in New South Wales* <<https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=1645>>. Four separate non-government Bills were introduced in the Commonwealth Senate between 2007 and 2010 but none has progressed: Stolen Generation Compensation Bill 2007 (Cth); Stolen Generation Compensation Bill 2008 (Cth); Stolen Generations Reparations Tribunal Bill 2008 (Cth); Stolen Generations Reparations Tribunal Bill 2010 (Cth).

6 For a discussion of the vindicating role of tortious damages, see generally Normann Witzleb and Robyn Carroll, ‘The Role of Vindication in Torts Damages’ (2009) 17 *Tort Law Review* 16; Bruce Feldthusen, Olena Hankivsky and Lorraine Greaves, ‘Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse’ (2000) 12 *Canadian Journal of Women and the Law* 66; Bruce Feldthusen, ‘The Civil Action for Sexual Battery: Therapeutic Jurisprudence?’ (1993) 25 *Ottawa Law Review* 203; Robyn Carroll and Normann Witzleb, ‘“It’s Not Just about the Money” – Enhancing the Vindicatory Effect of Private Law Remedies’ (2011) 37 *Monash University Law Review* 216.

process with the possibility of adverse costs orders.<sup>7</sup> Additionally, in cases concerning severe personal trauma, the difficulties faced by plaintiffs in cross-examination and the possibility of re-traumatisation cannot be ignored.<sup>8</sup> However, for some survivors it is unlikely that there will be a choice as to the avenue for compensation, and civil litigation may be their only option.

This article examines existing avenues for survivors to seek tortious compensation from institutions and options for reform. Under current Australian law, there are numerous procedural and doctrinal obstacles to such compensation over and above the ordinary risks and burdens of litigation.<sup>9</sup> The recommendations of the Royal Commission with respect to civil litigation are designed to provide clearer avenues to compensation for survivors than exist at common law. This is a much needed area of reform given the current state of the common law. We consider the nature and scope of the Royal Commission's proposed reforms to institutional liability and additional options for reform.

We take the need for improved access to redress and justice through civil litigation identified by the Royal Commission as the starting point for this analysis. Options for reform arise in the context of a range of interconnected issues: the Royal Commission has made recommendations with respect to new statutory liabilities, nomination of proper defendants, and the removal of limitation periods among other things. It is not possible to consider any one issue in isolation from the others, so this article also addresses a range of relevant matters to locate the main issues with respect to tortious compensation from institutions in this broader context.

We note that some survivors are also members of the Stolen Generations and to that extent this article addresses some of the issues identified in the *Bringing Them Home Report* as making civil process daunting or impossible for Stolen Generations members,<sup>10</sup> who face similar legal and procedural obstacles to compensation for abuse suffered.<sup>11</sup> But there are also very different and significant legal impediments facing Stolen Generations members in establishing tortious causes of action for historical removal of children that was, at the time,

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7 Richard L Abel, 'A Critique of Torts' (1990) 37 *UCLA Law Review* 785; John Smillie, 'The Future of Negligence' (2007) 15 *Torts Law Journal* 300; Terence G Ison, *The Forensic Lottery: A Critique of Tort Liability as a System of Personal Injury Compensation* (Staples Press, 1967); Peter Cane, *Atiyah's Accidents, Compensation and the Law* (Cambridge University Press, 7<sup>th</sup> ed, 2006); Productivity Commission, *Disability Care and Support: Inquiry Report*, Report No 54 (2011) vol 1, ch 17.

8 Feldthusen, Hankivsky and Greaves, above n 6; Feldthusen, above n 6.

9 The perpetrator may be deceased, imprisoned or bankrupt so prospects of recovering compensation can be very low. Therefore, avenues for compensation from the *institution* in which the abuse occurred become an important alternative.

10 *Bringing Them Home Report*, above n 5, ch 14.

11 The most serious of those obstacles are: the effects of limitation statutes (*Cubillo v Commonwealth [No 2]* (2000) 103 FCR 1 ('*Cubillo*'); *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497 ('*Williams*')); evidentiary problems (*Cubillo* (2000) 103 FCR 1; *Williams* (1994) 35 NSWLR 497) though the plaintiff overcame many of these obstacles and was successful in *State of South Australia v Lampard-Trevorrow* (2010) 106 SASR 331; and establishing vicarious liability (*Cubillo* (2000) 103 FCR 1).

legally authorised.<sup>12</sup> The Royal Commission did not consider that its Letters Patent enabled it to consider redress for Stolen Generations members other than in respect of institutional child sexual abuse.<sup>13</sup> Accordingly, the discussion which follows is limited to remedies for institutional child sexual abuse, though some issues are equally relevant to claims by Stolen Generations members in respect of other forms of historical mistreatment or abuse.

This article is in four parts. Part II examines the current limitations to establishing institutional liability for historical abuse at common law in Australia, and compares the Royal Commission's proposed statutory liabilities with developments at common law in other jurisdictions which have addressed the same issues. The desirability of statutory reform to the common law in the Australian context is examined and the importance of a uniform package of reforms is also discussed. Part III of the article explores the applicability of aspects of civil liability legislation<sup>14</sup> in Australian jurisdictions to child sexual abuse cases and the case for including in any reform package provisions which exclude their operation to such cases. Part IV focuses upon the difficulties which survivors face in identifying proper defendants in cases where abuse occurred in faith-based institutions where there is no corporate entity that holds property that would be available to satisfy a judgment. It considers the Royal Commission's recommendation to deal with this issue<sup>15</sup> and other possible approaches to reform. Part V briefly considers the effect of statutory limitation periods on civil proceedings in relation to historical child sexual abuse, the Royal Commission's recommendations and legislative developments to date.<sup>16</sup>

## II BASIS OF INSTITUTIONAL LIABILITY IN THE ABSENCE OF FAULT BY THE INSTITUTION

At common law in Australia, the basis upon which an institution can be made liable in tort to compensate survivors is currently unclear in the absence of fault on the part of the institution. An understanding of the current state of the common law, and the developments which have occurred at common law in other jurisdictions such as Canada and England, is necessary to fully appreciate

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12 *Kruger v Commonwealth* (1997) 190 CLR 1; *Cubillo v Commonwealth* (2001) 112 FCR 455; *Williams v Minister, Aboriginal Land Rights Act 1983* (1999) 25 Fam LR 86. See generally Tony Buti, 'Removal of Indigenous Children from their Families: The Litigation Path' (1998) 27 *University of Western Australia Law Review* 203; Antonio Buti, 'The Stolen Generations and Litigation Revisited' (2008) 32 *Melbourne University Law Review* 382; Randall Kune, 'The Stolen Generations in Court: Explaining the Lack of Widespread Successful Litigation by Members of the Stolen Generations' (2011) 30 *University of Tasmania Law Review* 32.

13 *Redress and Civil Litigation Report*, above n 1, 5.

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

15 *Redress and Civil Litigation Report*, above n 1, 511, recs 94–5.

16 *Ibid* 459, recs 85–8.

the intent and scope of the Royal Commission's proposed reforms, and alternative options for reform. Accordingly, this Part examines the common law in Australia and other jurisdictions, and against that background, analyses the proposed reforms to institutional liability.

There are two common law doctrines that survivors could potentially use to bring such an action: *vicarious liability* or a *non-delegable duty to ensure reasonable care is taken*. These are examined below.

## A Vicarious Liability under Australian Law

Vicarious liability in tort imposes strict liability upon a defendant for the negligence or intentional wrongdoing of another in the absence of fault by the defendant. Under current law in Australia, there are two important inquiries in the application of vicarious liability, both of which can give rise to difficulties for survivors. One is establishing a relevant relationship between the abuser and defendant, most commonly an employment relationship. Here there is a further inquiry, which is whether the impugned act was done 'in the course of employment'. This inquiry is used to establish the sufficiency of the connection between the tortious conduct and the employment to justify imposing vicarious liability.

### 1 The 'Course of Employment' Test

The 'course of employment' test<sup>17</sup> provides that in addition to liability for authorised acts, an employer may also be liable for wrongful and unauthorised acts if they are so connected with authorised acts that they may be regarded as modes, although *improper modes*, of doing them. However, according to this test, 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*.<sup>18</sup>

Determining when intentional wrongdoing<sup>19</sup> amounts to an improper mode of doing an authorised act is notoriously difficult. Nonetheless, the 'course of employment' test remains an essential inquiry under Australian law. In *Deatons*<sup>20</sup> it was interpreted so that intentional wrongdoing can only give rise to vicarious liability if it was 'incidental'<sup>21</sup> to the employment, in the sense of being done in 'furtherance of the master's interests', or in ostensible pursuit of the employer's business, or in apparent execution of authority which the employer holds the

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17 Also referred to as the 'Salmond' test, referring to its articulation in *Salmond on Torts* in 1907. This was also the standard test in Canada: see *Canadian Pacific Railway Co v Lockhardt* [1942] AC 591 (before it was expanded in *Bazley v Curry* [1999] 2 SCR 534 ('*Bazley*')), and in England: see *ST v North Yorkshire County Council* [1999] LGR 584 ('*Trotman*') (*Trotman* was overruled by the House of Lords in *Lister v Hesley Hall Ltd* [2002] 1 AC 215 where the scope of the 'course of employment' test was reconsidered).

18 R F V Heuston and R A Buckley, *Salmond and Heuston on the Law of Torts* (Sweet & Maxwell, 21<sup>st</sup> ed, 1996) 443; *Deatons Pty Ltd v Flew* (1949) 79 CLR 370 ('*Deatons*').

19 Such as theft, fraud, and physical assault.

20 (1949) 79 CLR 370.

21 *Ibid* 378 (Latham CJ).

employee out as having.<sup>22</sup> The difficulty in characterising deliberate, criminal sexual abuse of a child by an employee of an institution in this way is obvious. Vicarious liability for child sexual abuse was considered by the High Court in *New South Wales v Lepore* ('*Lepore*'),<sup>23</sup> discussed in more detail below. However, the reasons of the Court in relation to vicarious liability were varied with no clear ratio. *Deatons* was not overruled, despite some suggestion that vicarious liability could arise in respect of child sexual abuse in an institutional context. This has left survivors facing considerable uncertainty as to whether a claim relying on vicarious liability will be successful or not under Australian law.

## 2 Vicarious Liability Only in Respect of 'Employees'

Another significant limitation of vicarious liability at common law is that traditionally, it is limited to employees and does not extend to wrongdoing of independent contractors.<sup>24</sup> This is a deeply entrenched limit on the scope of vicarious liability.<sup>25</sup> However, there are also longstanding criticisms of it.<sup>26</sup> Professor Atiyah once noted that changing work practices might require this dichotomy between employees and contractors to be revisited.<sup>27</sup> The more employers contract out work to avoid tax and employment consequences, or vicarious liability, the greater the impact on potential compensation through vicarious liability. Further, poorly resourced or underinsured contractors (who may be cheaper to engage) may be unable to meet any liability to a plaintiff harmed by their work done at the request of the employer. In *Northern Sandblasting Pty Ltd v Harris*,<sup>28</sup> and in *Hollis v Vabu Pty Ltd*,<sup>29</sup> McHugh J agreed with Professor Atiyah's arguments and favoured development of the law. To date this has been a minority view in the High Court. These issues are however increasingly relevant to this debate, as in the sectors involved in working with children, significant responsibilities are frequently contracted out.

Other working relationships can be difficult to pigeonhole as relationships of employment. Foster care is a well-known example that is usually not an employment relationship with the institution with responsibility for the child, so falls outside the scope of vicarious liability. There are particular issues within the context of religious organisations<sup>30</sup> where the relationship of a priest or religious

22 Ibid 381 (Dixon J); approved and applied in *New South Wales v Lepore* (2003) 212 CLR 511, 537 [46] (Gleeson CJ), 591–2 [231] (Gummow and Hayne JJ) ('*Lepore*'). See also *Zorom Enterprises Pty Ltd v Zabow* (2007) 71 NSWLR 354, 360 [21] (Basten JA).

23 (2003) 212 CLR 511.

24 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 44–5 [57] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

25 *Day v The Ocean Beach Hotel Shellharbour Pty Ltd* (2013) 85 NSWLR 335, 341 [14] (Leeming JA).

26 See, eg, P S Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths, 1967) 333.

27 Ibid.

28 (1997) 188 CLR 313, 366–7.

29 (2001) 207 CLR 21, 53–4. Justice McHugh also referred to Justice Colin Phegan, 'Employers' Liability for Independent Contractors in Tort Law' (2000) 4 *Judicial Review* 395, who said that this case brings into sharp relief the 'ramifications for vicarious liability law of the progressive vertical disintegration of employment': at 420.

30 See especially *Trustees of the Roman Catholic Church v Ellis* (2007) 70 NSWLR 565 ('*Ellis*').

official to the parish or diocese or other church entity often falls outside the traditional employment paradigm. In a number of recent English and Canadian decisions dealing with the liability of the church for sexual abuse by priests, courts have found relationships ‘akin to’ employment which sufficed for the purposes of establishing the vicarious liability of the church or diocesan body.<sup>31</sup> These developments acknowledge that strict adherence to the form of traditional employment relationships would be unduly limiting of the public policy justifications for vicarious liability. These issues are equally apposite to claims brought by survivors against the clergy in Australia.

### 3 *Developments in Vicarious Liability in Other Jurisdictions*

In Canada and in England the traditional ‘course of employment’ test has been relaxed so that focus is now placed upon different criteria to demonstrate a sufficient connection between the wrongdoing and the employer. The result is that institutional liability for child sexual abuse can be established in a manner which is not available under Australian law.

In Canada, in *Bazley*,<sup>32</sup> the Supreme Court of Canada found that a residential facility, The Children’s Foundation, was vicariously liable for sexual abuse of children by an employed childcare worker. Justice McLachlin (for the Court) held that courts should ‘openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of “scope of employment” and “mode of conduct”’.<sup>33</sup> Instead, the Court focused on identifying whether the wrong was ‘closely and materially related to a risk introduced or enhanced by the employer’.<sup>34</sup> Without this, it was held that vicarious liability ‘serves no deterrent purpose, and relegates the employer to the status of an involuntary insurer’.<sup>35</sup> It was held that public policy requires a ‘strong connection between what the employer was asking the employee to do ... and the wrongful act’, so that it can be said that ‘the employer *significantly* increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks’.<sup>36</sup>

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31 See, eg, *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1, 17 [47] (Lord Phillips) (*Catholic Child Welfare*), approved and discussed in *Cox v Ministry of Justice* [2016] 2 WLR 806, 814 [24] (Lord Reed SCJ) (Lord Neuberger P, Baroness Hale DP, Lord Dyson MR and Lord Toulson SCJ agreeing). In Canada see, eg, *John Doe v Bennett* [2004] 1 SCR 436, 449 [27] (McLachlin CJ).

