

ROYAL COMMISSION

INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE

RESPONSE OF THE SYNOD OF VICTORIA AND TASMANIA OF THE UNITING CHURCH IN AUSTRALIA TO

ISSUES PAPER 5

Introduction

1. The following is the response of the Synod of *Victoria and Tasmania of the Uniting Church in Australia (UCA (Victoria & Tasmania))* to the invitation of the *Royal Commission into Institutional Responses to Child Sexual Abuse (Commission)* made on 6 December 2013, in the form of *Issues Paper 5 – Civil Litigation (Issues Paper 5)*.
2. Issues Paper 5, addresses the following issues relating to child sexual abuse in institutional contexts:
 - a. How effective the civil litigation systems are as they currently operate, in resolving claims for damages for child sexual abuse in institutional contexts.
 - b. Possible reforms to improve the effectiveness of the civil litigation systems.
3. More specifically, the Commission has invited a response on any of the following questions/issues:¹
 - “1. *Are there elements of the civil litigation systems, as they currently operate, which raise issues for the conduct of litigation brought by people who suffer sexual abuse in institutional contexts? For example:*
 - a. *some institutions cannot be sued because they are not incorporated bodies or they no longer exist or because decisions were made personally by an individual officeholder;*
 - b. *some institutions do not hold assets from which damages could be paid, or they are not insured or their insurance status is unknown;*
 - c. *the circumstances in which institutions are liable for the criminal conduct of their employees or other people;*
 - d. *the circumstances in which regulators are liable for failures of oversight or regulations;*
 - e. *limitation periods which restrict the time within which a victim may sue and the circumstances in which limitation periods may be extended;*

¹ Issues Paper 5, paragraph [1].

- f. *the requirements for bringing a class action, if victims from the same institution wish to sue as a group;*
 - g. *the existence of relevant records, locating them and retrieval costs;*
 - h. *the process of giving evidence and being subject to examination and cross-examination;*
 - i. *proving that the victim's injuries and losses were caused by the abuse;*
 - j. *the way in which damages are assessed; and*
 - k. *the cost of litigation and access to funding and legal services."*
4. Issues Paper 5 also invites a response in relation to other topics relevant to the civil litigation system, including dispute resolution, mediation and alternative redress in lieu of damages and/or financial compensation.
 5. UCA (Victoria & Tasmania) wishes to make legal submissions on the following issues to assist the *Commission* with its inquiries: Issues 1(a) & (b) (incorporation, church assets and insurance); Issue 1(c) (vicarious liability); Issue 1(d) (liability of regulators); Issue 1(e) (limitation of actions); and Issues 1(h),(i) and (j), (the process of giving evidence, causation and damages). For ease of reference, these topics are addressed in turn.
 6. Within the Uniting Church in Australia (***the National Church***), UCA (Victoria & Tasmania) is uniquely placed to respond to the legal issues just identified, as it has had the opportunity to participate and evaluate these issues following the publication of the 2013 Victorian Parliamentary Inquiry's (***Parliamentary Committee***) Report² into the Handling of Child Abuse by Non-Government organisations (***Victorian Parliamentary Report***). The contents of this submission do not reflect the views of the other Synods and the National Church is working towards reaching a final position on the issues that are discussed in this submission.

Issue 1(a) and (b):- Impediments to litigation caused by lack of incorporation; the fact bodies may cease to exist; the personal nature of decisions by individual office holders; assets and insurance

7. This issue raises the question whether the absence of legal status on the part of non-government organisations (who take responsibility for children) has restricted access to the courts, thereby interfering with the ability of victims to secure justice through the litigation process.
8. The issue was considered by the Parliamentary Committee in Victorian Parliamentary Report in which the Committee found that the non-incorporated status of some religious and/or non-government organisations (whose representatives may have perpetrated child abuse) meant they could not be sued.³ This meant that the assets of the organisation may be unavailable to claimants seeking civil compensation for claims.

² *Betrayal of Trust – Inquiry into the Handling of Child Abuse by Religious and other non-Government Organisations.*

³ See Victorian Parliamentary Report pp.533-535.

9. In the words of the Parliamentary Committee:

“Victims of child abuse can find it difficult to find an entity to sue because of legal structures of some non-government organisations. In addition, the assets of some organisations can be difficult to access due to the use of complex structures, such as property trusts. In order to successfully establish a civil claim, a victim needs to identify a legal entity to sue for failing to take reasonable care to prevent their abuse. The Committee heard that for many victims the organisation they sought to sue was not a legal entity.

