Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

Redress and civil litigation

Providing effective redress to survivors of abuse

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

2 March 2015

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WHO WE ARE

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

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

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

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

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INTRODUCTION

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

ISSUE 1 – A NATIONAL SCHEME?

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

2. There are advantages and disadvantages in a single national scheme. It would be slow to implement and require the referral of powers by states and territories. However, the alternative is a model which individual states and territories may or may not follow or implement only in part, creating great difficulty for those abused across jurisdictions and making injustice widespread between victims. We favour a single national scheme despite the potential delays in implementation.

3. The implementation of a national scheme would mean that there is less likely to be inequality in compensation amounts across jurisdictions. This would also reduce the number of disputes, as claimants would not be required to dispute which jurisdictional scheme would be more appropriate under their circumstances for their claim.

4. Creating a national scheme also avoids duplication in terms of processes, precedent and administration. We believe that in the long term, the administration of a national scheme would be more efficient.

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5. We submit that compensation previously paid under schemes (whether statutory or otherwise) should clearly be taken into account in any future scheme, by giving credit in respect of amounts previously received.

6. For those individuals dissatisfied with the scheme, common law rights should remain.

ISSUE 2 – PAST AND FUTURE VICTIMS

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

7. If the underlying causes that currently inhibit survivors from being able to claim compensation at common law are addressed, we submit that there may be a reduced need for a redress scheme for future victims of institutional abuse. It should also mean that most future victims would have access to a common law remedy should they wish to avail themselves of it.

8. However, allowance should be made for non-compliant institutions and for people who cannot face the stress of the risk of litigation. Although overwhelmingly, most cases resolve without going to court, it would be appropriate to give access to the scheme to future victims.

9. Even in the future, there will be some victims who won't be able to sue and there will be some people who won't wish to go to court. If the average time is 22 or 23 years before they come forward, the scheme will be closed before anyone abused in the last ten years gets a chance. An end date may not be likely to work.

10. If the underlying causes that currently inhibit survivors from being able to

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

11. These underlying causes include dealing with the problems in respect of limitation periods; vicarious liability; identity of defendants; incorporation of organisations as a legal entity capable of being sued; and the potential role of insurance. Doing so retrospectively should mean that most victims have access to a common law remedy, reducing the cost of a redress scheme.

12. With regard to apologies, they cannot be mandated. An apology which is as lacking in apparent sincerity as that read by Cardinal Pell without looking at the victim of his bureaucratic maladministration, John Ellis, (who was only a few metres away) is utterly without meaning or utility. There is undoubtedly a place for apologies, but they cannot be legislated.

ISSUE 3 – COUNSELLING AND CARE

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

13. There should be no fixed limits on counselling and psychological care provided to survivors under a redress scheme.

14. There may be a need for payment of the gap between medical charges and the scheduled fee in respect of practitioners who do not bulk-bill. An option under which existing Medicare services are utilised but gap payments are met through supplementary funding seems attractive.

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ISSUE 4 - MONETARY COMPENSATION

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

15. In respect of monetary payments, there appears to be much to be said for using something like s16 of the NSW *Civil Liability Act* 2002. Under that section, there is a cap, and payments (in that case for pain and suffering only) one judges as a percentage of a most extreme case, with reduced benefits in the lower range. Payments start at about 15% and a full percentage of a most extreme case is reached at about 33%. In NSW, the maximum amount for a most extreme case is currently $572,000 (indexed) for pain and suffering alone. Other heads of damage such as economic loss and care may greatly exceed this sum.

16. If there were to be a reduction at the lower end of the range, it would certainly need to be significantly less than the 15% starting point under the NSW CLA. Moreover, it would be appropriate for both pain and suffering and past and future economic loss to be included within such a calculus

17. Allowance for medical needs should be in a different category and should be, it is suggested, unrestricted, to the extent that they are over and above existing Medicare entitlements.

18. It would have to be recognised that such a scheme (which would still be significantly less than the Irish scheme) might in many cases grossly inadequately compensate for economic loss but such claims should, it is submitted, be more appropriately left to the common law to compensate, subject to appropriate legislative changes, to make such remedies more readily available for both past and future victims.

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19. The NSW experience of percentages of a most extreme case goes back to the implementation, initially for motor accidents, from about 1988 and has in general terms been satisfactory. The definition of what is included would, of course, have to be varied.

20. We note that the Royal Commission has arranged for modelling of average monetary payments of $50,000, $65,000 and $80,000, (with proposed maximum payments of $100,000, $150,000 or $200,000). While we recognise that these are averages, the caps on damages in the Melbourne Response, reported to be $75,000, were amounts which fell well below community expectations.