32 [1999] 2 SCR 534.

33 *Ibid* 559 [41].

34 *Ibid* 556 [36].

35 *Ibid*.

36 *Ibid* 560 [42] (emphasis in original). While this might appear to be attributing blame to the institution, the Court did not find wrongdoing by the institution or require it to found the claim based on vicarious liability. Instead, references to the fact that the employer ‘increased the risk of harm’ go to determining the threshold or circumstances in which it is just and fair to impose liability on the institution for the tortious wrongdoing of its employee in the absence of personal fault for the particular tort in question. However, the creation of risk can also lead to direct liability: see *EB v Order of the Oblates of Mary Immaculate of the Province of British Columbia* [2005] 3 SCR 45, 64 [27] (Binnie J).

A new test was proposed. Firstly, the court should consider if any precedent concerning very similar facts exists to resolve the question.<sup>37</sup> If not, the next step is to determine whether vicarious liability *should* be imposed in light of the broader public policy rationales which underpin vicarious liability.<sup>38</sup> The Court posed a number of factors to assist in determining whether an employer had created a material increase in the risk of harm occurring. 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; (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; and (e) the vulnerability of potential victims to wrongful exercise of the employee's power.<sup>39</sup>

Similar development of vicarious liability has also taken place in England. In *Lister v Hesley Hall Ltd* the House of Lords held that an institution might be held vicariously liable for child sexual abuse by an employee if there was a 'close connection' between the abuse and the employment. However, the reasons for judgment in that case varied considerably<sup>40</sup> and were criticised for lacking sufficient guidance as to when liability should arise.<sup>41</sup> The Supreme Court clarified the test in *Catholic Child Welfare*<sup>42</sup> and again more recently in *Mohamud v WM Morrison Supermarkets plc*.<sup>43</sup> In *Catholic Child Welfare*, Lord Phillips held that vicarious liability is imposed where the defendant has used the abuser to further its own interests and put the abuser in a position which has 'created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse'.<sup>44</sup> In *Mohamud*, the Supreme Court approved *Lister* and *Catholic Child Welfare* and held that '[t]he cases in which the necessary connection has been found ... are cases in which the employee used or misused

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37 *Bazley* [1999] 2 SCR 534, 545 [15].

38 *Ibid.*

39 *Ibid* 560 [3]. These principles in relation to vicarious liability have been approved by Canadian courts in numerous cases subsequently: see, eg, *Jacobi v Griffiths* [1999] 2 SCR 570; *Blackwater v Plint* [2005] 3 SCR 3.

40 [2002] 1 AC 215, 227 [20] (Lord Steyn) ('*Lister*') (emphasis added). In so doing it overruled *ST v North Yorkshire County Council* [1999] LGR 584. In this case, Butler-Sloss LJ held that sexual assaults were 'far removed from an unauthorised mode of carrying out a teacher's duties': at 591. Chadwick LJ also found that it was 'impossible to hold that the commission of acts of indecent assault can be regarded as a mode – albeit an improper or unauthorised mode – of doing [what he was employed to do]': at 592–3.

41 In Canada, in *Jacobi v Griffiths* [1999] 2 SCR 570, decided concurrently with *Bazley*, the Supreme Court reached the opposite result to that in *Bazley*, leading some to question how easily the new test can be applied. In *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366, Lord Nicholls observed that the 'close connection' test, applied in *Lister v Hesley Hall Ltd* 'focuses attention in the right direction. But it affords no guidance on the type or degree of connection which will normally be regarded as sufficiently close to prompt the legal conclusion that the risk of the wrongful act occurring, and any loss flowing from the wrongful act, should fall on the firm of employer rather than the third party who was wronged': at 377–8 [25]. See also Paula Giliker, 'Making the Right Connection: Vicarious Liability and Institutional Responsibility' (2009) 17 *Torts Law Journal* 35.

42 [2013] 2 AC 1.

43 [2016] 2 WLR 821 ('*Mohamud*').

44 *Catholic Child Welfare* [2013] 2 AC 1, 26 [86]–[87].



the position entrusted to him in a way which injured the third party'.<sup>45</sup> This is now substantially the same as the law in Canada.

These developments have replaced the traditional form of the 'course of employment' test with a broader range of factors than those applied under the *Deatons* test, to determine the sufficiency of the connection between the abuse and the institution/employer to justify vicarious liability.

### B Non-delegable Duty of Care

The non-delegable duty is a personal duty to ensure that reasonable care is taken.<sup>46</sup> It has been described as a 'sub-species of negligence law'.<sup>47</sup> Recognised categories have involved 'a person being so placed in relation to another as "to assume a particular responsibility for [that other person's] safety" because of the latter's "special dependence or vulnerability"'.<sup>48</sup> In certain circumstances (such as schools vis-a-vis students,<sup>49</sup> employers vis-a-vis employees,<sup>50</sup> and hospitals vis-a-vis patients)<sup>51</sup> the law recognises a duty to ensure that reasonable care is taken and *liability* for functions integral to this positive duty cannot be delegated, even if the *tasks* are delegated to an independent contractor.<sup>52</sup> Any negligence on the part of an independent contractor in fulfilling such a duty will be sheeted home to the principal.<sup>53</sup> No other common law jurisdiction has applied a non-delegable duty to impose liability for institutional child sexual abuse. However, it has been considered by the High Court in Australia, and has influenced the Royal Commission's recommendations,<sup>54</sup> so it warrants consideration.

### C The High Court: *New South Wales v Lepore*

In *Lepore*<sup>55</sup> the High Court considered institutional liability for sexual abuse of children by teachers in primary schools. Appeals were brought from the Supreme Court of New South Wales (*Lepore v New South Wales*)<sup>56</sup> and the Supreme Court of Queensland (*Rich v Queensland*)<sup>57</sup> and were heard together. Both vicarious liability and the non-delegable duty of care were considered by the High Court.

45 *Mohamud* [2016] 2 WLR 821, 835 [45] (Lord Toulson SCJ).

46 *Commonwealth v Introvigne* (1982) 150 CLR 258, 271 (Mason J); *Kondis v State Transport Authority* (1984) 154 CLR 672, 686–7 (Mason J). See also *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313.

47 John Murphy, 'The Liability Bases of Common Law Non-delegable Duties – A Reply to Christian Witting' (2007) 30 *University of New South Wales Law Journal* 86, 99.

48 *Lepore* (2003) 212 CLR 511, 551 [99] (Kirby J).

49 *Commonwealth v Introvigne* (1982) 150 CLR 258.

50 *Kondis v State Transport Authority* (1984) 154 CLR 672.

51 *Albrighton v Royal Prince Alfred Hospital* (1980) 2 NSWLR 542.

52 *Woodland v Swimming Teachers Association* [2014] AC 537, 583 [23] (Lord Sumption SCJ).

53 See, eg. *Commonwealth v Introvigne* (1982) 150 CLR 258.

54 *Redress and Civil Litigation Report*, above n 1, 490.

55 (2003) 212 CLR 511.

56 (2001) 52 NSWLR 420.

57 (2001) Aust Torts Reports ¶81-626.

In the proceedings below in *Lepore v New South Wales*, in the New South Wales Court of Appeal, Mason P (with whom Davies AJA agreed) held that the scope of the non-delegable duty ‘extends to ensuring that [the children] are not injured physically at the hands of an employed teacher (whether acting negligently or intentionally)’.<sup>58</sup> Justice Heydon dissented.<sup>59</sup> His Honour noted that the teacher’s alleged conduct was ‘not aptly characterised as a failure to take reasonable care’.<sup>60</sup> In the Queensland proceedings, *Rich v Queensland*, the Court of Appeal declined to follow the New South Wales Court of Appeal’s decision with respect to the scope of the non-delegable duty.

In the High Court, the majority (McHugh J dissenting) rejected the application of the non-delegable duty to child sexual abuse in an institutional context.<sup>61</sup> Justices Gummow and Hayne held that the extension of the non-delegable duty to such intentional acts would ‘remove the duty altogether from any connection with the law of negligence’.<sup>62</sup> Chief Justice Gleeson (with whom Callinan J agreed)<sup>63</sup> observed that:

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.<sup>64</sup>

Only McHugh J, in dissent, accepted that a non-delegable duty could apply to intentional wrongdoing as well as negligent conduct and therefore ought to apply to sexual abuse.<sup>65</sup>

In relation to the scope of *vicarious liability*, there was no clear ratio.<sup>66</sup> The High Court considered the developments which had by then taken place in Canada and England, but there was no clear majority support for developing the law in a comparable way. Justices Gummow and Hayne in a joint judgment, and Callinan J, held that sexual abuse could not be regarded as falling within the

58 *Lepore v New South Wales* (2001) 52 NSWLR 420, 432 [61].

59 *Ibid* 443 [109]. His Honour noted the submission made that such a duty as proposed would render the employer liable if say, a nurse decided to carry out an ad hoc euthanasia in a hospital, or if a teacher murdered a student, or if senior counsel’s clerk shot his receptionist.

60 *Ibid* 443 [107].

61 See *Lepore* (2003) 212 CLR 511, 535 [38] (Gleeson CJ), 601 [265] (Gummow and Hayne JJ), 624 [339] (Callinan J).

62 *Ibid* 601 [266].

63 *Ibid* 624 [340].

64 *Ibid* 531–2 [31].

65 *Ibid* 571–2 [161].

66 In *Catholic Child Welfare* [2013] 2 AC 1, 25 [82], Lord Phillips referred to the ‘bewildering variety of analysis’ in *Lepore*. For detailed discussion of the High Court’s judgments see Jane Wangmann, ‘Liability for Institutional Child Sexual Assault: Where Does *Lepore* Leave Australia?’ (2004) 28 *Melbourne University Law Review* 169; Prue Vines, ‘*New South Wales v Lepore*; *Samin v Queensland*; *Rich v Queensland*: Schools’ Responsibility for Teachers’ Sexual Assault: Non-delegable Duty and Vicarious Liability’ (2003) 27 *Melbourne University Law Review* 612. Subsequent case law in relation to vicarious liability is difficult to reconcile: *Withyman v New South Wales* (2013) Aust Torts Reports ¶82-124; cf *A, DC v Prince Alfred College Inc* (2015) 67 AILR 350; *Erlich v Leifer* (2015) Aust Torts Reports ¶82-245.

‘course of employment’ for the purposes of vicarious liability under any circumstances, maintaining the traditional scope of the test.<sup>67</sup> Chief Justice Gleeson and Gaudron J seemed to accept that it could in certain circumstances, but for quite different reasons.<sup>68</sup> Justice McHugh did not need to decide the issue as his Honour would have applied a non-delegable duty of care. Only Kirby J found that the law of vicarious liability should be developed to address such claims in a manner comparable to the developments in Canada and England.<sup>69</sup>

Chief Justice Gleeson reasoned that:

where the teacher-student relationship is invested with a high degree of intimacy, the use of that power and intimacy to commit sexual abuse may provide a sufficient connection between the sexual assault and the employment to make it just to treat such contact as occurring in the course of employment.<sup>70</sup>

This suggests that abuse by a person holding responsibilities which include intimate contact with children *could* give rise to vicarious liability. However, the scope for liability was still limited by the requirement to characterise the abuse as occurring within the course of employment.<sup>71</sup> For example, Gleeson CJ noted that the maintenance of discipline by a teacher is clearly within the employment responsibilities of a teacher, so that if the alleged misconduct could be regarded as excessive or inappropriate *chastisement*, this might give rise to vicarious liability.<sup>72</sup> However, if the conduct of the teacher was found to be ‘so different from anything that could be regarded as punishment that it could not properly be seen as other than merely sexually predatory behaviour, then, in relation to such conduct, the plaintiff would have no case based on vicarious liability’.<sup>73</sup> This is consistent with *Deatons* in requiring the abuse to be characterised as occurring within the course of employment rather than accepting that the relevant connection could be established by the factors applied in *Bazley*.

Justice Gaudron reasoned that vicarious liability should only arise in respect of deliberate criminal acts where the person against whom liability is asserted is estopped from asserting that the person whose acts are in question was not acting as his or her servant, agent or representative when the acts occurred.<sup>74</sup> However, her Honour gave no indication whether such a principle limited liability to acts arising in the *Deatons* sense, or otherwise.

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67 *Lepore* (2003) 212 CLR 511, 594 [239] (Gummow and Hayne JJ), 625 [342] (Callinan J).

68 *Ibid* 546 [74] (Gleeson CJ), 561 [130] (Gaudron J).

69 *Ibid* 620 [324].

70 *Ibid* 546 [74].

71 *Ibid*.

72 *Ibid* 547 [78].

73 *Ibid*.

74 *Ibid* 561 [130].

Subsequent case law demonstrates different interpretations of the judgments in *Lepore* and is not easily reconciled.<sup>75</sup> Therefore, in Australia, reform to create, or clarify, a cause of action for institutional liability for deliberate sexual abuse of a child is essential if survivors are to be able to bring proceedings against the relevant institution for compensation.

## D The Royal Commission's Recommendations for New Statutory Duties

The Royal Commission has recommended the introduction of two new statutory liabilities, both of which are to have prospective operation only, to provide a cause of action for survivors of child sexual abuse in Australia.<sup>76</sup> One is a statutory non-delegable duty of care upon certain institutions. The other is a statutory liability upon all institutions for child sexual abuse unless the institution establishes that it took reasonable care to prevent the abuse. These are examined below.