The Committee heard that some non-government organisations whose personnel had perpetrated criminal abuse are not incorporated entities, and cannot be sued in their own name. This is more frequently the case with religious organisations. As a consequence (particularly when the abuse occurred many years ago and office bearers in the organisation have changed), a victim is left with no defendant to sue.”

10. In response, the Parliamentary Committee recommended to the Victorian Government that it give consideration to:
- a. Requiring that non-government organisations in Victoria who work with children (i.e. who provide services for children) be both incorporated and adequately insured as pre-conditions to receipt of Government funds and/or tax exemption entitlements;
 - b. Working with the Commonwealth Government to require religious and non-government organisations that provide services for children to adopt incorporated legal structures.⁴
11. The National Church has not reached a concluded view on these issues. That said, UCA (Victoria & Tasmania) submits that a decision by Government to adopt the Parliamentary Committee’s recommendations by requiring any entity that provides services to children (as a condition of receipt of government funding or exemptions), to incorporate and to be adequately insured against potential liability arising from sexual abuse claims, is a sensible proposal, can be accommodated within the structure and workings of UCA (Victoria & Tasmania) and should be supported. Whilst UCA (Victoria & Tasmania) is also considering the practical impact of such a proposal, the following points can be made.
12. To establish a civil claim against an organisation (for example, an organisation which has provided a service) it is necessary for the organisation to be identifiable in law as a legal person. Incorporation performs an important function in this regard. By incorporation, an entity attains a legal identity separate from its members. It acquires perpetual succession and can sue and be sued in the same way as a natural person. In this way it becomes legally accountable for its actions.

Structure of the UCA (Victoria & Tasmania) and its agencies

⁴ Victorian Parliamentary Report, Chapter. 26 p.527.

13. The National Church is a voluntary organisation of members bound together by common beliefs but also by a consensual compact, which confers rights and obligations on its members. In this respect, the status of the National Church is the same as that of its predecessor churches, the Presbyterian Church of Australia, the Methodist Church of Australasia and the Congregational Union of Australia.⁵
14. The National Church was inaugurated on 22 June 1977 by a union of these churches. The union was made possible by enabling legislation, the *Uniting Church in Australia Acts (Enabling Acts)* which were passed by all State and Territory parliaments. This legislation enshrined (in a schedule to the relevant Acts) a basis of union previously agreed by the three uniting churches as the framework upon which their union would occur. This Basis of Union provides the structure of governance of the UCA and remains its central foundational document.⁶ Other key documents on structure and governance issues are the National Church's constitution (*Constitution*) and its regulations (*Regulations*).⁷
15. Clause 15 of the Basis of Union deals specifically with church governance. It provides for the UCA to be governed by the following series of interrelating councils: a national council (*Assembly*); regional councils (*Synods*); district councils (*Presbyteries*); and congregational councils (*Elders' or Leaders Meetings*); each of which has overlapping tasks and responsibilities in relation to worshipping members and adherents (*Congregations*).
16. There are around 2500 Congregations throughout Australia. Some are large with several hundred members; others are small. Some Congregations are grouped together into "clusters" or "parishes" for the better exercise of their mission. Each Congregation (or group of Congregations in some instances) has a Church Council (*Church Council*). At the apex of these congregations are the respective state Synods.
17. The National Church has six Synods which are loosely (not precisely) correlated to State and Territory boundaries.⁸ Each Synod is responsible for the general governance of the church's activities within its regional boundaries. Each Synod establishes and oversees committees and agencies as may be necessary to enable it to carry out those responsibilities.
18. Presbyteries, which consist of ministers and church members, are appointed to oversee ministers, Congregations and local agencies (except for agencies which are directly responsible to the Synod or Assembly). Each Synod determines the number and bounds of Presbyteries and exercises oversight in relation to their operational functions, including disciplinary functions.

⁵ See *Attorney-General (NSW) v Grant* (1976) 135 CLR 587 at p.600 per Gibbs J.

⁶ In *Attorney-General (NSW) v Grant*, *ibid*, the High Court considered the status of both the Presbyterian Church and the proposed Uniting Church in the context of considering whether existing trusts in favour one of the predecessor churches (the Presbyterian Church), could ensure in favour of the new Uniting Church and, if so, on what basis. The judgment is instructive as to the status of the basis of the union of the UCA.

⁷ The *Constitution* and *Regulations* of the UCA constitute a compact or contract between each of the Church members and operate to define and regulate the rights and responsibilities of the members.