21. Compensation amounts for the Irish Residential Institutions Redress Board were recommended by the Compensation Advisory Committee to be categorised into five bands:[2]

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

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

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

23. A redress scheme needs to be structured to ensure long term compliance by institutional contributors. The Irish experience is instructive. By 2009, seven years after the scheme had been established, the initial indemnity agreement between the government and institutions was failing. At one stage, institutions were meeting only about 10 per cent of the Board's payments.

24. Of course, in the way it is suggested in the Consultation Paper, there would be a need for guidance criteria for those tasked with assessing appropriate percentages. There would also need to be a right for review of a determination. It would be desirable, in the interests of reducing expense for the initial claim, to be non-litigious but with appropriate support services to assist victims who might otherwise be incapable of presenting their claim. Both the initial determination should be before an independent person and there should be a right of review by a review panel, which should also be wholly independent. There should be a right to costs recovery in respect of review where legal representation might be more appropriate. Review by the courts should be restricted to the category of cases laid down in *House v The King* (1936) 55 CLR 499 at 505. Where a court does uphold administrative review (essentially on the basis of error of law, failure to have regard to established facts or having regard to matters which are legally irrelevant) the reviewing court, on upholding an application for prerogative relief, should have power to substitute its own determination so as to avoid

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

25. It would be clearly be appropriate that in respect of any redress scheme, the amounts payable would be subject to reduction for any benefits previously received from institutions or government. It should not, however, be subject to any payback to Medicare or Department of Social Security (Centrelink). It would be possible in the criteria for assessment to provide that regard should be had to previous benefits in determining where on the scale the victim should lie.

26. For our part, we would adopt the Victorian approach evident in the *Limitation of Actions Amendment (Criminal Child Abuse) Bill* 2014 (VIC) which includes sexual or physical abuse whether by act or omission but add related psychological abuse. We would not seek to include psychological abuse alone, which seems to us to involve substantial evidentiary and definition difficulties. It would be arbitrary and, in our view, irrational to exclude physical abuse. A case such as *Salvation Army (South Australia Property Trust) v Graham Rundle* [2008] NSWCA 347 illustrates the psychological effects as well as the physical effects of repeated beatings, starvation, being confined to a cell and deprived of warmth (blankets) as a young child.

27. The difficulty of any scheme having a fixed closing date seems to us to be almost insuperable, having regard to the known very long delay in victims coming forward and the very real difficulties many victims have in articulating their issues. We would suggest an open-ended scheme in these circumstances, albeit that for future victims, the combination of deterrence and more effective civil legal remedies, together with insurance and the

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

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

ISSUE 5 – ELIGIBILITY AND STANDARD OF PROOF

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

29. We would suggest that because the amounts available would inevitably be substantially less than reasonable compensation under common law rights, an appropriate measure may be that recommended by the Senate Community Affairs References Committee of 'reasonable likelihood' as the standard of proof.[3] This places the onus higher than plausibility but lower than the balance of probabilities, which is the standard utilised for litigation. We submit that a standard of proof that is based on the balance of probabilities, as previously recommended by the Truth, Healing and Justice Council, is grossly inappropriate, especially considering that the compensation amounts will be significantly lower under the scheme than available under the common law.

30. Many victims will need assistance to present and do themselves justice. There will need to be some form of advocacy mechanism, not necessarily by lawyers. Lawyers might be more appropriate on review, where costs might be available for successful applications but not those who are unsuccessful.

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31. Decision-makers will need legal training, and will need to be independent of institutions and government, as should the review process. We would support as little legal formality as possible, with most claims being primarily determined on paper applications. It will be necessary and desirable in many cases for there to be medical input prior to determination in order to do justice to victims. Such medical review should be done without expense to the victim and should assist the decision-maker.

32. Given that any redress scheme is unlikely to offer anything approaching the true value of common law compensation, it seems to us that it would be an injustice to require a deed of release. On the other hand, any payments made (together with any previous institutional or government compensation) should necessarily be taken into account and remain recoverable or repayable if common law damages are ultimately and successfully pursued. In respect of the redress scheme, any payments made should be offset against common law awards.

ISSUE 6 - FUNDING

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

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

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care.

34. An alternative approach would be to require institutions and government to contribute prospectively to a fund and thereafter meet claims which the redress fund finds established against them. In respect of an institution which has wholly ceased to exist (with no related or successful organisations) or with a genuine incapacity to meet payments, there would need to be a proportionate levy on all contributing institutions, so that government alone does not bear the whole burden.