### I A Non-delegable Duty

In its Report, the Royal Commission recommended that:

State and territory governments should introduce legislation to impose a non-delegable duty on certain institutions for institutional child sexual abuse despite it being the deliberate criminal act of a person associated with the institution.<sup>77</sup>

It is proposed that it should apply to certain institutions only.<sup>78</sup> These include residential facilities for children, school or day care facilities, disability or health services or religious organisations or other facilities operated for profit having care, supervision or control of children for a period of time. It is not proposed that the duty apply to foster care or kinship care on the basis that the institution that arranges these forms of care does not have the degree of supervision or control over the home environment to justify the imposition of a non-delegable duty.<sup>79</sup> Nor is it proposed that the duty would apply to community not-for-profit or volunteer institutions offering cultural, social and sporting activities.<sup>80</sup> The Commission noted that these institutions do not provide particularly high-risk services and so excluding these organisations is designed to avoid discouraging

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75 See *Sprod BNF v Public Relations Oriented Security Pty Ltd* (2007) Aust Torts Reports ¶81-921, [54] (Ipp JA): 'It is not easy to trace a certain and secure path through the dicta [in *Lepore*]'. Since *Lepore*, some courts have rejected claims arising from institutional sexual abuse by distinguishing sexual misconduct from anything the employee was authorised or required to do: *Withyman v New South Wales* (2013) Aust Torts Reports ¶82-124 (a sexual relationship between a teacher and an intellectually handicapped student in a school); *A, DC v Prince Alfred College Inc* (2015) Aust Torts Reports ¶82-245 (abuse by a housemaster of a student in a boarding school) although this was overturned on appeal: [2015] SASCFC 161. On the other hand, in *Erlich v Leifer* (2015) Aust Torts Reports ¶82-245, [125] (Rush J) the focus was on misuse of a position of 'power and intimacy' by the headmistress of a school, which was found to have the relevant connection to give rise to vicarious liability.

76 *Redress and Civil Litigation Report*, above n 1, 77, rec 89. See also at 489–91.

77 *Ibid.*

78 *Ibid.* 490.

79 *Ibid.* 493.

80 *Ibid.*

valuable cultural, social and sporting association in the community, particularly as the risk of liability or the cost of insurance might force such organisations to cease providing these services.<sup>81</sup>

It appears from the discussion in the *Redress and Civil Litigation Report* that the proposed duty is modelled upon the minority view in *Lepore* and is intended to be a statutory form of the common law non-delegable duty.<sup>82</sup> A statutory form of institutional liability for child sexual abuse would provide a clear pathway for future abuse survivors to establish liability and entitlement to damages. However, we make three observations with respect to the form and scope of the proposed statutory *non-delegable duty*:

- the scope of the proposed duty may be broader than the scope of institutional liability imposed in other common law jurisdictions by means of vicarious liability;
- there is an argument in favour of harmonisation with other common law jurisdictions that have already addressed these issues by means of vicarious liability rather than a non-delegable duty; and
- there could be potential consequences for the common law from using this negligence-based duty, the non-delegable duty of care, as the basis for liability for such criminal wrongdoing.

These issues are considered below.

(a) *The Scope of the Proposed Non-delegable Duty*

The proposed statutory non-delegable duty has no comparable provision or common law counterpart in other common law jurisdictions. Accordingly, it can only be compared with the scope of vicarious liability in other jurisdictions. In making that comparison, the proposed statutory non-delegable duty may be broader in scope in two respects.

Firstly, the proposed duty is intended to apply to a *greater range of workers* than historically was within the scope of vicarious liability. The Royal Commission has proposed that the institutions subject to the proposed duty may be liable for the acts of ‘members or employees’ defined broadly to cover almost any working relationship:

An institution’s ‘members or employees’ should be defined broadly to include persons associated with the institution, including officers, office holders, employees, agents and volunteers. It should include persons contracted by the institution. It should also include priests and religious [sic] associated with the institution.<sup>83</sup>

As discussed earlier, vicarious liability remains limited to liability for acts of employees. The proposed statutory extension of the range of persons for whom an institution may be liable effectively bypasses these historical limitations to the relationships to which vicarious liability applies. Of course, the non-delegable

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81 Ibid 491.

82 Ibid 488–93.

83 Ibid 493.

duty of care at common law is not subject to this limitation and already applies to independent contractors. There is much to commend the application of any proposed statutory duty to a broader range of workers who may be engaged or utilised by an institution in the care of children than the limited scope of vicarious liability at common law given the increasing diversity of working relationships.<sup>84</sup>

Secondly, the proposed duty may be broader in *scope* than vicarious liability as developed in Canada and England. This can be illustrated by example. If an institution employs a worker in an area with no or very limited responsibility for the care of children, such as a cleaner, gardener or office worker, and that person sexually abuses a child in the care of the institution, will the institution be liable?

This question has been considered directly in Canada. There it has been held that public policy considerations require 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',<sup>85</sup> in the sense that 'the employer *significantly* increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks'.<sup>86</sup> In *Bazley*, McLachlin J observed that:

Where vicarious liability is not closely and materially related to a risk introduced or enhanced by the employer, it serves no deterrent purpose, and relegates the employer to the status of an involuntary insurer.<sup>87</sup>

The Court noted that otherwise, liability would be unlikely to have a significant deterrent effect as 'short of closing the premises or discharging all employees, little can be done to avoid the random wrong'.<sup>88</sup> In *EB v Order of the Oblates of Mary Immaculate of the Province of British Columbia*,<sup>89</sup> the Supreme Court of Canada refused a claim to make the school vicariously liable for the sexual abuse of a child by a baker who was employed by the school. The school had given the baker no responsibility for or authorisation to have contact with children. It was held that 'mere opportunity' to abuse a child was not sufficient to impose liability.<sup>90</sup> The same policy question arises under English law and similarly requires a close connection between the abuse and the employee's responsibilities to give rise to liability.<sup>91</sup>

It is not entirely clear whether liability under the proposed non-delegable duty would extend to child sexual abuse by *any* person associated with the institution, or whether it is intended that it should be limited to liability for acts of

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84 See also Ewan McKendrick, 'Vicarious Liability and Independent Contractors – A Re-examination' (1990) 53 *Modern Law Review* 770; Hugh Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 *Oxford Journal of Legal Studies* 353.

85 *Bazley* [1999] 2 SCR 534, 560 [42] (McLachlin J) (emphasis added).

86 *Ibid* (emphasis in original).

87 *Ibid* 556 [36].

88 *Ibid* 561 [42] (McLachlin J).

89 [2005] 3 SCR 45.

90 (2005) 258 DLR (4<sup>th</sup>) 385, [40], approved in *EB v Order of the Oblates of Mary Immaculate of the Province of British Columbia* [2005] 3 SCR 45, 52 [3] (Binnie J).

91 *Catholic Child Welfare* [2013] 2 AC 1, 26 [86]–[87] (Lord Phillips).

persons with specific responsibilities in relation to a child such that it could be said that ‘the employer significantly increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks’.<sup>92</sup> Recommendation 89 contains no limitation, but the discussion in the *Redress and Civil Litigation Report* in places suggests some limitation. The Report states:

A non-delegable duty is a personal duty borne by the institution. It cannot be delegated. Where this duty is recognised, the institution must ensure that reasonable care is taken by those to whom it entrusts the performance of its duty of care. Sexual abuse of a child is the deliberate act of the perpetrator. It is the antithesis of the taking of reasonable care. *Where a person associated with an institution fails to take reasonable care of a child in the care and control of that institution, by that person committing a criminal act against the child a strict liability regime will impose liability on the institution for that failure.*<sup>93</sup>

If the reference to ‘those to whom it entrusts the performance of its duty of care’<sup>94</sup> means those particular associates to whom responsibilities for the care and supervision of children are given, it may end up with a similar scope to the *Bazley* test under vicarious liability. If so, liability would probably not arise in the hypothetical scenario above. However, if the proposed liability is drafted without limitation, this may render the relevant institutions the insurers of all harm arising from the ‘mere opportunity’ that association with the institution presents. The public policy justifications of any broader scope than that available in other common law jurisdictions ought to be clarified if this is intended.

### (b) Experience of Other Common Law Jurisdictions in Vicarious Liability

As already discussed, other common law jurisdictions have developed vicarious liability principles rather than the non-delegable duty of care to address institutional liability for child sexual abuse. These developments in Canada<sup>95</sup> and the United Kingdom<sup>96</sup> have been approved by the Court of Final Appeal in Hong Kong<sup>97</sup> and by the Court of Appeal in Singapore.<sup>98</sup>

One issue is whether Australian legislators should adopt a path of statutory reform which follows more closely the common law developments in Canada and England, rather than modelling it upon a development to common law non-delegable duty which has not in fact been adopted previously in Australia or elsewhere. The reason for considering a statutory duty modelled upon this existing, expanded form of vicarious liability is this. As Lord Neuberger P noted in *FHR European Ventures LLP v Cedar Capital Partners LLC*, it is desirable for

92 *Bazley* [1999] 2 SCR 534, 560 [42] (McLachlin J), quoted in *Catholic Child Welfare* [2013] 2 AC 1, 22 [64] (Lord Phillips).

93 *Redress and Civil Litigation Report*, above n 1, 490 (emphasis added).

94 *Ibid.*

95 *Bazley* [1999] 2 SCR 534.

96 *Lister v Hesley Hall Pty Ltd* [2002] 1 AC 215; *Catholic Child Welfare* [2013] 2 AC 1.

97 *Ming An Insurance Co (HK) Ltd v Ritz-Carlton Ltd* [2002] HKLRD 884.

98 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2011] SGCA 22.

common law jurisdictions ‘to lean in favour of harmonising the development of the common law round the world’.<sup>99</sup> In *Hasler v Singtel Optus Pty Ltd* Leeming JA endorsed the remark of Lord Neuberger P, and observed that ‘[t]here is frequently much to be learnt from the experience of other jurisdictions whose legal systems share a common ancestor’.<sup>100</sup> It may be of value to legislators and courts applying any proposed liability, to have recourse to the experience of other common law countries in the same context. For example, in *Bazley* the Court considered the factors relevant to determining the sufficiency of the connection<sup>101</sup> and set out specific factors relevant to determining whether an employer had introduced or significantly exacerbated the specific risk of sexual abuse by the nature of the responsibilities given to the employee.<sup>102</sup> Such prior judicial experience with the same or similar issues may be of assistance to Australian courts.

(c) *A ‘Subspecies’ of Negligence: Contentious Application of Non-delegable Duties to Criminal Intentional Wrongdoing*

The non-delegable duty has been previously described as a ‘sub-species of negligence law’<sup>103</sup> and this raises a further issue with describing the proposed statutory duty by reference to this common law duty. Whether the tort of negligence can extend to intentional wrongdoing is not settled.<sup>104</sup> However, the application of a negligence-based duty to *criminal* intentional wrongdoing is particularly contentious and was rejected by a majority of the High Court in *Lepore*.<sup>105</sup> As already noted, in *Lepore* Gleeson CJ (with whom Callinan J agreed)<sup>106</sup> expressed concern that criminally intentional conduct introduced a

99 [2015] AC 250, 273 [45].

100 (2014) 87 NSWLR 609, 626 [71].

101 [1999] 2 SCR 534, 560 [41(3)] (McLachlin J). These principles in relation to vicarious liability have been approved by Canadian courts in numerous cases subsequently: see, eg, *Jacobi v Griffiths* [1999] 2 SCR 570; *Blackwater v Plint* [2005] 3 SCR 3.

102 These included: whether ‘an employee is permitted or required to be alone with a child for extended periods of time’; supervising activities such as bathing or toileting or permitting physical contact with intimate body zones; putting the employee in a position of intimacy with and power over the child (which ‘may enhance the risk of the employee feeling that he or she is able to take advantage of the child and the child submitting without effective complaint’); encouraging ‘the employee to stand in a position of respect’ and encouraging the child to emulate or obey: [1999] 2 SCR 534, 561–2 [43]–[44] (McLachlin J).

103 Murphy, above n 47, 99.

104 See Peter Handford, ‘Intentional Negligence: A Contradiction in Terms?’ (2010) 32 *Sydney Law Review* 29; Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) 122–3. See also Neil J Foster, ‘Vicarious Liability and Non-delegable Duty in Common Law Actions Based on Institutional Child Abuse’ (Speech delivered to Kelso Lawyers, Newcastle Club, 20 March 2015) <[http://works.bepress.com/neil\\_foster/92](http://works.bepress.com/neil_foster/92)>. On the other hand, in the context of civil liability reform, intentional torts were not considered to be within the scope of negligence: Panel of Eminent Persons, *Review of the Law of Negligence: Final Report* (2002) 27 [1.14] (*Ipp Report*). See also the apparent rejection in *Williams v Milottin* (1957) 97 CLR 465, 470 (The Court). In *Catholic Child Welfare* [2013] 2 AC 1, 21 [62], Lord Phillips also noted that ‘sexual abuse can never be a negligent way of performing such a requirement [of employment]’.

105 (2003) 212 CLR 511.

106 *Ibid* 624 [340].



‘factor of legal relevance’ which took it outside the scope of the duty of care in negligence and the non-delegable duty.<sup>107</sup> If the proposed statutory non-delegable duty were to include such criminally intentional conduct, there is the potential for it to influence the development of the common law doctrine through the process of analogical reasoning by which courts have regard to statutory context in the development of common law.<sup>108</sup> As noted by Leeming JA writing extra-curially:

In short, statutes are an under-appreciated component in the academic literature on the Australian legal system: their role lies not merely in stating norms of law, but in influencing judge-made law and as a critical driver of change *and* restraint in the Australian legal system.<sup>109</sup>

Civil compensation for negligence extending to *criminally* intentional conduct would be a profound shift in tort law. This is not to suggest that change to the common law would necessarily occur, or that if it did, it would happen directly or abruptly or immediately. It is merely to flag that there is the potential for influence upon the common law from such statutory development.

At the end of the day, both common law doctrines of vicarious liability and the non-delegable duty achieve the same purpose of imposing strict liability for the acts of another in the absence of fault on the part of the defendant. Both have limitations at common law which impact on the availability of tortious compensation in institutional child sexual abuse cases. A new statutory duty in the form of a non-delegable duty as proposed is of course possible. However, framed as a ‘non-delegable duty’ it would lack coherence with other common law jurisdictions and there are no apparent advantages to using this form to achieve the desired aim of imposing strict liability upon certain institutions for child sexual abuse (with or without limitation upon the circumstances of such abuse).

It is not strictly necessary to use either of the existing common law duties as the form for the imposition of such strict liability, but a statutory liability based on an expanded *vicarious liability* would avoid any potential difficulty with applying a negligence-based liability to criminally intentional wrongdoing and would give courts closer comparison with existing common law case law for reference in considering institutional liability in this context. The limitations of vicarious liability with respect to a requirement for an employment relationship can be removed in the manner proposed by the Royal Commission regardless of

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107 Ibid 532 [31].