⁸ The boundaries of a *Synod* do not necessarily correlate to State or Territory boundaries. For example, *Congregations* and some Church entities located on the NSW side of the Murray River are within the Synod of Victoria and Tasmania. Similarly, the Kimberly region and much of northern WA is in the Northern *Synod*. The *Synod* of Queensland is the only synod with boundaries correlating exactly with State boundaries.

19. The pastoral activities of the church are generally carried out through the Synods and fall under the control of the respective Synod bodies.⁹ Many of these activities (including activities that involve working with children) are carried out through institutions and agencies set up for specific purposes. The origins and contemporary roles of these institutions in the church and community are based on theological and missiological rationales. However, the responsibility of the particular Synods for their activities, extend to authorising separate incorporation, vesting of property in the relevant property trust and overseeing as necessary to ensure accountability and proper management. In most cases, a Synod will, when establishing an organisation, approve the constitution of that organisation and appoint all or some members of the governing body.¹⁰
20. This is the position with UCA (Victoria & Tasmania). For decades, UCA (Victoria & Tasmania) has established and overseen institutions such as schools, university colleges, hospitals, children's homes, child care centres and aged care facilities. Many of these bodies offer a variety of both residential and non-residential services to the community for which they receive substantial funding from, or grants by, government (***UCA Victoria & Tasmania Agencies***). Some of these UCA Victoria Agencies work with children.
21. At present in Victoria, there is no requirement compelling these UCA Victoria & Tasmania Agencies which provide services to children, to incorporate or to adopt any particular legal structure; in practice, some are incorporated; others operate as unincorporated associations.
22. An example of this is schools. Whether a Uniting Church school in Victoria or Tasmania is or is not incorporated has largely been left to the discretion of the particular school. However, all Uniting Church schools in Victoria and Tasmania have their own boards of governance. They invariably have their own constitution or governing document. The legal relationship between a school and the Synod will be defined by the constitution of the school. Apart from the schools and agencies within the *Synod* that deal with children (and that are, either directly or indirectly controlled by the Synod), there are congregational-based community service agencies, that do not fall under the direct control of the Synod.

Appointment, management and control of Personnel in institutions that deal with Children

23. Responsibility for personnel who carry out the church's work (e.g. teaching staff or other employees, religious members or volunteers in church institutions) ordinarily lies with the institution itself, at least in the case of institutions which provide services in respect of or for children.
24. In the case of UCA (Victoria & Tasmania) schools for example, responsibility for the engagement of, management of, tasks delegated to, and work performed by, the

⁹ Regulation 3.7.4.7

¹⁰ This may involve an ex-officio membership. For example, the Moderator or nominee is a member of many Boards, and in the Synod of NSW & ACT, the Director of Schools Ministry is a member of the Board of each school associated with the UCA. In this way the Church influences rather than directs the governance and management of such associated bodies

teachers and/or staff in a UCA (Victoria & Tasmania) school, lies with the school itself, through its governing body or council.

Incorporation of UCA institutions that work with children

25. Some UCA (Victoria & Tasmania) institutions that are set up specifically to work with, or provide services for, children and which receive funding by government for the provision of services), are already incorporated (***State funded UCA Institutions***).
26. There are a number of reasons why incorporation of State funded UCA Institutions may improve outcomes for victims of child abuse. For example, requiring incorporation of institutions that work with children would promote certainty. For UCA (Victoria & Tasmania), it would provide a platform for the promulgation of minimum behavioural, reporting and other applicable standards which could be applied, and audited, consistently across institutions. This is something the UCA (Victoria & Tasmania) is giving consideration to at the present time, following the Victorian Parliamentary Report.
27. From the perspective of the victim, incorporation of the State funded UCA Institutions responsible for the care of the victim would create a clear legal relationship between entity and victim from which duties and legal responsibilities would arise.
28. Whilst State funded UCA Institutions have not been required to incorporate merely because they work with children, there is no reason why such institutions could not be required to incorporate. Moreover, in the majority of instances, incorporation would be compatible with governance at the institutional level.
29. However, whilst State funded UCA Institutions can probably be incorporated without too much difficulty, there are a host of other voluntary church organizations that are set up within local Presbyteries and Congregations and which provide voluntary services to children, for which incorporation may be more problematic. These include, for example, play groups, Sunday schools, youth and other social groups and educational groups. The responsibility for these entities has traditionally fallen at the feet of the Presbyteries and/or the Synod. UCA (Victoria & Tasmania) is currently considering models of incorporation that both creates an identifiable legal entity capable of being sued as well as being compatible with the Basis of Union of the Church.