35. We would strongly oppose having different redress schemes in different states and territories. This could only lead to significant injustice, as well as extraordinary complexity for those injured in more than one jurisdiction by the same institution.

36. Clearly, it would be necessary for those who might have claims against more than one institution to have some further limitation upon their rights of recovery so that they could not receive many multiples of the maximum for a single institution's abuse.

ISSUE 7 – INTERIM ARRANGEMENTS

What interim arrangements should apply pending more permanent arrangements?

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

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ISSUE 8 - CIVIL LITIGATION

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

The Limitation Period

38. In respect of limitation periods, there is a clear need for action. In the Royal Commission's Interim Report, Volume 1 (at 5.1 on page 158) appears a finding based upon 1,677 private interviews that 'survivors took an average of 22 years to disclose their abuse after it began'. This is remarkably close to the period of 23 years from last abuse to first complaint found by an Anglican Queensland survey of victims.[4]

39. The reasons for delay include infancy; lack of access to independent legal and other advice; psychological injury consequent upon sexual and/or physical abuse; ignorance of the nature of the abuse or indeed, in some cases that it is abuse at all; lack of insight into the sequelae of such abuse; fear or threats by abusers or those associated with them, directed both at the victim and, on occasions, at the victim's family; gross embarrassment; unwillingness to disclose details of abuse to family or others who may disbelieve them; an unwillingness to undergo the trauma of complaint in respect of criminal, let alone civil, remedies.

40. The explanatory notes to the Victorian Discussion Paper on the *Limitation of Actions Amendment (Criminal Child Abuse) Bill* 2014 *Exposure Draft* referred to the incongruity of circumstances in which the perpetrator can be tried and convicted of sexual abuse many years later but the institution under whose aegis the abuse occurred, can argue that on the lower civil onus, a fair trial is no longer possible. Such an argument was advanced (albeit unsuccessfully) in *Salvation Army (South Australia Property Trust) v*

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Graham Rundle [2008] NSWCA 347.

41. It is worthy of note that limitation regimes vary enormously throughout Australia, ranging from regimes under which extensions of time over lengthy periods are well nigh impossible (Western Australia and Queensland) to more liberal regimes such as South Australia. In the *Salvation Army v Rundle* case referred to above, the extension of time application was in respect of prolonged sexual and physical abuse in a Salvation Army institution in South Australia in the early 1960s, brought in NSW, where the victim now lives. His abuser was convicted of offences against a substantial number of victims, including the plaintiff, in quite recent times.

42. There is in the NSW Discussion Paper, *Limitation periods in civil claims for child sexual abuse*,[5] a helpful summary of the various issues under NSW law in relation to potential rights to extension of time. Those rights, however, are markedly less liberal than the South Australian law applied by the NSW court and it is most unlikely that time would have been extended if the abuse had occurred in NSW and NSW law had had been applied rather than the law of South Australia in respect of limitation extensions.

43. Moreover, all applications for extension of time, as distinct from proving incapacity under the *Limitation Act* 1969 (NSW) must meet the *Brisbane South*[6] test, where the plaintiff must establish that a fair trial is still possible after a prolonged lapse of time and given a presumed reduction in capacity of witnesses to recall evidence, even where records have not been destroyed.

44. The existing rights for minors, save where the abuse is by a parent/guardian, in NSW, bind a child by the conduct of the parent/guardian and if that person fails to bring an action in time, then notwithstanding the infancy of the victim, the child loses the right to an extension of time and to

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

45. Moreover, the need to apply for an extension of time or to prove disability can itself be extremely traumatic. See, for example, *John Ellis v Pell and the Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2006] NSWSC 109.

46. John Ellis was cross-examined for more than three days in circumstances where it was being put to him that he was lying and presenting a false case in respect of abuse, notwithstanding that the Church had accepted on the *Briginshaw*[7] onus that the abuse had occurred and in fact the Church had other evidence (which it did not disclose) supporting its own finding to that effect. Similarly, in *Salvation Army (South Australia Property Trust) v Graham Rundle* [2008] NSWCA 347, the Salvation Army's conduct was heavily criticised, as was the conduct of two solicitors who were found to have sought to mislead the court as to the extent of the information available to that Church. It is noteworthy that that was a case where the limitation period was extended back to offences occurring in the early 1960s but relevantly under the law of South Australia. Had the relevant limitation law been that of NSW rather than the significantly more liberal South Australian regime, as suggested earlier, it is unlikely that the plaintiff would have succeeded.

47. To put victims through the gruelling process required under the NSW limitation regime to establish an extension of time amounts, it is submitted, inflicts legal abuse on top of sexual and psychological abuse.