108 For more detailed discussion of analogical development of the common law by reference to statute, see J Beatson, ‘The Role of Statute in the Development of Common Law Doctrine’ (2001) 117 *Law Quarterly Review* 247; Andrew Burrows, ‘The Relationship between Common Law and Statute in the Law of Obligations’ (2012) 128 *Law Quarterly Review* 232; Justice Mark Leeming, ‘Theories and Principles Underlying the Development of the Common Law – The Statutory Elephant in the Room’ (2013) 36 *University of New South Wales Law Journal* 1002; Elise Bant, ‘Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence’ (2015) 38 *University of New South Wales Law Journal* 367; Sir Anthony Mason, ‘The Interaction of Statute Law and Common Law’ (2015) 27 *Judicial Officers’ Bulletin* 87, 91–3.

109 Leeming, above n 108, 1002–3 (emphasis in original).

whether the form of liability more closely resembles common law vicarious liability or a non-delegable duty.

## 2 *Statutory Liability with a Reverse Onus of Proof*

The Royal Commission has recommended that irrespective of whether a non-delegable duty of care is imposed on certain types of institution by statute, legislation should be introduced to make *all* institutions liable for child sexual abuse by a broad range of associates ‘unless the institution proves it took reasonable steps to prevent the abuse’.<sup>110</sup> Recommendation 91 of the *Redress and Civil Litigation Report* states:

Irrespective of whether state and territory parliaments legislate to impose a non-delegable duty upon institutions, state and territory governments should introduce legislation to make institutions liable for institutional child sexual abuse by persons associated with the institution unless the institution proves it took reasonable steps to prevent the abuse. The ‘reverse onus’ should be imposed on all institutions, including those institutions in respect of which we do not recommend a non-delegable duty be imposed.<sup>111</sup>

Significantly, this proposed statutory liability would apply to all institutions including community, not-for-profit and volunteer organisations as well as organisations administering foster care or kinship care. Some of these types of organisations have traditionally not fallen within the scope of vicarious liability at common law (for example foster care)<sup>112</sup> and so statutory inclusion would assist in providing causes of action which are not presently available at common law. It would also apply to those organisations to which the Commission’s proposed non-delegable duty of care would apply. There is no doubt that the proposed statutory vicarious liability would assist survivors of future abuse to establish institutional liability, but again, it leaves existing survivors without any improvement of their current position.<sup>113</sup>

Recommendation 91 is in essence proposing a statutory form of vicarious liability that is not strict. This is something unknown to the common law, though not unknown in statute law. There are two important features of this proposed duty.

Firstly, there is no apparent requirement for any particular connection between the abuse and the institution beyond the requirement for the abuser to be an ‘associate’ of the institution.<sup>114</sup> If so, the recommended provision has a much

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110 *Redress and Civil Litigation Report*, above n 1, 495, recs 91–2. The recommendation is that all institutions should be liable for child sexual abuse by a broad range of persons including office holders, employees, agents, volunteers and contractors. For religious organisations, persons included would be religious leaders, officers and personnel of the religious organisation. See also: at 219.

111 *Ibid* 495.

112 In the United Kingdom, see, eg, *S v Walsall Metropolitan Borough Council* [1985] 3 All ER 294; in Canada, see, eg, *KLB v British Columbia* [2003] 2 SCR 403. See also Phillip Morgan, ‘Ripe for Reconsideration: Foster Carers, Context, and Vicarious Liability’ (2012) 20 *Torts Law Journal* 110.

113 *Redress and Civil Litigation Report*, above n 1, 495, rec 93.

114 As would be the case at common law in the jurisdictions which have expanded the application of vicarious liability beyond strict application of the ‘Salmond’ test: *Catholic Child Welfare* [2013] 2 AC 1; *Bazley* [1999] 2 SCR 534.

broader scope than vicarious liability at common law. For example, under this proposed liability, a sporting club may be liable for abuse by a cleaner or person such as the baker in *EB v Order of the Oblates of Mary Immaculate of the Province of British Columbia* (unless the defence of having taken reasonable steps to prevent abuse can be raised).<sup>115</sup> This would be of considerable advantage to survivors, but it has significant public policy implications.

As discussed in relation to the scope of the non-delegable duty, under Canadian and English vicarious liability, public policy has required balancing the interests of survivors in having a defendant to sue on the one hand, against ‘[foisting] undue burdens on business enterprises’<sup>116</sup> rendering them ‘involuntary insurers’<sup>117</sup> for all sexual abuse on the other. Courts in Canada and England considering the public policy questions have found that liability for *all* child sexual abuse is not justified and so liability is limited to circumstances where the institution has ‘*significantly* increased the risk of harm by putting the employee in his or her position and requiring him to perform the assigned tasks’.<sup>118</sup> This is not to say that the same public policy issues could not be debated and resolved differently in Australia. For example, it may be determined that the existence of the proposed defence, discussed below, renders it fair to expand the scope of this second liability. However, these issues will need to be fully addressed by legislators considering the implementation of reforms, as where the defence cannot be raised, the scope of the liability is significantly broader.

Secondly, this new statutory liability may be avoided upon proof by the institution that it took reasonable care to prevent abuse, effectively creating a defence to vicarious liability that is unknown to the common law. These reforms appear<sup>119</sup> to be based upon provisions in the Commonwealth and Victorian discrimination legislation<sup>120</sup> which provide that where an employee or agent acting in the course of their employment contravenes the Act, then the employer or principal will be vicariously liable unless it can establish that it took reasonable precautions to prevent the contravention.<sup>121</sup> The difference is that liability under these provisions is limited, as is common law vicarious liability, by the twin requirements of an employment relationship and a sufficient connection with the employment.

The proposed defence, or so-called *reverse onus of proof*, is a significant advantage to institutions which does not exist at common law. The implication of

115 Heuston and Buckley, above n 18, 443.

116 *Bazley* [1999] 2 SCR 534, 551 [26] (McLachlin J).

117 *Ibid* 556 [36] (McLachlin J).

118 *Ibid* 560 [42] (McLachlin J) (emphasis in original).

119 The Royal Commission referred to Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-government Organisations* (2013) 552, rec 26.4 (*Betrayal of Trust Report*), which recommended that the Victorian Government consider, as an option for reform, reforms to the *Wrongs Act 1958* (Vic) based upon vicarious liability in Commonwealth and Victorian discrimination legislation: *Redress and Civil Litigation Report*, above n 1, 474.

120 *Sex Discrimination Act 1984* (Cth); *Equal Opportunity Act 2010* (Vic).

121 *Sex Discrimination Act 1984* (Cth) s 106; *Equal Opportunity Act 2010* (Vic) ss 109–10.

the proposed defence appears to be that if the institution does *not* take reasonable precautions to prevent sexual abuse, then it is fair that it is made liable for any abuse. Conversely, if an institution *does* take reasonable steps (whatever they might be) to prevent abuse it will escape liability, even if the nature of the responsibilities given to the perpetrator would be accepted in other jurisdictions as having significantly increased the risk of sexual abuse occurring, and therefore warranting the imposition of vicarious liability. It may result in finding or denying vicarious liability where, on the same facts, a different result would be likely in other common law jurisdictions.

The Royal Commission recognised that what are reasonable steps for an institution to take to avoid child sexual abuse will vary depending upon the type of institution and the position and responsibility of the abuser within the institution. More active steps toward precaution might be expected of a for-profit institution than a community-volunteer institution. These questions will depend on many individual circumstances but will no doubt involve complex factual issues such as reasonable foreseeability of risk, and the kinds of matters typically relevant to a finding of negligence.<sup>122</sup> The Royal Commission recognised that institutions are in a far superior position to plaintiffs to be able to prove the precautions taken to prevent abuse, having relatively easy access to records and witnesses.<sup>123</sup> Yet, inevitably the survivor plaintiff would bear an evidentiary onus which may be difficult to discharge.

The Commission recognised that its recommendation, if adopted, may lead to increased insurance premiums for institutions but that it would also potentially engender higher standards of care, governance and risk mitigation within institutions.<sup>124</sup> The social benefit of encouraging all institutions to do more to reduce the risk of child sexual abuse goes without saying. However, the uncertainty as to what would constitute reasonable steps to prevent abuse may be of concern, especially to small community groups.

The interrelationship between the two proposed liabilities is not entirely clear. Presumably, institutions to which both the non-delegable duty and the statutory liability apply may be liable under the former even in circumstances in which the defence can be raised to the latter. However, when would those institutions be liable under the second statutory duty and *not* liable under the non-delegable duty? One answer might be that the non-delegable duty is limited in scope to acts of abuse by persons with responsibility for welfare of children. If abuse by a non-childcare worker, such as a cleaner, does not fall within the scope of the non-delegable duty, it might still fall within the scope of the statutory liability. In such circumstances, an institution to which the non-delegable duty applies could be liable under the second statutory liability if it cannot make out the defence that it took reasonable steps to prevent abuse.

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122 Often referred to as the ‘*Shirt* calculus’, referring to *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

123 *Redress and Civil Litigation Report*, above n 1, 494.

124 *Ibid.*

### **E Dual Vicarious Liability: Reform to Impose Liability upon more than One Institution**

Under Australian common law, it is not possible for two parties to be vicariously liable for a defendant's wrong.<sup>125</sup> The position is otherwise in England.<sup>126</sup> In *Catholic Child Welfare*,<sup>127</sup> Lord Phillips approved the dicta of Rix LJ in *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* that what the court looks for is 'a situation where the employee in question ... is so much a part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence'.<sup>128</sup>

Lord Phillips held that the relationship of the tortfeasor with each defendant determines whether the defendant is liable.<sup>129</sup> In that case, the diocesan bodies responsible under statute for managing a residential school for boys left it to 'the Institute', a lay Roman Catholic order, to nominate a headmaster and appoint the teachers from brother members of the Institute. The brothers entered into contracts with the diocesan bodies but it was the relationship of the brothers with the Institute which enabled their placement as teachers in the school. Lord Phillips held that it was 'fair, just and reasonable' for vicarious liability for child sexual abuse by brother teachers to be shared by the two defendants.<sup>130</sup>

In *Day v The Ocean Beach Hotel Shellharbour Pty Ltd*,<sup>131</sup> Leeming JA noted that there were statutory forms of dual vicarious liability under Australian law,<sup>132</sup> but that short of legislative reform, the acceptance of dual vicarious liability would have to come from the High Court.<sup>133</sup> The issue was not addressed by the Royal Commission in its Report. However, as has been recognised in England, there is no persuasive reason why the law should not be reformed to permit a court to find more than one defendant vicariously liable for institutional child sexual abuse in circumstances where the abuser is part of the 'work, business or organisation' of more than one institution.

### **F The Argument for Statutory Reform Rather than Common Law Development**

As already noted, the Royal Commission recommends statutory reform to bring clarity and certainty to the availability of compensation. The reasons which support statutory reform to the basis of institutional liability currently provided

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125 *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626, applied in *Day v The Ocean Beach Hotel Shellharbour Pty Ltd* (2013) 85 NSWLR 335, 334–46 [23]–[33] (Leeming JA).

126 See *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2006] 2 WLR 428.

127 [2013] 2 AC 1, 17 [43].

128 [2006] 2 WLR 428, 453 [79].

129 *Catholic Child Welfare* [2013] 2 AC 1, 18 [45].

130 *Ibid* 27 [94].

131 (2013) 85 NSWLR 335.

132 *Ibid* 344 [25]. Leeming JA referred to s 917C of the *Corporations Act* (Cth) as an example of a provision pursuant to which multiple holders of Australian financial services licences may be liable for the conduct of a single authorised representative.

133 *Ibid* 346 [33].

by the common law of tort, as opposed to leaving it to be developed by the courts, are considered briefly here.

### **1 Unpredictability of Common Law Reform**

First and foremost, there is simply no guarantee that common law development will occur at all in Australia, or with in any predictable time frame. The High Court last considered these issues in *Lepore* in 2003.<sup>134</sup> That decision had no clear ratio, contributing to the problems faced now. There are fixed criteria to meet before the High Court will grant special leave to appeal and particular criteria to satisfy before it will reconsider its earlier decisions.<sup>135</sup> The case needs to be the appropriate vehicle to determine the issues with the relevant question ‘in dispute’. Courts are restricted to deciding only the issues in the case before the court.<sup>136</sup> All these factors stand in the way of timely change to the common law by the courts. This is a particular burden for elderly and unwell survivors.

### **2 Advantages of Legislative Reform**

The legislature on the other hand is not limited by the circumstances of any particular court case so reforms can be introduced more quickly and comprehensively. Legislative provisions are capable of having a normative effect on practices and systems, an issue of considerable significance with respect to the alteration of institutional practices in response to notification of child sexual abuse, or the employment or management of staff in high risk positions. The law reform process is also capable of being consultative in a way that is not open to the judiciary.<sup>137</sup>

As has been pointed out in *Morgans v Lauchbury*, creating a special rule for a particular class of case in the context of a common law principle is generally the function of the legislature.<sup>138</sup> A stand-alone statutory regime would also avoid unintended consequences which might result from reforms that were enacted as amendments to existing civil liability legislation.<sup>139</sup>

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134 (2003) 212 CLR 511.

135 See *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438–9 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ); Matthew Harding and Ian Malkin ‘Overruling in the High Court of Australia in Common Law Cases’ (2010) 34 *Melbourne University Law Review* 519.

136 See especially the discussion of these issues in Barbara McDonald, ‘Law Reform and Private Law: The Role of Legislation in Supplementing or Supplanting the Common Law’ (Paper presented at Fifty Years of the Law Commission: The Dynamics of Law Reform Now, Then and Next – An International Conference, United Kingdom Supreme Court, London, 10–11 July 2015).

137 *Ibid.*

138 [1973] AC 127, 136–7 (Lord Wilberforce), 142–3 (Lord Pearson), 145–6 (Lord Cross), 151 (Lord Scarman), cited with approval in *Scott v Davis* (2000) 204 CLR 333, 340 [10] (Gleeson CJ).

139 In this regard we note that the Ipp reforms which have been at least partially enacted in all Australian jurisdictions were not intended to address intentional torts including sexual battery: *Ipp Report*, above n 104, 1, rec 2 [2.2]–[2.3].