Church Assets and Insurance

30. In submissions made to the 2013 Victorian Parliamentary Inquiry concerning religious organisations, the question of incorporation of relevant institutions was linked, if not directly aligned, to the question of the availability (for the purposes of claims for compensatory damages in litigation) of church assets, particularly those held in statutory trusts (e.g. the Property Trusts of UCA Victoria).¹¹
31. The Enabling Acts passed by the State and Territory parliaments in 1977 provided for the constitution and functions of the National Church property trusts and for the vesting

¹¹ This assumption appears to have been made both in submissions to the *Parliamentary Committee I*, and in the Committee's findings (e.g. see pp.532-533).

of certain property in those trusts. Each Enabling Act provides for a body corporate (**Property Trust**) in whom legal title to all church property is vested. Property Trusts may sue and be sued in respect of those matters over which they have responsibility.¹² However, the reasons for the setting up of these Property Trusts were entirely historical. For centuries religious institutions operated as charities and/or not-for profit organisations on an unincorporated basis. It was therefore necessary for there to be a legal custodian for assets of the unincorporated associations.

32. Insofar as the UCA (Victoria & Tasmania) performs its pastoral functions as a religious organisation, the Property Trust in Victoria and Tasmania continue to fulfil this important function. However, the Property Trust plays no role in the day to day administration of UCA (Victoria & Tasmania) Agencies. It is the UCA (Victoria & Tasmania) Agencies that fulfil that function.
33. In the event that the taking out of insurance (against liability arising from operations) is made a condition of funding for UCA Victoria Agencies (as contemplated by the relevant Parliamentary Committee recommendation), the question of the availability of Trust Property assets is not relevant. The requirement for insurance would ensure the UCA Victoria funded Agency is able to meet any judgment made against it by a court.
34. The UCA (Victoria & Tasmania) accepts that incorporation of institutions that deal with children would improve the accountability of the UCA (Victoria & Tasmania) for its actions in respect of children; the requirement that the incorporated entity take out appropriate insurance perhaps as a precondition of funding and in a prescribed form and for a minimum sum insured, would ensure access to funding of damages awards obtained through the civil litigation system.

Issue 1(c):- The circumstances in which institutions are liable for the criminal conduct of employees or other people

35. In its report to the Victorian Parliament, the Victorian Parliamentary Committee noted that, in Australia, the civil law has not developed to recognise liability of non-government organisations for the criminal abuse of children perpetrated by their representatives. In response, it recommended that the Victorian Parliament consider two options for legislative change to:
 - a. Legislating non-delegable duty of care in the *Wrongs Act 1958* (Vic) (**the Wrongs Act**) to ensure that organisations have a non-delegable duty to take reasonable care to prevent intentional injury to children in their care;
 - b. A provision regarding vicarious liability in the *Wrongs Act* based on the examples in the Victorian and Commonwealth discrimination legislation.¹³

¹² *Trustees of the Roman Catholic Church v Ellis & Anor* [2007] NSWCA 117; 70 NSWLR 565 (NSW Court of Appeal).

¹³ See *Victorian Parliamentary Report* at p.551-552. The legislation referred to was equal opportunity legislation such as the *Equal Opportunity Act 2010* (Vic) and the *Sex Discrimination Act 1984* (Cth). The Parliamentary Committee recommended, based on these models, that the Victorian Parliament consider deeming an organisation to be vicariously liable for the sexual abuse of a minor perpetrated by "members of their organisations" unless it can establish that the NGO had taken reasonable precautions to prevent the sexual abuse of children in its care.