48. Sadly, the history of such conduct, including by organisations such as state governments claiming to be model litigants, is replete with examples of poor conduct. See the approach of the State of NSW in *TB and DC v State of*

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

The Preferred Model for Reform

49. In the Victorian Department of Justice *Limitation of Actions Amendment (Criminal Child Abuse) Bill 2014 - Exposure Draft*, it is proposed to completely remove limitation periods applying to civil actions, including the longstop limitation period, to do so retrospectively and to do so in respect of acts or omissions amounting to physical or sexual abuse 'that could, at the time the act or omission is alleged to have occurred, constitute a criminal offence under the law of Victoria or the Commonwealth.'

50. This approach, similar to that of British Columbia, has very considerable advantages. The trauma and expense of litigation to obtain an extension of time or establish a disability is removed. We attach the Australian Lawyers Alliance Submission to the Victorian Department of Justice Exposure Draft to these submissions.

51. The Victorian approach is not perfect. For reasons which are unclear, it excludes (perhaps accidentally) psychological abuse connected with the physical or sexual abuse. Section 27A of the draft should, in our submission, be amended to read:

> *'criminal child abuse means an act or omission in relation to a person when the person is a minor—*
>
> i. *(a) that is physical or sexual* ***or related psychological abuse****; and…*

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

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

53. Again, this drafting seems to us to be deficient (albeit perhaps accidental). To prove that it could be an offence under the law of the place where the action is brought may create difficulties, given substantial differences in law between the different states and territories. The reference to the Commonwealth is broadly unhelpful, given that the Commonwealth generally does not govern this area of criminal law. We would relevantly insert 'constitute a criminal offence under the law of a State or Territory or the Commonwealth.'

54. Ideally, this drafting would thus read:

> *'criminal child abuse means an act or omission in relation to a person when the person is a minor—*
>
> i. *(a) that is physical or sexual* ***or related psychological abuse****; and…*
> ii. (*b) that could, at the time the act or omission is alleged to have occurred,* ***constitute a criminal offence under the law of a State or Territory or the Commonwealth.'***

55. It is to be borne in mind that many of the institutions and much of the abuse crosses state and territory boundaries and the moving on of abusers from one place to another, as well as the movement of victims, is an unnecessary complication which can readily be avoided by appropriate drafting.

56. In the NSW Department of Justice Discussion Paper on *Limitation Periods*

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

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

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

Retrospectivity

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

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

59. In *Rundle*, the Salvation Army vigorously defended an extension of time in respect of an abuse victim, one of whose abusers was subsequently charged with multiple offences and gaoled, all the way to the Court of Appeal. Institutions should be held to account and justice for victims should have priority. This is one of the rare circumstances where retrospectivity is justified. The Victorian draft legislation is expressly retrospective, including in respect of cases presently on foot and excluding only cases where a final judgment or settlement has occurred. It seems to us that this is an appropriate outcome.

60. It is to be noted that there are examples of retrospective legislation in respect of rights in NSW, such as the amendments to s3B of the *Civil Liability Act* 2002, which deprived some claimants of their right to common law damages even whilst their cases were part-heard. We would not wish to see such an injustice revisited but providing rights to those wrongly denied them in the past falls into a very different category.

61. Moreover, the Victorian draft and the NSW Option A only require that an allegation of sexual or physical criminal conduct be made in order to avoid the limitation regime. Given the extraordinary complexity, varying opportunities from jurisdiction to jurisdiction and expense and trauma of bringing extension of time applications even where they are available, we commend the Victorian proposal and approach. To prove incapacity under the *Brisbane South* test places an extraordinary burden on litigants. It has undoubtedly deterred and prevented many genuine claims for compensation. Alternatives discussed in the NSW Department of Justice

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

62. We commend the Victorian approach with minor modification in two respects. One is including associated psychological abuse and the other is in avoiding any issue as to which state or territory the criminality is alleged to have occurred in. Subject to these minor changes, the Victorian draft legislation properly reflects the findings of the Victorian Legislative Council Inquiry 'Betrayal of Trust' dated 13 November 2013. This approach might appropriately be used as a guideline for all states and territories with the minor caveats referred to earlier.

63. We note that alternatives such as an extended limitation period are suggested to ameliorate the problem. Given the very long periods involved, this does not seem to be a practicable or just solution in many cases. The real protection for defendants is in the requirement for plaintiffs to prove the case on the balance of probabilities, and courts are perfectly capable of having regard to the evidentiary difficulties faced by all parties after lengthy periods of time. After all, in *Rundle*, despite the abuse having occurred between 1960 and 1965, one of the perpetrators was found guilty and sentenced to a lengthy period of imprisonment on the criminal onus within the last five years. The suggestion that defendants on the civil onus need higher standards of protection than on the criminal onus, in our submission, defies logic.