### 3 Precedent for Statutory Reform of Tort Law and Vicarious Liability

Legislative intervention in the common law of tort is not new,<sup>140</sup> and has since the 19<sup>th</sup> century been used in various discrete areas to extend tortious liability,<sup>141</sup> or in some instances to augment the common law by way of statutory schemes<sup>142</sup> or codes.<sup>143</sup> It is also noteworthy that there are precedents for specific statutory reforms to the common law of vicarious liability.<sup>144</sup> In these circumstances, there are strong reasons to consider statutory reform in Australia to provide a comprehensive package of reforms to assist survivors.

### 4 Uniformity

One of the important opportunities that law reform would offer is the prospect that uniform statutory reform could be introduced in all states and territories, by agreement of the Attorneys-General.<sup>145</sup> Survivors should have the same rights and options regardless of the jurisdiction in which compensation is

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140 For a comprehensive discussion see Barbara McDonald, 'Legislative Intervention in the Law of Negligence: The Common Law, Statutory Interpretation and Tort Reform in Australia' (2005) 27 *Sydney Law Review* 443.

141 See, eg, statutory provisions which make contributory negligence a ground for reduction of damages instead of a complete defence which was formerly the case at common law: *Law Reform (Miscellaneous Provisions) Act 1955* (ACT) pt 5; *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) pt 3; *Law Reform (Miscellaneous Provisions) Act 1956* (NT) pt V; *Law Reform Act 1995* (Qld) pt 3 div 3; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) s 7; *Wrongs Act 1954* (Tas) s 4; *Wrongs Act 1958* (Vic) pt V; *Law Reform (Contributory Negligence and Tortfeasors Contribution) Act 1947* (WA); *Law Reform (Contributory Negligence) Act 1945* (UK).

142 *Workmen's Compensation Act 1897* (UK). Current Australian legislation is: *Safety, Rehabilitation and Compensation Act 1988* (Cth); *Seafarers Rehabilitation and Compensation Act 1992* (Cth); *Workers Compensation Act 1951* (ACT); *Workers Compensation Act 1987* (NSW); *Workplace Injury Management and Workers Compensation Act 1998* (NSW); *Workers Rehabilitation and Compensation Act 1986* (NT); *WorkCover Queensland Act 1996* (Qld); *Workers Rehabilitation and Compensation Act 1986* (SA); *Workers Rehabilitation and Compensation Act 1988* (Tas); *Accident Compensation Act 1985* (Vic); *Workers' Compensation and Injury Management Act 1981* (WA). There is also special legislation in some states dealing with particular types of industry or claim: see, eg, *Workers' Compensation (Dust Diseases) Act 1942* (NSW).

143 For example, defamation law in Australian jurisdictions is partially codified: *Civil Law (Wrongs) Act 2002* (ACT) ch 9; *Defamation Act 2005* (NSW); *Defamation Act 2006* (NT); *Defamation Act 2005* (Qld); *Defamation Act 2005* (SA); *Defamation Act 2005* (Tas); *Defamation Act 2005* (Vic); *Defamation Act 2005* (WA).

144 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, so that at common law the state could not be held vicariously liable for tortious acts of a police officer. This was reversed by specific legislation introduced in all jurisdictions, albeit not simultaneously. See *Australian Federal Police Act 1979* (Cth) s 64B; *Law Reform (Vicarious Liability) Act 1983* (NSW) s 8; *Police Service Administration Act 1978* (NT) s 148C; *Police Service Administration Act 1990* (Qld) s 10.5; *Police Act 1998* (SA) s 65; *Police Service Act 2003* (Tas) s 84; *Police Regulation Act 1958* (Vic) s 123; *Police Act 1982* (WA) s 137. Note that the *Australian Federal Police Act 1979* (Cth) also applies to the ACT: at s 5A.

145 It would be desirable not to repeat the experience of the tort law reforms: see *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 2002* (NSW); *Personal Injuries (Liabilities and Damages) Act 2003* (NT); *Civil Liability Act 2003* (Qld); *Civil Liability Act 1936* (SA); *Civil Liability Act 2002* (Tas); *Wrongs Act 1958* (Vic); *Civil Liability Act 2002* (WA). These statutes were enacted by Australian Parliaments in 2002–03 following the Ipp Report. Uniformity was unfortunately not achieved, though in some instances, similar but not identical provisions were enacted.

sought or in which abuse occurred. Statutory reforms to the common law of tort are, of course, constitutionally within the powers of state and territory Parliaments rather than the federal Parliament. However, it is to be hoped that there would be cooperation between all state and territory Attorneys-General in order to achieve a national uniform approach to these reforms.

### G Prospective or Retrospective Reform?

Consideration must be given to the critical question of whether reforms to impose institutional liability should be prospective only or given retrospective operation. The Royal Commission has stipulated that its proposed statutory reforms should have prospective application only.<sup>146</sup>

The law has an appropriate and abiding caution with respect to retrospective law reform, which sits uneasily with the rule of law. It is considered to be potentially prejudicial to parties who may have arranged their affairs based upon the state of the law at the time and has particular significance in relation to criminal liability.<sup>147</sup> However, there are several reasons why exceptional consideration should be given to retrospective reform of civil liability of institutions for child sexual abuse.

The most significant reason is that if comparable changes were made to the common law by the courts, they would have retrospective effect anyway, as acknowledged by the Royal Commission.<sup>148</sup> In the United States Supreme Court in *Kuhn v Fairmont*, Holmes J observed that '[j]udicial decisions have had retrospective operation for near a thousand years'.<sup>149</sup> This has already occurred in other jurisdictions that have clarified the scope of vicarious liability. However, the Royal Commission suggests that legislation should be enacted to *avoid* the likelihood that Australian courts go down a similar path.<sup>150</sup> The Royal Commission reasoned that retrospective application was not appropriate because 'relevant institutions would face potentially large and effectively new liability for abuse that has already occurred',<sup>151</sup> and that retrospective insurance would be in all likelihood unaffordable, and referred to 'the burden that retrospective change would impose on insurers or institutions that will not have insured against this liability'.<sup>152</sup> These issues are undeniable. However, the Royal Commission did not explain why they warrant a different approach in Australia to other common law jurisdictions which have already expanded vicarious liability with retrospective effect.

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146 *Redress and Civil Litigation Report*, above n 1, 495, rec 93.

147 See, eg, Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachment by Commonwealth Laws*, Interim Report No 127 (2015) 250.

148 *Redress and Civil Litigation Report*, above n 1, 491.

149 215 US 349, 372 (1910). See also M L Friedland, 'Prospective and Retrospective Judicial Lawmaking' (1974) 24 *University of Toronto Law Journal* 170.

150 *Redress and Civil Litigation Report*, above n 1, 491.

151 *Ibid* 491–2.

152 *Ibid* 491.



With respect to difficulties in defending proceedings arising from significant effluxion of time from the date of alleged abuse, courts have the power to stay any proceedings in which prejudice could be established. However, without retrospective operation for institutional liability, a significant proportion of the claims of those survivors who might be in a position to bring proceedings would be unmaintainable. Retrospective reform to limitation periods alone as proposed by the Royal Commission will be of very limited utility to existing survivors if they have no sustainable cause of action. They will be in the same position they are now.

The Royal Commission's recommendations assume the implementation of a national redress scheme, which would certainly afford some financial compensation to survivors of past abuse. On one level, this appears to reduce the need for retrospective reform. However, there is no guarantee that the redress scheme will be implemented in the manner proposed by the Royal Commission, and even if it is, the justification for denying retrospective reform by statute which could be achieved in a similar manner by common law development is not clear. This is particularly so where in other common law jurisdictions, survivors of past abuse already have access to such retrospective action.

Another issue for legislators to consider is that it is not necessary to limit consideration of retrospectivity to the particular statutory reforms proposed by the Royal Commission. An option would be the implementation of a statutory vicarious liability for survivors of past abuse in a manner comparable to the vicarious liability imposed in other common law jurisdictions with retrospective operation, even if other reforms such as the proposed duty and statutory liability are enacted with prospective operation only. This would give Australian survivors of past abuse comparable rights to those which exist currently in other jurisdictions; not greater, but not less, as is currently proposed by the Commission.

### **III OPERATION OF CIVIL LIABILITY (TORT REFORM) LEGISLATION**

The potential application of state and territory civil liability legislation to survivors' claims against institutions in the tort of negligence is an important consideration in respect of which the Royal Commission has made no recommendations. This was no doubt because the Royal Commission's recommendations were for statutory causes of action imposing institutional liability for deliberate conduct by others. Civil liability legislation across Australian jurisdictions generally excludes causes of action in respect of

deliberate conduct from the legislation.<sup>153</sup> But given that survivors of historical abuse will not have the benefit of any prospective reform, consideration should be given to the application of civil liability legislation to historical claims which may be brought in battery or may depend on causes of action in negligence. There are various aspects of the civil liability legislation<sup>154</sup> that, because they are not uniform,<sup>155</sup> would have differential effects on claims by survivors depending on the jurisdiction in which claims were brought. Given the widespread nature of institutional child sexual abuse across Australia, it would be appropriate to ensure that all claims would be decided on the same common law principles. In this Part we consider the civil liability provisions most likely to affect claims concerning institutional child sexual abuse: those dealing with the liability of public authorities, claims for psychiatric injury and the restrictions on damages.

### A Public Authority Defendants

In most Australian jurisdictions,<sup>156</sup> civil liability legislation makes special provision with regard to the liability in negligence of public authorities.<sup>157</sup> However, there are significant jurisdictional differences between them. Generally they restrict the circumstances in which public authorities will be subject to a duty of care and set out principles which the courts must consider on the issues of imposition of a duty of care on an authority, or breach of a duty of care by an authority.<sup>158</sup> It has been judicially recognised that in some cases these provisions

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153 In SA 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: Tina Cockburn and Bill Madden, ‘Intentional Torts to the Person, Compensation for Injury and 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; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 4(1). Provisions in *Civil Liability Act 2002* (Tas) s 3B(1)(a); *Wrongs Act 1958* (Vic) ss 28C(2)(a), 28LC(2)(a); *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: *Civil Liability Act 2002* (NSW) s 3B.

154 The reform legislation was based on the recommendations of the *Ipp Report*, above n 104.

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

156 Excepting SA and NT.

157 *Civil Law (Wrongs) Act 2002* (ACT) ch 8; *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. In SA s 42 of the *Civil Liability Act 1936* (SA) applies to road authorities only. In the NT, there is no specific applicable civil liability legislation.

158 Those 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. See *Civil Law (Wrongs) Act 2002* (ACT) s 110; *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.

produce the same result as the application of common law principles,<sup>159</sup> but that is not so in all cases.

It will be the case that some institutional defendants in negligence claims for child sexual abuse will be public authorities within the definitions in the civil liability statutes. In New South Wales for example, the definition of a *public or other authority* includes, among others, a government department, a public health organisation or a public or local authority constituted by or under an Act.<sup>160</sup> Notably, the New South Wales provision would include government and non-government schools.<sup>161</sup> In order to avoid differential treatment of institutional defendants which are statutory authorities, it would be desirable to ensure that the relevant civil liability legislation does not apply to institutional defendants in cases of child sexual abuse.

## B Psychiatric Injury

In most cases of child sexual abuse, the plaintiff's damage consists of psychiatric harm. Survivors of institutional child sexual abuse may wish to claim against an institution in the tort of negligence. In all Australian jurisdictions<sup>162</sup> except Queensland and the Northern Territory, civil liability legislation governs claims in respect of negligently inflicted psychiatric injury.<sup>163</sup> The provisions have some application to all cases of psychiatric harm, whether pure mental harm or mental harm that is consequent on physical injury. While the legislation is not uniform across jurisdictions, generally the effect is to restrict recovery for pure mental harm to recognised psychiatric illness<sup>164</sup> and to limit the duty of care not to cause mental harm to instances where it was foreseeable that a person of normal fortitude might suffer a recognised psychiatric illness if reasonable care were not taken.<sup>165</sup> The legislation is not radically different from the Australian common law concerning the duty of care not to cause mental harm,<sup>166</sup> but it must

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159 *Roads and Traffic Authority of New South Wales v Refrigerated Roadways Pty Ltd* (2009) 77 NSWLR 360, 400 [188] (Campbell JA). For the common law principles, see *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1.

160 *Civil Liability Act 2002* (NSW) s 41.

161 Pursuant to *Civil Liability Regulation 2014* (NSW), non-government schools are prescribed as authorities to whom the relevant part of the Act applies.

162 Following the recommendations of the *Ipp Report*, above n 104, 136 [9.5].

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

164 *Civil Law (Wrongs) Act 2002* (ACT) ss 34(1), 35; *Civil Liability Act 2002* (NSW) s 31; *Civil Liability Act 1936* (SA) s 53(2); *Civil Liability Act 2002* (Tas) s 33; *Wrongs Act 1958* (Vic) s 72(1); *Civil Liability Act 2002* (WA) s 5S(1).

165 *Civil Law (Wrongs) Act 2002* (ACT) s 34; *Civil Liability Act 2002* (NSW) s 32; *Civil Liability Act 1936* (SA) s 33; *Civil Liability Act 2002* (Tas) s 34; *Wrongs Act 1958* (Vic) s 72; *Civil Liability Act 2002* (WA) s 5S.

166 *Tame v New South Wales* (2002) 211 CLR 317. For commentary, see Peter Handford 'Psychiatric Injury: The New Era' (2003) 11 *Tort Law Review* 13; *Koehler v Cerebos (Aust) Ltd* (2005) 222 CLR 44.

necessarily include some subtle differences which will inevitably depend on future judicial interpretation of the provisions.<sup>167</sup>

In the case of consequential mental harm it would be necessary under the legislation for the plaintiff to establish a duty of care in respect of the mental harm independently of any duty of care in respect of the physical injury on which the mental injury is consequent: a separate duty of care in respect of the consequential mental harm.<sup>168</sup> This is not the case at common law where only one duty of care in respect of the physical injury need be established. At common law the chief issues for determination in relation to a consequential mental injury would be questions of causation and remoteness.<sup>169</sup>

Differential treatment of Australian plaintiffs could be avoided by ensuring that state and territory civil liability legislation does not apply to claims in respect of psychological injury caused by institutional child sexual abuse.