36. These recommendations of the Parliamentary Committee deal with quite different issues. The first concerns the imposition of a provision in the Wrongs Act codifying a basis for the imposition of fault-based liability upon an employer (or someone in the position of an employer) for the conduct of an employee or agent. By contrast, the second recommendation concerns the inclusion in the Wrongs Act of a statutory provision imposing liability upon a person or organisation not otherwise at fault, because, for policy reasons, it has been decided that the person or organisation should be responsible for the actions of another person (i.e. vicarious liability).
37. As to the first recommendation, the UCA (Victoria & Tasmania) would not recommend any provision of the kind suggested, as it would be unnecessary. First, some organisations (including schools) are already under a common law duty of care and that duty is a non-delegable duty. Secondly, even for organisations which are not the subject of a non-delegable duty, they are still subject to a duty of care requiring such organisation to taken reasonable steps to prevent the intentional injury to children in their care. No further statutory duty is necessary to give rise to liability. Moreover, that duty would extend to a duty to prevent criminal conduct as much as it would other (i.e. negligent) conduct on the part of the employee/agent. The absence of such a statutory duty has therefore not interfered with, or been an impediment to, the making of claims against religious or other organisations.
38. The second recommendation by the Parliamentary Committee raises a rather more important question, to which this discussion responds. That is, to what extent should institutions who may themselves be innocent of wrongdoing, nevertheless be held liable for the actions of those they hold out as acting on their behalf.
39. At common law, the principle of vicarious liability is accepted as applying to certain legal relationships (normally employment), where the circumstance of employment acts as a controlling concept. Although the law recognises that persons (e.g. non-government organisations) may owe a duty to take care of persons in their charge, there has been some reluctance at common law, to extend principles of vicarious liability to criminal conduct as such conduct is usually regarded as aberrant and not easily associated with employment.
40. For these and perhaps other reasons, victims of child abuse in organisational settings, as well as their lawyers¹⁴, often state that the current common law position in relation to when an organisation will be held to be vicarious liability for the criminal conduct of persons for whom it is responsible, prevents victims from attaining justice through the courts' system for the harm that has been inflicted on them.
41. The degree to which religious and/or non-Government organisations (**NGO's**) should be responsible in law for the criminal conduct of persons working in their organisations who come into contact with children, is a vexed question. Divorced from emotional considerations, it requires a careful balancing between, on the one hand, the need for children to be safe and free from emotional and physical harm on the part of a custodian or carer and, on the other, the need to ensure that organisations (who are

¹⁴ Examples where such views have been expressed include the following submissions that were filed with the Parliamentary Committee : Australian Lawyers Alliance, Lewis Holdway Lawyers, Ryan Carlisle Thomas Lawyers and Waller Legal.

otherwise not to blame) are not unjustly or unfairly treated by being made responsible for aberrant conduct by a person or persons acting outside any authority conferred upon them; and in circumstances where there may be only a remote connection between the criminal act and the NGO. By this balancing act, the law ensures justice for all parties concerned. It is a balancing act which invariably requires very careful evaluation of the particular case before the court. No two cases are the same.

42. At present, however, the common law (in Victoria) contains an important safe-guard to the imposition of vicarious liability (i.e. the “sufficiently close connection” test). This is explained below. The question addressed here is whether this safe-guard should be retained in any legislative model adopted.

The Common Law

43. In recent years, the common law of Australia has grappled with these competing policy considerations in some important cases. At present, the leading authority as to when an organisation will be held to be liable for the criminal conduct of an employee, is *Lepore v State of New South Wales* (2003) 212 CLR 511 (**Lepore**).
44. In *Lepore*, the plaintiff alleged that he was a victim of child sex abuse in a government school in New South Wales. The trial judge found that the school had failed to exercise proper care. On appeal, the New South Wales Court of Appeal held that the school owed a non-delegable duty of care to the students (i.e. a duty which could not be passed on or delegated to another person in order to relieve the school from liability) which extended to ensuring that students are not injured (negligently or intentionally) at the hands of an employed teacher.¹⁵
45. On appeal, the High Court heard the *Lepore* case together with that of two former students who alleged that they were victims of child sexual assault at a government school in rural Queensland in the 1960's. In examining these cases, the High Court concluded that, jurisprudentially, vicarious liability (and not non-delegable duty of care) is the more appropriate legal principle through which to evaluate the responsibility of an organisation for the criminal abuse of persons who are ostensibly working on its behalf.
46. This finding is consistent with the approach taken in England, Canada and other common law jurisdictions. A strong reason for this approach is considerations of justice which require some constraint on liability to be imposed by reference to whether the employee was acting in the course of his or her employment. It is to be contrasted with an approach which transforms a duty to take care (e.g. the duty owed by an employer of a teacher in a school) into an absolute duty to prevent harm (as would occur if the applicable legal principle was a non-delegable duty of care).¹⁶ The duty of care, around which vicarious liability depends in these sorts of cases, is not so demanding. Nor should it be. In many cases, the institution concerned may have itself done nothing wrong. The impugned conduct may occur despite the existence of

¹⁵ Non delegable duties have also been recognised in an employment context, for example, the duty of an employer to maintain a safe work place and systems of work. See for example, *Kondis v State Transport Authority* (1984) 154 CLR 672, *Stevens v Brodribb Sawmilling Pty Ltd* (1986) 160 CLR 16 and *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, especially at pp.575 – 576.

¹⁶ See the discussion in *Lepore* at [32] per Gleeson CJ.

systems and controls to monitor the conduct of employees and to reduce risk. This is often the case when an employee intentionally engages in unauthorised acts (e.g. criminal conduct).