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Vicarious Liability

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

65. In particular, Lord Phillips, with the concurrence of the balance of the Supreme Court, said:

> [86] 'Vicarious liability is imposed where a defendant,

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> whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a strong causative link.
>
> [87] These are the criteria that establish the necessary 'close connection' between the relationship and abuse.'[11]

66. It is this approach, it is respectfully submitted, which should commend itself as the underlying principle. This approach appears to be established in law in common law countries other than Australia. The position on vicarious liability in Australia has not been considered in the High Court since the inconclusive decision in *Lepore,* but the rest of the common law world has clearly moved on. *Trustees of the Roman Catholic Church for the Diocese of Sydney v Ellis* (2007) 70 NSWLR 565 stands in stark contrast with this.

67. If we consider whether the child or the institution has better prospects of controlling the abusive conduct, then there can be no doubt that placing responsibility on the institution (even when negligence cannot in a particular case be proven) ultimately serves the interests of promoting protective conduct and deterring and reducing the likelihood of misconduct. Leaving the burden on an infant merely heaps one abuse on top of another.

Non-Delegable Duties

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

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

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

The Proper Defendant

70. References were made in the Royal Commission Consultation Paper to the difficulties involved in suing unincorporated associations. These difficulties at common law can be overstated. In general, if an organisation has an identified membership, then a representative order can be made against its committee or trustees or head in order for the action to take place and liability will then fall upon the whole of the membership. Such a representative order was sought unsuccessfully (ultimately) in the *Ellis* case,[12] because the Church was so amorphous that its membership was uncertain.

71. This is a relatively unusual complication.

72. This was the first time that this problem had directly arisen. Previously, the practice of the Church in each diocese had been to accept that its trustees (incorporated by state or territory law) and holding its property, were the

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

73. As the Royal Commission heard, Cardinal Pell decided to deter future claims by raising this matter, bringing in Victorian solicitors to oppose the claim and vigorously (and quite inappropriately) defending the claim on the basis of falsity, when the Church had itself accepted on the *Briginshaw* onus that the abuse had occurred.

74. Since *Ellis*, some parts of the Church have continued to use the defence that the Church is effectively immune from suite. See *PAO, BJH, SBM, IDF and TMA v Trustees of the Roman Catholic Church for the Archdiocese of Sydney & Ors* [2011] NSWSC 1216 (Hoeben J) and *Uttinger v The Trustees of the Hospitaller Order of St John of God Brothers* [2008] NSWSC 1354. However, other bishops such as the Bishop of Newcastle/Maitland, have not taken the point and continued to permit the trustees to be sued.

75. Given that the status of the Roman Catholic Church was created at its own request by acts of the state and territory legislatures, it should be recommended that the various acts be amended to make the trustees liable along the lines of the legislation currently before the NSW Legislative Council in *The Roman Catholic Church Property Amendment (Justice for Victims) Bill* 2012.

76. Other churches and institutions do not generally appear to raise the same difficulties involved in the peculiar structure of the Roman Catholic Church and it is to that Church that specific amendments of state and territory legislation is required. Should any other significant institution lack an identifiable body to be sued, then the state or territory should similarly

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

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

INSURANCE

78. The complexities of insurance are very considerable. Even where insurance exists, there are significant doubts as to whether it covers criminal liabilities. There are significant difficulties in regard to small organisations such as sporting activities for children, where the cost might be prohibitive even if adequate insurance was available.

79. We would suggest that this is a matter for further consideration and a separate discussion paper from the Royal Commission.

CONCLUSION

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

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[6] *Brisbane South Regional Health Authority v Taylor* [1996] HCA 25; 186 CLR 541.

[7] *Briginshaw v Briginshaw* (1938) 60 CLR 336

[8] *Salvation Army (South Australia Property Trust) v Graham Rundle* [2008] NSWCA 347

[9] *State of NSW v Lepore* (2003) 212 CLR 511

[10] *John Doe v Bennett* [2004] 1 SCR 436

[11] *The Catholic Child Welfare Society & Ors (Appellants) v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools & Ors (Respondents)* [2012] UKSC 56 at [86] – [87].

[12] *Trustees of the Roman Catholic Church for the Diocese of Sydney v Ellis* (2007) 70 NSWLR 565

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