### C Restrictions on Damages

Civil liability legislation imposes severe limitations on personal injury damages. The legislation excludes certain causes of action<sup>170</sup> and in New South Wales for example, the exclusions include cases where liability arises from ‘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’.<sup>171</sup> So in New South Wales, 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 New South Wales Act or the prohibition on the award of exemplary, punitive and aggravated damages in section 21 of the New South Wales legislation which applies in respect of negligent conduct alone. In Tasmania, Victoria and Western Australia the position is similar to that in New South Wales.<sup>172</sup>

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

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167 The High Court has already interpreted one of the NSW provisions (*Civil Liability Act 2002* (NSW) s 30(2) relating to pure mental harm suffered by a plaintiff as a result of witnessing others ‘being killed, injured or put in peril’) as being narrower in scope than the common law: *Wicks v State Rail Authority of NSW* (2010) 241 CLR 60.

168 *Civil Law (Wrongs) Act 2002* (ACT) s 34; *Civil Liability Act 2002* (NSW) s 32; *Civil Liability Act 1936* (SA) s 33; *Civil Liability Act 2002* (Tas) s 34; *Wrongs Act 1958* (Vic) s 72; *Civil Liability Act 2002* (WA) s 55.

169 *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383; *Kavanagh v Akhtar* (1998) 45 NSWLR 588.

170 *Civil Liability (Wrongs) Act 2002* (ACT) s 93; *Civil Liability Act 2002* (NSW) s 3B(1); *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 4(1); *Civil Liability Act 2003* (Qld) ss 4–5; *Civil Liability Act 1936* (SA) s 51(a)(ii); *Civil Liability Act 2002* (Tas) s 3B(1)(a); *Wrongs Act 1958* (Vic) ss 28C(2)(a), 28LC(2)(a); *Civil Liability Act 2002* (WA) s 3B(1).

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

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

in New South Wales by virtue of section 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*’.<sup>173</sup> The New South Wales Court of Appeal interpreted the section in *Zorom Enterprises Pty Ltd v Zabow*<sup>174</sup> and held that section 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 vicariously liable for the intentional tort of an employee.<sup>175</sup> The position in other Australian jurisdictions may remain somewhat uncertain.

In a negligence claim 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. 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.<sup>176</sup> These would produce major inconsistencies and inequality resulting in under-compensation in many cases and differential compensation among survivors across Australia.<sup>177</sup> The problem would be obviated by a clear statutory statement to the effect that a relevant state or territory civil liability enactment will not apply in respect of any claim (be it in trespass to person, negligence, or any other cause of action) for damages by survivors of institutional child sexual abuse. Common law principles concerning assessment of damages should apply to these cases.

#### D Aggravated and Exemplary Damages Should Be Available in Child Sexual Abuse Cases

Consideration should be given to the availability of aggravated and exemplary damages for several reasons. Child sexual abuse is an egregious abuse of human rights.<sup>178</sup> The conduct of perpetrators and those institutions that took few if any precautions against abuse, and in many instances ignored credible

173 *Civil Liability Act 2002* (NSW), s 3B(1)(a)(emphasis added).

174 (2007) 71 NSWLR 354.

175 *Ibid* 358–9 [13]–[14] (Basten JA) (McColl and Campbell JJA agreeing).

176 *Civil Law (Wrongs) Act 2002* (ACT) pt 7; *Civil Liability Act 2002* (NSW) pts 2, 2A; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) pt 4; *Civil Liability Act 2003* (Qld) ch 3; *Civil Liability Act 1936* (SA) pt 8; *Civil Liability Act 2002* (Tas) pt 7; *Wrongs Act 1958* (Vic) pts VB, VBA; *Civil Liability Act 2002* (WA) pt 2.

177 Australian Lawyers Alliance, Submission to Royal Commission into Institutional Responses to Child Sexual Abuse, 28 February 2014, 23–5; NSW Bar Association, Submission to Royal Commission into Institutional Responses to Child Sexual Abuse, 31 March 2014, 5.

178 Australia’s international law obligations (pursuant to the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948) and the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’)) include the provision of effective remedies for victims of human rights breaches. ICCPR art 2(3) provides that where a person’s rights have been violated, that person has a right to an ‘effective remedy’ including, where appropriate, compensation: Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80<sup>th</sup> sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [15]–[16].

reports of abuse, was reprehensible, with the gravest consequences for victims. The common law courts have long recognised that a ‘right must be supported by an effective sanction’.<sup>179</sup>

Survivors are able to pursue aggravated and exemplary damages awards in trespass to person claims for sexual battery and other intentional torts against perpetrators. Though without statutory reform, aggravated and exemplary damages will not ordinarily be available in some states against institutional defendants where the cause of action is in the tort of negligence, because of tort reform legislation.<sup>180</sup>

Aggravated damages are a form of general damages awarded as compensation for ‘high-handed, malicious, insulting or oppressive’<sup>181</sup> treatment or victimisation by humiliation<sup>182</sup> or emotional distress.<sup>183</sup> Aggravated damages are provided as compensation for intangible as well as substantive injury caused by the circumstances and manner of the defendant’s wrongdoing.<sup>184</sup> Exemplary damages are punitive in nature. Whereas aggravated damages focus on factors such as humiliation, embarrassment, shame, and emotional distress of the plaintiff, exemplary damages focus on the culpable behaviour of the defendant and are awarded as punishment, retribution and deterrence.<sup>185</sup> 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’.<sup>186</sup> The sexual abuse of a child in an institution is such a grievous human rights abuse that common law principles might very often indicate the imposition of punitive damages. Exemplary damages have been awarded in many different tortious causes of action in Australia including in cases of battery<sup>187</sup> and false imprisonment.<sup>188</sup> The High Court has held that an award of both aggravated and exemplary damages is allowable and does not constitute a ‘double punishment’ where the quantum of each is not disproportionate, because the two are different in kind.<sup>189</sup>

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179 *Plenty v Dillon* (1991) 171 CLR 635, 655 (Gaudron and McHugh JJ), quoting Geoffrey Samuel, ‘The Right Approach’ (1980) 96 *Law Quarterly Review* 12, 14, quoted in *Hill v Higgins* [2012] NSWSC 270 [36] (Harrison J); *New South Wales v Ibbett* [2005] NSWCA 445, [90] (Spigelman CJ).

180 *Civil Liability Act 2002* (NSW) s 21; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 19; *Civil Liability Act 2003* (Qld) s 52.

181 *Cassell & Co Ltd v Broome* [1972] AC 1027, 1085 (Lord Reid).

182 *Lamb v Cotogno* (1987) 164 CLR 1, 8 (The Court).

183 *New South Wales v Corby* (2010) 76 NSWLR 439.

184 *New South Wales v Ibbett* (2006) 229 CLR 638, 646–7 [29]–[32] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ).

185 *Gray v Motor Accident Commission* (1998) 196 CLR 1, 7 [15] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71, 81 (Isaacs J).

186 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 129 (Taylor J).

187 *Henry v Thompson* [1989] 2 Qd R 412; *Fontin v Katapodis* (1962) 108 CLR 177.

188 *AW v New South Wales* [2005] NSWSC 543. For commentary, see Cockburn and Madden, above n 153.

189 *New South Wales v Ibbett* (2006) 229 CLR 638, 648 [35]–[36] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ).

The High Court has explicitly held that the purpose of exemplary damages is to punish and deter a defendant.<sup>190</sup> Accordingly, an award of exemplary damages may not be made where a defendant has already been convicted and subjected to a 'substantial' punishment for a criminal offence arising from the same conduct for which exemplary damages are sought. That would be a double punishment.<sup>191</sup> The situation is uncertain, however, where there is only the possibility of later criminal prosecution which has not been commenced or where a prosecution is not concluded at the time of a civil trial. There is also the possibility that a civil court might consider whether a non-custodial sentence is 'substantial' so as to preclude the imposition of an exemplary damages award.<sup>192</sup> Justice Kirby has held that an award of exemplary damages is discretionary so that a criminal conviction does not automatically bar an award. It must however be taken into account given that the object of exemplary damages is to punish a defendant.<sup>193</sup>

Where an institutional defendant is vicariously liable for the deliberate tortious conduct of the perpetrator, exemplary and aggravated damages should, on current authority, be available against the institution in most states.<sup>194</sup> However, such damages will not be available against institutional defendants in respect of negligence liability. Legislative reform allowing an award of aggravated and/or exemplary damages on common law principles against institutions in cases of negligently inflicted child sexual abuse would be necessary given the present restrictions under state legislation.

Whether it would be appropriate to legislate retrospectively to enable the award of aggravated and exemplary damages on common law principles for past abuse claims in the tort of negligence is a difficult question. To do so would increase potential liability of institutions very significantly where the number of maintainable claims would increase in the event that suggested reforms regarding abolition of limitation periods and identification of defendants were implemented. The possibility of such damages awards in respect of future cases would be a powerful deterrent and incentive for institutions to ensure as far as possible that future child sexual abuse does not occur.

## E Apologies

There is increasing recognition of the value of an apology in civil proceedings especially where the plaintiff has suffered an abuse of human

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190 *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448.

191 *Gray v Motor Accident Commission* (1998) 196 CLR 1, 13–14 [38]–[43] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

192 *Ibid* 14–15 [45], [48] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

193 *Ibid* 31–4 [92]–[98] (Kirby J).

194 *Zorom Enterprises Pty Ltd v Zabow* (2007) 71 NSWLR 354, 358–9 [13]–[14] (Basten JA) (McColl and Campbell JJA agreeing), where the NSW Court of Appeal held that *Civil Liability Act 2002* (NSW) 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) provisions restricting damages to vicarious liability for deliberate harm.

rights.<sup>195</sup> At common law the courts do not have power to order apologies, but an apology can be given on settlement of a claim. The present common law position is that admissions of regret or apologies will not automatically constitute admissions of liability.<sup>196</sup> Parliaments clearly acknowledge the merit of an apology as one in a suite of remedies in a range of civil proceedings.<sup>197</sup> In most Australian jurisdictions an apology in a claim in the tort of negligence is not admissible as an admission of liability.<sup>198</sup>

The Royal Commission has not recommended court-ordered apologies but has recommended that institutions should provide direct personal responses to survivors, including an apology, on request by a survivor.<sup>199</sup> A statutory requirement for apologies in cases of institutional child sexual abuse might be considered. While a court-ordered apology might not have the same value as a genuine apology freely given, a court- or statute-mandated apology would serve a worthwhile purpose in providing to a survivor a statement of acknowledgement and regret for abusive treatment.

#### IV IDENTIFYING A PROPER DEFENDANT WITH ASSETS TO MEET A CLAIM

##### A Faith-Based Institutions with Statutory Property Trusts

The Royal Commission's Report details the disproportionate numbers of abuse cases in faith-based institutions.<sup>200</sup> One of the major impediments to claims by these plaintiffs<sup>201</sup> is identifying any corporate entity in existence at the time the abuse occurred and still existing that has assets available to meet a judgment. In

195 Prue Vines, '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* 1; Prue Vines, 'The Apology in Civil Liability: Underused and Undervalued?' (2013) 115 *Precedent* 28; Prue Vines, 'Apologies and Civil Liability in the UK: A View from Elsewhere' (2008) 12 *Edinburgh Law Review* 200; Robyn Carroll, '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 *University of New South Wales Law Journal* 360; Robyn Carroll, 'Apologies as a Legal Remedy' (2013) 35 *Sydney Law Review* 317; Craig Brown, 'Apology Legislation: Oiling the Wheels of Tort' (2009) 17 *Tort Law Review* 127; Chris Wheeler, 'The Power of Sorry' (Paper presented at Judicial Commission of NSW Ngara Yara Program Twilight Seminar, 16 February 2011).

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

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

198 *Civil Law (Wrongs) Act 2002* (ACT) s 14; *Civil Liability Act 2002* (NSW) s 69; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 13; *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.

199 *Redress and Civil Litigation Report*, above n 1, 172, rec 5(c)(i). Where a survivor wants no direct contact with the institution, the Commission recommends that the operator of the recommended redress scheme should facilitate the provision of an apology by the institution: at 176, rec 6.

200 *Ibid* 121, table 11.

201 Particularly in relation to claims against the Catholic Church.



many instances survivors were abused in institutions that were unincorporated associations though they were part of a mainstream church and conducted by clergy or other religious personnel or lay members of the church. While there existed a hierarchical church authority and while institutions were situated on church real estate, there was no corporate structure and no legal relationship of responsibility between church corporations or trusts and the institution or church members responsible for the abuse.<sup>202</sup>

It seems manifestly unjust that survivors of abuse in faith-based institutions have no opportunity to recover compensation at common law from long-established religious groups having very significant assets. Those assets are unavailable to meet a judgment and the religious group cannot be made a party to litigation because of its lack of corporate personality. Yet these same churches have the benefit of perpetual succession in relation to property ownership under state and territory legislation.<sup>203</sup>

The decision of the New South Wales Court of Appeal in *Trustees of the Roman Catholic Church v Ellis* ('*Ellis*')<sup>204</sup> illustrates the difficulties facing survivors of child sexual abuse by persons associated with unincorporated religious bodies. In that case the plaintiff joined as a defendant the Trustees of the Roman Catholic Church for the Archdiocese of Sydney, a statutory body corporate with perpetual succession established under the *Roman Catholic Church Trust Property Act 1936* (NSW).<sup>205</sup> The plaintiff's case was that the Trust owned the church property for the Archdiocese of Sydney including the church premises at Bass Hill where the plaintiff was sexually abused by the parish priest and that 'as the permanent corporate entity or interface between the spiritual and temporal sides of the Church [it was] legally responsible for the Acts and

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- 202 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Redress and Civil Litigation* (2015) 220–5 [10.4] ('*Redress Consultation Paper*'). 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: at 223 [10.4]. See also Patrick Parkinson, 'Child Sexual Abuse and the Churches: A Story of Moral Failure?' (2014) 26 *Current Issues in Criminal Justice* 119, 132.
- 203 See, eg, *Anglican Church of Australia Trust Property Act 1917* (NSW); *Christian Israelite Church Property Trust Act 2007* (NSW); *Roman Catholic Church Trust Property Act 1936* (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).
- 204 (2007) 70 NSWLR 565. This decision was followed in *PAO v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2011] NSWSC 1216. Separate plaintiffs who were students at Patrician Brothers Primary School at Granville had their cases heard with four other identical claims. All were unsuccessful for the same reasons.
- 205 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: *Ellis* (2007) 70 NSWLR 565, 583 [78] (Mason P) (Ipp and McColl JJA agreeing). The proceedings were not continued against the estate of the deceased alleged abuser.

omissions of the Archbishop and his subordinates'.<sup>206</sup> The evidence was that the Trustees had no role in the appointment or oversight of priests.<sup>207</sup> The plaintiff's claim against the Trustees failed in the Court of Appeal where it was held that the statutory recognition of the Trust as capable of being sued in its corporate name did not render the Trust a defendant 'responsive in law to any and every claim for legal redress that a person might wish to bring against a Catholic in the Archdiocese'.<sup>208</sup> Furthermore, it was held that the fact that the Trustees held property for and on behalf of 'the Church' did not render the property available to meet any liability 'associated with Church activities'.<sup>209</sup>

If survivors are to be afforded a remedy in tort it should be a straightforward matter for them to identify and sue a corporate entity that has the financial capacity to meet claims. A potential solution to this problem would be legislation making church property trusts the proper defendants to claims for child sexual abuse for which the church is alleged to be liable, and to 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. The assets of the church property trusts should be made available to meet liability of the church in respect of any claim for institutional child sexual abuse.