Rationale for imposing Vicarious Liability

47. In considering whether to impose liability vicariously, courts have been motivated by a number of policy considerations. These policy considerations are underpinned by the no-fault basis of the liability which vicarious liability imports.
48. One policy is that the conduct of an employer's business creates some risk that third parties may be harmed by employees when they are carrying out their employment duties and that it is only fair that an employer who benefits from a business should bear the costs of injury.¹⁷ Another is the deterrent rationale, i.e. that employers who are made liable will more likely adopt systems that reduce the risks to third parties (e.g. students).¹⁸ Yet another rationale is that vicarious liability spreads the costs of injury caused by injury even if their acts were unauthorised.¹⁹ Vicarious liability may also be justified by an observation that teachers (and others responsible for children), may in some circumstances abuse their position with (whether it be one of power over or intimacy in relation to) children. The school or employer may bear some responsibility for the way these powers are exercised, perhaps by failing to take protective measures of some kind.
49. Whilst the "*verbal formulae*" of the majority in *Lepore* "*do not provide any bright light*"²⁰ for deciding when an employer should be held vicariously liable, there is nevertheless a common thread which emerges from at least three members of the majority, upon which it may be said vicarious liability principles depend²¹. That thread lies in the degree of connection between the impugned act and the employees' responsibilities. This point was most clearly articulated in the judgment of Gleeson CJ but Kirby J agreed with the approach and Gaudron J, whilst approaching the problem through the rubric of estoppel, reached a similar conclusion.
50. With respect, Gleeson CJ's judgment is worth considering closely. At 546, he evaluated the element of protection involved in the relationship between employee and the pupil:

"It is the element of protection involved in the relationship between the school authority and pupil that has given rise to difficulty in defining the circumstances in which an assault by a teacher upon a pupil will result in vicarious liability on the part of a school authority. The problem is

¹⁷ See generally discussion in *Blake v JR Perry Pty Ltd* [2012] VSCA 122 (*Blake v JR Perry*) at [5] to [8].

¹⁸ *Supra* at [7] per Neave JA.

¹⁹ *Supra*, at [8] per Neave JA; see also discussion by in *Lepore* (2003) 212 CLR 511 at [306] per Kirby J and [197] per Gummow and Hayne JJ.

²⁰ *Blake v JR Perry* at [2] per Neave JA.

²¹ The other members of the court took different approaches to the application of vicarious liability principles. Gummow and Hayne JJ articulated a narrow test where liability would be imposed where the conduct of which complaint is made was either done: (i) in the intended pursuit of the employer's interests or (ii) in the ostensible pursuit of the employer's business or the apparent execution of the authority which the employer held out the employee as having. The majority in the High Court ordered a new trial in the District Court of New South Wales. Callinan J held that deliberate criminal conduct was not properly to be regarded as connected with an employee's employment.

complicated by the variety of circumstances in which pupil and teacher may have contact, the differing responsibilities of teachers, and the differing relationships that may exist between a teacher and a pupil. Some teachers may be employed simply to teach; and their level of responsibility for anything other than the educational needs of pupils may be relatively low. Others may be charged with responsibilities that involve them in intimate contact with children, and require concern for personal welfare and development. The ages of school children range from infancy to early adulthood. Although attendance at school is compulsory for children between certain ages, many secondary school students remain at school for several years after it has ceased to be obligatory.”

51. He also considered that the nature of the unauthorised act may be relevant to liability:

“Sexual abuse, which is so obviously inconsistent with the responsibilities of anyone involved with the instruction and care of children, in former times would readily have been regarded as conduct of a personal and independent nature, unlikely ever to be treated as within the course of employment. Yet such conduct might take different forms. An opportunistic act of serious and random violence might be different, in terms of its connection with employment, from improper touching by a person whose duties involve intimate contact with another. In recent years, in most common law jurisdictions, courts have had to deal with a variety of situations involving sexual abuse by employees.”

52. He regarded the degree of personal responsibility or protection and the degree of power and intimacy as important indicators of vicarious responsibility:²² He concluded:

“If there is sufficient connection between what a particular teacher is employed to do, and sexual misconduct, for such misconduct fairly to be regarded as in the course of the teacher’s employment, it must be because the nature of the teacher’s responsibilities, and of the relationship with pupils created by those responsibilities, justifies that conclusion. It is not enough to say that teaching involves care. So it does; but it is necessary to be more precise about the nature and extent of care in question. Teaching may simply involve care for the academic development and progress of a student. In these circumstances, it may be that, as in John R, the school context provides a mere opportunity for the commission of an assault. However, where the teacher-student relationship is invested with a high degree of power and 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. The degree of power and intimacy in a teacher-student relationship must be assessed by reference to factors such as the age of students, their particular vulnerability if any, the tasks allocated to teachers, and the number of adults concurrently responsible for the care of

²² At [67].

students. Furthermore the nature and circumstances of the sexual misconduct will usually be a material consideration.” (underlining added)²³

53. As already pointed out, Kirby J, who also formed part of the majority, took a similar approach. He regarded the requirement for a *sufficiently close connection* between the employer’s enterprise and the acts alleged to constitute wrongdoing of the employee, as a protective gateway to vicarious liability. As he explained:

“...the expression “connection”, potentially connotes either a causal or temporal connection between the acts alleged and the employment, or both. Whether the acts were conducted within school hours and on school property would be a relevant consideration although not conclusive. When the employment duties of teachers and other temporary guardians of children are viewed in this light, it is much easier to see instances of sexual abuse as ‘closely connected’ to the employers enterprise than it is if the focus is solely on the isolated sexual acts of the wrongdoers themselves. However, the employment must represent more than the occasion for the performance by the teacher of his or her individual criminal and civil wrongs.”²⁴ (Underlining added).

54. Gaudron J’s approach was based on principles of estoppel but was similar:

“The only principled basis upon which vicarious liability can be imposed for the deliberate criminal acts of another, in my view, is that 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. And on that basis, vicarious liability is not necessarily limited to the acts of an employee, but might properly be extended to those of an independent contractor or other person who, although as a strict matter of law, is acting as principal, might reasonably be thought to be acting as the servant, agent or representative of the person against whom liability is asserted. Ordinarily a person will not be estopped from denying that a person was acting as his or her servant, agent or representative, unless there is a close connection between what was done and what that person was engaged to do....” (Underlining added).

55. In recognising the importance of a *sufficiently close connection* between the impugned conduct and the employer’s enterprise, each of their Honours were, in effect balancing the competing policy considerations identified above at [48].

56. This approach of Gleeson CJ, Gaudron and Kirby J was apparently influenced by the approach in other common law countries as demonstrated by three important cases considered in *Lepore*: the House of Lords decision in *Lister v Hesperley Hall Ltd* [2002] 1 AC 215 (**Lister**) and the Canadian Supreme Court decisions of *Beazley v Curry* [1999] 2 SCR 534 (**Beazley**) and *Jacobi v Griffiths* [1999] 2 SCR 570 (**Jacobi**). In each of these decisions, the courts examined closely the facts of the case to ascertain whether, by reason of the connection between the conduct and the employment, the

²³ At [74].

²⁴ At pp.620-621 at [326].

organisation concerned should be liable for the sex abuse occurring within it. The degree of connection between the impugned conduct and the employer's employment was used as a basis for the imposition of liability. Importantly, applied to the different facts, it led to different outcomes in the different cases.

57. The case of *Lister* concerned a school for children with behavioural problems. Boarding facilities were provided for the pupils and a warden and his wife were in charge of the boarding annex. The House of Lords found that the annex was intended to be a home (and not a mere extension of the school environment) as the warden had many of the responsibilities of a parent. The warden sexually abused some of the pupils. The House of Lords found that the warden's employer was vicariously liable for his assaults. At (230) Lord Steyn said that:

“the warden's torts were so closely connected with his employment that it would be just to hold the employers vicariously liable”.

58. *Beazley* concerned a non-profit organisation which operated residential care facilities for the treatment of emotionally troubled children. The care facility required its employees to perform parental duties, including bathing and tucking in at bed time. The organisation employed a paedophile who subsequently sexually abused a child. The Supreme Court of Canada found that the organisation was vicariously liable for his wrongdoing. At para [46] the Court said that:

“The test must not be applied mechanically, but with a sensitive view to the policy considerations that justify the imposition of vicarious liability – fair and efficient compensation for wrong and deterrence. This requires trial judges to investigate the employee's specific duties and determine whether they gave rise to special opportunities for wrongdoing. Because of the peculiar exercise of power and trust that pervade cases such as child abuse, special attention should be paid to the existence of a power or dependency relationship, which on its own often creates a considerable risk of wrongdoing”.