The Royal Commission's Consultation Paper suggested that legislation conferring the benefit of succession to property owned by religious bodies could be amended to provide that liability of the religious body for institutional child sexual abuse could be met from the assets of the trust. Further, the trust could be made the proper defendant to claims of child sexual abuse against the religious body.<sup>210</sup>

A non-government Bill introduced in the New South Wales Parliament in 2014 provides an example of the type of provision that would ensure that a plaintiff would have the opportunity to sue in respect of abuse suffered in a faith-based institution where there is no corporate defendant having available assets to meet a judgment. The Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2014 (NSW)<sup>211</sup> dealt specifically with the Catholic Church. In summary, it provided that a plaintiff claiming damages for sexual abuse by a member of the Church's clergy (or other person related to the Church) while the plaintiff was in the care of the Church could join as a defendant to

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206 These words were used by the judge at first instance who held that there was an arguable case against the Trustees: *Ellis v Pell* [2006] NSWSC 109, [73] (Patten JA).

207 *Ellis* (2007) 70 NSWLR 565, 590 [120] (Mason P) (Ipp and McColl JJA agreeing).

208 *Ibid* 590 [118] (Mason P) (Ipp and McColl JJA agreeing).

209 *Ibid* 596 [149] (Mason P) (Ipp and McColl JJA agreeing). The Court of Appeal referred to *Archbishop of Perth v 'AA' to 'JC'* (1995) 18 ACSR 333, where the plaintiffs sought to make a legal person liable for damages for sexual and physical abuse allegedly committed by members of the Christian Brothers. In that case the plaintiffs were unsuccessful for the same reasons as the plaintiff in *Ellis*.

210 *Redress Consultation Paper*, above n 202, 224 [10.4].

211 A private member's public Bill introduced by David Shoebridge MLC. The Bill lapsed on prorogation on 2 March 2015; it had lapsed previously on prorogation on 8 September 2014 and been restored to Business Papers on 9 September 2014. The Royal Commission referred to the Bill in its Report: *Redress and Civil Litigation Report*, above n 1, 501.

proceedings the body corporate established under the *Roman Catholic Church Trust Property Act 1936* (NSW) and the trustees of Church trust property. Further, a body corporate established under the *Roman Catholic Church Communities' Lands Act 1942* (NSW) which employed the abuser or that was trustee of land of a community to which the abuser belonged could be joined as a defendant. These corporations and their trustees were to be jointly and severally liable as if they were the abuser.<sup>212</sup> The provisions were to apply retrospectively.<sup>213</sup> The Bill further provided that judgment debts for sexual abuse by Church clergy, officials or teachers could be required to be paid from trust funds.<sup>214</sup> While the New South Wales Bill dealt solely with liability of the Catholic Church, a general provision of this type would be appropriate to all cases of faith-based institutions.

The final recommendations of the Royal Commission on this issue do not go so far as to recommend that in all cases, property trusts are to be the 'proper defendants' to proceedings against faith-based organisations. Rather, the Commission has recommended a kind of default setting whereby if any institution with which a property trust is associated fails to nominate a proper defendant with sufficient assets to meet a claim when a survivor wishes to litigate, then the property trust is the proper defendant. In such circumstances the liability of the institution could be met from the assets of the trust.<sup>215</sup> While the Commission's recommended legislation would achieve the desired result, it relies on compliance by religious organisations. If they were reluctant or tardy to nominate a suitable entity as defendant, plaintiffs would be disadvantaged by delay and procedural difficulties. Legislation making church or religious property trusts the 'proper defendant' from the outset is the surest way to preclude the problems illustrated by *Ellis*.

## **B Difficulties in Identifying a Proper Defendant in Institutions Other than Faith-Based Institutions**

The Royal Commission's recommendation concerning the nomination of proper defendants applies to institutions with which property trusts are associated. However, there would be many unincorporated institutions or associations having no association with property trusts. Under the legislation recommended by the Royal Commission, they would not be subject to any requirement to nominate proper defendants. There are many institutions or associations which are smaller and less hierarchically organised than their faith-based counterparts, but which are no less responsible for the wellbeing of children in their care or control. In such cases, the lack of a corporate entity to

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212 There was provision for extension 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 it would be just to make the Church liable for the abuse, if proven: *The Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2014* (NSW) cl 18(2).

213 *Ibid* cl 18.

214 *Ibid* cl 19.

215 *Redress and Civil Litigation Report*, above n 1, 511, recs 94–5.

sue is, however, only the threshold problem. Many associations (particularly small interest groups or sporting or other clubs) may have no assets which would be available to meet a judgment, even if there were an entity to be sued.

One approach would be to require that in future such entities carry insurance or self-insure with declared assets against claims for civil liability for child sexual abuse by employees or associates or volunteers. Such a proposal was considered by the Royal Commission in its *Redress Consultation Paper*<sup>216</sup> and a similar solution has also been proposed by the Parliament of Victoria Family and Community Development Committee in its *Betrayal of Trust Report*.<sup>217</sup>

The Royal Commission accepted that there may be 'some merit' in the Victorian Parliament Family and Community Development Committee's recommendation that, where the Victorian Government funds non-government organisations or provides tax exemptions or other entitlements, the government consider requiring them to be incorporated and adequately insured.<sup>218</sup> The Commission was ultimately persuaded that compulsory incorporation and insurance of small community organisations would potentially deter people from forming small associations, thereby 'losing the various sporting, cultural and other activities they provide in the community'.<sup>219</sup> For this reason the Royal Commission declined to recommend that *any* organisations should be required to incorporate.<sup>220</sup> The Royal Commission did however suggest that where unincorporated bodies receive direct or indirect government funding to provide children's services, they might be required to insure.<sup>221</sup>

To ensure access to compensation by survivors, the preferable approach would be to require incorporation of bodies which undertake responsibility for the physical welfare or spiritual, psychological or emotional guidance of children. This is especially so in the case of organisations that are funded by government or provided with tax exemptions and other entitlements. Exemptions could be allowed for small organisations (sporting and other clubs with small memberships, for example). The requirement for compulsory incorporation and insurance could be limited to specific types of organisations which provide particular types of children's services, as was suggested by the Royal Commission in its *Redress Consultation Paper*.<sup>222</sup>

A statutory requirement for incorporation of at least some of these non-government organisations would ensure that survivors have the capacity to easily identify and sue a corporate entity. The Royal Commission did not discuss the reasons why such a proposal could not be framed in a way that provided the benefits of incorporation and insurance, but it was apparently to avoid deterring desirable social activities among sporting and smaller associations.

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216 *Redress Consultation Paper*, above n 202, 224 [10.4].

217 *Betrayal of Trust Report*, above n 119, 536.

218 *Redress and Civil Litigation Report*, above n 1, 510.

219 *Ibid* 511. See also *Redress Consultation Paper*, above n 202, 224 [10.4].

220 *Redress and Civil Litigation Report*, above n 1, 511.

221 *Ibid*.

222 *Ibid*.

## V STATUTORY LIMITATION PERIODS

The threshold issue for most survivors wishing to pursue a claim at common law is the expiration of a limitation period, which is a major obstacle. It is well documented that many survivors take many years to disclose their abuse.<sup>223</sup> The Royal Commission found that the average time taken by those who attended its sessions to disclose their sexual abuse was 22 years from the date of the abuse.<sup>224</sup>

### A Limitation Periods for Personal Injury

All Australian states and territories impose limitation periods for claims in respect of personal injury.<sup>225</sup> Following the recommendations of the *Ipp Report*<sup>226</sup> in 2002, some Australian jurisdictions<sup>227</sup> enacted limitation provisions that generally follow the recommendations, though they are not uniform.<sup>228</sup> Broadly speaking, pursuant to these provisions the limitation period of three years commences upon the date of ‘discoverability’ of the cause of action with a ‘long-stop’ period of 12 years running from the date of the event on which the claim is based. In some instances the courts have discretion to extend the long-stop period to the expiry of a period of three years from the date of discoverability. Limitation periods may be suspended during any incapacity of the plaintiff,

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223 These reasons include: infancy; debilitating psychological injury as a result of the abuse; lack of access to legal advice; ignorance of the link between the abuse and psychiatric illness; fear of retaliation; personal guilt; fear of not being believed; the possibility of retraumatisation associated with seeking civil remedy or complaint to criminal law enforcement authorities: see Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report* (2014) 8 [5.1]; Patrick Parkinson, Kim Oates and Amanda Jayakody, ‘Breaking the Long Silence: Reports of Child Sexual Abuse in the Anglican Church of Australia’ (2010) 6 *Ecclesiology* 183, cited in Judy Cashmore and Rita Shackel, *Responding to Child Sexual Abuse* (May 2013) Australian Review of Public Affairs <[http://www.australianreview.net/digest/2013/05/cashmore\\_shackel.html](http://www.australianreview.net/digest/2013/05/cashmore_shackel.html)>.

224 Redress Consultation Paper, above n 202, 204 [10.2]. See also figures for Queensland cases: Ben Mathews, ‘Limitation Periods and Child Sexual Abuse Cases: Law, Psychology, Time and Justice’ (2003) 11 *Torts Law Journal* 218; and SA: Jan Breckenridge, Joan Cunningham and Karen Jennings, *Cry for Help: Client and Worker Experiences of Disclosure and Help Seeking Regarding Child Sexual Abuse* (2008) Relationships Australia <[http://www.respondsa.org.au/wp-content/uploads/sites/8/2013/05/Cry-for-Help-Report\\_2008.pdf](http://www.respondsa.org.au/wp-content/uploads/sites/8/2013/05/Cry-for-Help-Report_2008.pdf)>.

225 *Limitation Act 1985* (ACT) s 16B (three years); *Limitation Act 1969* (NSW) s 50(C) (three years with 12 year long-stop); *Limitation Act 1981* (NT) s 12(1) (three years); *Limitation of Actions Act 1974* (Qld) s 11(1) (three years); *Limitation of Actions Act 1936* (SA) s 36(1) (three years); *Limitation Act 1974* (Tas) s 5A (three years with 12 year long-stop); *Limitation of Actions Act 1958* (Vic) s 27D (three years with 12 year long-stop); *Limitation Act 2005* (WA) s 14(1) (three years).

226 *Ipp Report*, above n 104, 87–97, recs 23–5.

227 *Limitation Act 1969* (NSW); *Limitation Act 1974* (Tas); *Limitation of Actions Act 1958* (Vic).

228 For discussion, see Peter Handford, ‘“Negligence, Nuisance or Breach of Duty” and “Disease or Disorder”: Personal Injury Limitation Periods in the High Court’ (2006) 14 *Tort Law Review* 125; Ben Mathews, ‘Post-Ipp Special Limitation Periods for Cases of Injury to a Child by a Parent or Close Associate: New Jurisdictional Gulfs’ (2004) 12 *Torts Law Journal* 239; Mathews, ‘Limitation Periods and Child Sexual Abuse Cases’, above n 224.

including minority or disability.<sup>229</sup> Though, it should be noted that in New South Wales and Victoria the provisions concerning children are particularly severe with the limitation period continuing to run during minority in most cases where a child has a parent or guardian, except where minors were injured by the parent, guardian or close associate of the parent or guardian.<sup>230</sup> Under present limitation legislation around Australia, plaintiffs whose claims are statute barred need to persuade a court that it is just and reasonable to grant an extension of time in which to bring proceedings.<sup>231</sup>

There are important rationales for the imposition of limitation periods: that delays in commencing proceedings lead to loss of evidence; that it may be oppressive to defendants to allow distant past claims to be maintained; that defendants should be able to arrange their affairs without indefinite uncertainty concerning potential liability; and that public interest requires that disputes should be settled expeditiously.<sup>232</sup> Yet the law must maintain a balance between the rights of defendants and those of plaintiffs<sup>233</sup> so that the limitation period does not operate to shut out claims unjustly.

## **B Effect of Limitation Periods in Institutional Child Sexual Abuse**

Numerous cases illustrate the potency of the limitation defence and the frequency with which it is employed against plaintiff survivors of childhood

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229 *Limitation Act 1985* (ACT) s 36; *Limitation Act 1981* (NT) s 36(1); *Limitation of Actions Act 1974* (Qld) s 29; *Limitation of Actions Act 1936* (SA) ss 45, 45A; *Limitation Act 1974* (Tas) s 26; *Limitation Act 2005* (WA) ss 30–3.

230 *Limitation Act 1969* (NSW) ss 50E, 50F; *Limitation of Actions Act 1958* (Vic) ss 27I, 27J. See Mathews, 'Post-Ipp Special Limitation Periods', above n 228; Ben Mathews, 'Assessing the Scope of the Post-Ipp "Close Associate" Special Limitation Period for Child Abuse Cases' (2004) 11 *James Cook University Law Review* 63.

231 Generally, the matters which the courts are required to consider on an application for extension are: the length of and reasons for the delay; any prejudice to the defendant by reason of lost evidence; the nature and extent of the plaintiff's injury; any conduct of the defendant that induced the delay by the plaintiff; the plaintiff's efforts to obtain medical, legal or other expert advice and the nature of advice received; the time when the cause of action was discoverable. See, eg, *Limitation Act 1969* (NSW) ss 62A, 62B. In NSW there is the added requirement that a plaintiff must satisfy the Brisbane South onus by establishing that a fair trial is possible notwithstanding a prolonged delay and despite a presumed reduced capacity for witnesses to recall events: *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 ('Brisbane South').

232 *Brisbane South* (1996) 186 CLR 541, 552 (McHugh J); *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256, 320 [218] (Callinan J); David Jackson, 'The Legal Effects of the Passing of Time' (1970) 7 *Melbourne University Law Review* 407, 409.

233 *Brisbane South* (1996) 186 CLR 541, 553 (McHugh J).

sexual abuse.<sup>234</sup> In *Ellis v Pell*<sup>235</sup> the plaintiff was successful in obtaining an extension of time in which to sue the second defendant.<sup>236</sup> Mr Ellis was required to provide much detailed evidence of his psychiatric injury and he was cross-examined for more than three days during the hearing.<sup>237</sup> The cases illustrate how arguments about limitation periods can be hard-fought by defendants and distressing for claimants. It is also clear that the institutional childhood sexual abuse cases offer little guidance as to the likely outcome.

The impact of statutory limitation periods on child sexual abuse cases is disproportionate to other civil claims because of the particular circumstances of adult survivors of child sexual abuse who so often are unable to disclose their abuse or to seek compensation for many years afterwards. Further, the psychiatric injuries caused by the abuse are the very reason that the survivors have been unable to commence proceedings earlier: effectively the defendants are a significant cause of the delay. In very many cases of institutional child sexual abuse, adult plaintiffs will need to make successful applications for extension of limitation periods before any issue in the substantive causes can be tried.<sup>238</sup> The process is expensive, uncertain, carries a high risk of an unfavourable costs order and takes a further emotional and psychological toll upon a likely already fragile plaintiff survivor.

A common argument against removing limitation periods entirely is the risk that delay will prejudice the ability of a defendant to defend proceedings where critical evidence has been lost or key witnesses are no longer available. Yet, 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

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234 See, eg, *Cranbrook School v Stanley* [2002] NSWCA 290; *Hopkins v Queensland* [2004] QDC 21; *SDW v Church of Jesus Christ of Latter-Day Saints* [2008] NSWSC 1249 (applying *Limitation of Actions Act 1974* (Qld)), where an extension of time was refused. In *Salvation Army (South Australia Property Trust) v Rundle* [2008] NSWCA 347, [107] (McColl JA), [134]–[143] (Basten JA), [155]–[156] (Bell JA), an extension of time under the *Limitation of Actions Act 1936* (SA) was upheld in the NSW Court of Appeal. In *Lloyd v Bambach* [2005] NSWSC 80, an extension of time was granted.

235 [2006] NSWSC 109. The third defendant (the plaintiff's abuser) had died prior to the hearing and the plaintiff did not proceed against his estate. The Court held that the cause of action could not be maintained against Archbishop Pell and dismissed the motion in respect of the first defendant with costs.

236 *Ibid* [95] (Patten AJ). The Court held that he had not become aware of the nature and extent of his injury until September 2001, though the abuse he suffered had ceased in 1979. The court exercised its discretion to grant an extension of time having concluded that it would be just and reasonable to do so because the evidence sufficiently established that there could be 'a fair trial of the Plaintiff's action albeit not a perfect one'.

237 Australian Lawyers Alliance, Submission to Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper on Redress and Civil Litigation*, 2 March 2015, 16 [46]. For a perspective from Mr Ellis himself, see John Ellis and Nicola Ellis, 'A New Model for Seeking Meaningful Redress for Victims of Church-Related Sexual Assault' (2014) 26 *Current Issues in Criminal Justice* 31.

238 In NSW the issue of limitation periods can be determined together with other substantive issues at the hearing, or separately at an interlocutory hearing: *Guthrie v Spence* (2009) 78 NSWLR 225, 229 [10] (Campbell JA). High Court authority is to the effect that generally, all issues should be determined in one hearing: *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 533 (Mason CJ, Dawson, Gaudron and McHugh JJ).

specified day.<sup>239</sup> Supreme courts have inherent power to stay proceedings which are an abuse of process<sup>240</sup> permanently where there cannot be a fair trial due to delay in commencing the proceedings.<sup>241</sup> This inherent power of the courts mitigates any concern about disadvantage to institutional defendants.<sup>242</sup>

### C Legislative Reforms to Date

In some Australian legislatures there is now recognition that the demands of justice for survivors of child sexual abuse require alteration to existing statutory limitation regimes. In New South Wales the *Limitation Amendment (Child Abuse) Act 2016* (NSW) removes altogether the limitation period for damages claims for death or personal injury arising from child abuse. The Act defines ‘child abuse’ as abuse perpetrated against a person under 18 years of age, that is sexual abuse, serious physical abuse, and/or other abuse perpetrated in connection with sexual or serious physical abuse.<sup>243</sup> Importantly, the Act preserves any inherent jurisdiction of the courts including the court’s powers to stay proceedings where a defendant would be unduly prejudiced by delay. In Victoria, the *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic) retrospectively removes limitation periods for causes of action for damage resulting from physical or sexual abuse (and consequent psychological damage) when the plaintiff was a minor.<sup>244</sup>

### D The Royal Commission’s Recommendation

The Royal Commission has recommended that state and territory governments should retrospectively remove limitation periods in respect of all claims for personal injury resulting from institutional childhood sexual abuse.<sup>245</sup>

239 See, eg, *Civil Procedure Act 2005* (NSW) s 67.

240 *Jago v District Court of New South Wales* (1989) 168 CLR 23.

241 *Battistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256.

242 Indeed, the NSW Department of Justice made this very point in its Discussion Paper: ‘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’: NSW Government, Department of Justice, ‘Limitation Periods in Civil Claims for Child Sexual Abuse’ (Discussion Paper, January 2015) 11.

243 *Limitation Amendment (Child Abuse) Act 2016* (NSW) sch 1.

244 *Limitation of Actions Act 1958* (Vic) ss 27O–27P. The *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic) was enacted in response to the Betrayal of Trust Report, above n 119. Similarly, in Canada most provinces and territories have legislated to alter limitation periods for cases of child sexual abuse and in many instances the limitation period has been removed altogether, though the legislation is not uniform. Alberta: *Limitations Act*, RSA 2000, c L-12; British Columbia: *Limitation Act*, SBC 2012, c 13; Manitoba: *Limitation of Actions Act*, CCSM 2014, c L-150; New Brunswick: *Limitation of Actions Act*, SNB 2009, c L-8.5; Newfoundland and Labrador: *Limitations Act*, SNL 1995, c L-16.1; Saskatchewan: *The Limitations Act*, SS 2004, c L-16.1; Yukon: *Limitation of Actions Act*, RSY 2002, c 139. For a discussion of the problems of non-uniformity of Canadian legislation and remaining unresolved issues, see Elizabeth Adjin-Tettey and Freya Kodar, ‘Improving the Potential of Tort Law for Redressing Historical Abuse Claims: The Need for a Contextualised Approach to the Limitation Defence’ (2010) 42 *Ottawa Law Review* 95.

245 *Redress and Civil Litigation Report*, above n 1, 459, recs 85–8.



This recommendation is consistent with the approach in other Australian and overseas common law jurisdictions.<sup>246</sup> There is no limitation period in relation to criminal prosecution for the abuse which causes the injuries for which adult survivors seek compensation. It has been argued that this anomaly should be a persuasive factor enabling survivors to bring civil claims out of time.<sup>247</sup>

The removal of limitation periods altogether<sup>248</sup> is a straightforward and effective method of providing plaintiffs with a pathway to a tortious remedy. It obviates the need for expensive and uncertain interlocutory proceedings where defendants plead the limitation defence and seek to have proceedings struck out. Plaintiffs would not be required to provide evidence of their psychological damage at the interlocutory stage, and defendants' legal attention would shift to the merits of the substantive case rather than a limitation defence. Existing judicial powers to order the stay of proceedings, or to strike out or dismiss claims without prospects of success, provide protection to defendants against prejudicial litigation in respect of distant past events.

## VI COMMON LAW RIGHTS UNDER A REDRESS SCHEME

Finally, we consider whether, if a redress scheme is implemented, survivors of past abuse should retain their common law rights if they receive payment under the scheme. The Royal Commission has recommended that a single national redress scheme be established by the Australian government with the cooperation of states and territories.<sup>249</sup> The Royal Commission recommends that an applicant receiving a payment pursuant to the scheme be required to release the scheme and the contributing government and the relevant institution from any further liability for the abuse.<sup>250</sup> The applicant would be required to sign a deed of release and would be provided with limited fixed-price legal advice funded by the scheme before accepting the scheme offer and signing the release.<sup>251</sup> Of course, it is a basic tenet of the common law that a person should not be compensated twice for a single loss and clearly double recovery should be prohibited. But it is not necessary to require survivors effectively to make an election between a claim against a redress scheme and a common law claim to avoid double compensation. A fairer arrangement would be to require a survivor who had obtained a payment under a redress scheme to refund the payment upon

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246 Ibid 383–90, recs 63–5.

247 *Applications 861 and 864* (Unreported, District Court of Queensland, Botting DCJ, 21 June 2002), where the defendant had been convicted of sexual offences against the plaintiffs, yet the Court held that a 38-year delay in bringing proceedings was too prejudicial to the defendant.

248 *Redress and Civil Litigation Report*, above n 1, 459, recs 85–8.

249 Ibid 322–4, recs 26–30, 355, recs 43–7.

250 Ibid 383–90, recs 63–5.

251 Ibid 389–90, recs 64–5.

subsequent recovery of common law damages in respect of the same abuse for which the scheme payment was received.<sup>252</sup>

The Royal Commission was persuaded that survivors should be required to give up their common law rights because the scheme was seen as an alternative to litigation rather than an addition to it. Given that the Commission has stated that the payments pursuant to the proposed redress scheme ‘should not attempt to be fully compensatory or to replicate common law damages’,<sup>253</sup> there is an apparent contradiction where receipt of a payment under the scheme would extinguish a claimant’s common law right to sue for damages, especially as the scheme would not offer sums comparable in value to common law damages.<sup>254</sup>

The Royal Commission was further influenced by the practical consideration of increasing the likelihood that institutions and insurers would respond favourably to the proposal for a scheme if payments extinguished common law rights.<sup>255</sup> Such an approach may be pragmatic but it does not necessarily best serve the interests of fairness for survivors of abuse.

The Commission emphasised the likely increased costs to the scheme if common law rights were preserved because the Actuaries Institute had submitted that the costs of ‘no-fault schemes’ increased where common law entitlement coexisted.<sup>256</sup> In the context of recommending a universal scheme for disability care and support, the Australian Productivity Commission emphatically stated that avoidance of double compensation involves ‘significant, unavoidable administrative complexities and high costs’<sup>257</sup> where an injured person receives financial compensation for injury as well as having access to taxpayer-funded social welfare services. But the redress scheme proposed for survivors of institutional child sexual abuse is *not* a universal ‘no-fault liability scheme’ in the same category as the National Disability Insurance Scheme or workers compensation schemes or motor accident compensation schemes. It is an entirely different species of smaller scheme that is not to be entirely funded by government. It will provide single payments of limited financial redress to a finite number of victims of past wrongdoing, as well as some counselling and psychological services. It is envisaged that the scheme will eventually close,<sup>258</sup> with the number of potential claimants estimated at 60 000.<sup>259</sup> In this context the arguments concerning efficiency, complexity of administration and the high expense of avoiding double compensation are not so persuasive because the scale

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252 There are precedents for this type of arrangement in past and present workers’ compensation statutes in various Australian jurisdictions: see, eg, *Workers Compensation Act 1951* (ACT) ss 184–6.

253 *Redress and Civil Litigation Report*, above n 1, 222.

254 The Australian Lawyers Alliance argued strongly in the Royal Commission that survivors should not be required to forego common law rights: Australian Lawyers Alliance, Submission to Redress Consultation Paper, above n 237, 12.

255 *Redress and Civil Litigation Report*, above n 1, 388–9.

256 Actuaries Institute, *Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, Issues Paper No 6: Redress Schemes*, 23 April 2014, 7.

257 Productivity Commission, above n 7, 814.

258 *Redress and Civil Litigation Report*, above n 1, 358, rec 48. There is no fixed closing date.

259 *Ibid* 33.

is much reduced. Any administrative and cost burden of avoidance of double compensation could be borne by the scheme rather than eliminated altogether by requiring survivors of abuse to forego their common law rights. In the event of a common law judgment or settlement, double compensation would be avoided by a refund or set-off arrangement in respect of any prior redress scheme payment and the plaintiff/applicant would cease to be eligible for counselling and psychological services through the redress scheme.

## VII CONCLUSION

Survivors of institutional child sexual abuse have long been faced with procedural and doctrinal hurdles making proceedings for compensation arising from extremely difficult circumstances only harder and more uncertain. There is now the opportunity for governments to implement reforms to clarify and reform the law. It will be up to the governments of Australia to agree on the form of institutional liability and additional measures to ensure better institutional practices and greater accountability for the future. To deliver effective and meaningful reform the preferable course is for the implementation of a *package* of specific, uniform legislative reforms. Reforms which provide for the retrospective removal of limitation periods, a clear basis for institutional liability, dual vicarious liability, consequential amendments to civil liability provisions, and the introduction of reforms to address the identification of proper defendants in faith-based institutions and other unincorporated associations, would ameliorate the most significant hurdles that currently stand in the way of compensation from institutions for child sexual abuse.

The Royal Commission's recommendations for statutory liability aim to clarify the cause of action on which survivors can claim compensation from institutions. This is much-needed reform given the current state of the common law of tort. The proposed extension of liability to a greater range of workers associated with institutions would be a significant and advantageous development for Australian law. However, there are unanswered questions about the form and scope of the proposed statutory liabilities. That said, these are matters which can be resolved in drafting the reforms: the more pressing concern will be the collective political will to ensure that statutory reforms to institutional liability will be passed. However, unless some substantive reforms are given retrospective operation, the reforms will assist future victims only. There is a strong argument to be made that Australian survivors of past abuse should not be worse off than survivors in other common law jurisdictions.