59. By contrast, in *Jacobi*, (a case that was handed down on the same day as *Beazley*), the Canadian Supreme Court held that a not-for-profit organisation which operated a recreational club for children was not vicariously liable for the sexual assault of 2 children by one of the club's employees. *Beazley* was distinguished (at pp.595-596) as a case where the sexual abuse occurred in a special environment that involved intimate private control, and a quasi-parental relationship and power. In *Jacobi*, however, the club offered group recreational activities in the presence of volunteers. Those activities were not of a kind as to create a relationship of power and intimacy; they merely provided the offender with an opportunity to meet children. The children were free to come and go as they pleased and they returned to their parents at night. Accordingly the institution could not be held to be liable.
60. In summary, following *Lepore*, Courts in Australia may apply principles of vicarious liability to sexual assault cases involving employees. Liability will then depend on the

sufficiency of the connection between the impugned conduct and the employment. This represents the current state of the law in Victoria.²⁵

61. The situation is not, however, as clear-cut where the conduct is engaged in by persons who are not in an employment relationship with the organisation concerned. Typically, this may be a priest or member of a religious organisation, a contractor or a volunteer who is held out by the organisation as acting on its behalf. Having said that, there is no reason, in principle, to limit the doctrine of vicarious liability to employment relationships. As Gaudron J observed in *Lepore*:²⁶

*“...vicarious liability is not necessarily limited to the acts of an employee, but might properly extend to those of an independent contractor or other person who, although as a strict matter of law is acting as principal, might reasonably be thought to be acting as the servant, agent or representative of the person against whom liability is asserted.”*²⁷

62. There are also a number of decisions in other common law jurisdictions where vicarious liability has been found to exist even absent a formal employment relationship.²⁸
63. Moreover, many priests and members of religious or non-government organisations who work with children do have a relationship with their organisation which is similar to an employment relationship. In these circumstances it may, subject to the *sufficiently close connection* test being satisfied, be appropriate to extend the principles of vicarious liability to attract institutional liability for the conduct of those persons.

Potential Statutory Reform – The Position of the Church in Victoria

64. UCA (Victoria & Tasmania) agrees with the broader sentiment of the Parliamentary Committee that, organisations need to be aware that persons who abuse children are often able to do so because the person’s relationship to, and membership of, the organisation and because the organisation holds the person out to be a trustworthy person. In these circumstances, it behoves the organisation all available steps to ensure that the risk of abuse by such persons is minimised.
65. However, were vicarious liability principles to be extended to cases where there is no, or no sufficient, connection between the impugned conduct and the circumstances of the employment or engagement, it could lead to unjust outcomes. Moreover, it would effectively disregard the competing policy considerations identified at [48] above, which have influenced the approach of the superior court in each of the United Kingdom, Canada and Australia, in determining when an organisation should be held to be vicariously liable for the criminal conduct occurring within it. In this respect, it

²⁵ Ibid; see *Blake v JR Perry*.

²⁶ *Lepore*, ibid at p.561.

²⁷ Citing with approval *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 58 [94], per McHugh J and *Scott v Davis* (2000) 204 CLR 333 at 346 [34] per McHugh J.

²⁸ See for example, the following UK cases: *Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256 and *JGE v The English Province of Our lady of Charity and the Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2011] EWHC 2871 and [201] EWCA civ 938; *The Catholic Child Welfare Society and Others (Appellants) v Various Claimants (FC) the Institute of the Brothers of the Christian Schools and Others (Respondents)* [2012] JKSK 56 (UK Supreme Court).

must be remembered that vicarious liability principles apply where there is otherwise no fault on the part of the organisation. Different principles apply if the organisation is itself at fault (e.g. the organisation engages in negligent conduct).

66. A statutory amendment of the kind referred to by the Parliamentary Committee, which, effectively incorporates a reverse onus of proof²⁹ divorced from considerations of “*sufficiently close connection*”, would not be appropriate.
67. On the other hand, a statutory provision that provides that an organisation may be vicariously liable for conduct (including criminal conduct) on the part of a person engaged on its behalf to work with children (impugned conduct) where there is a sufficiently close connection between the impugned conduct and what the person was engaged by the organisation to do, would work. Alternatively, a statutory provision which deems certain persons to be in an employment relationship for the purposes of application of common law principles of vicarious liability may also work. The effect of either approach would be much the same with either approach retaining the important common law safe-guard enshrined in the “sufficiently close connection” test.
68. A provision of the kind referred to in the preceding paragraph is likely to benefit the community because organisations would pro-actively implement effective employment controls and screening practices for people engaged to work with children. Similarly, it would also have the consequence that organisations would be encouraged to prevent sexual abuse in the first place rather than responding after a complaint has been made.

Issue 1(d):- The circumstances in which regulators are liable for failures of oversight or regulation

69. The issue here is whether a regulator (or the State) can and should be liable for negligence at common law in the event the regulator (or the State) fails to take reasonable care in carrying out its statutory responsibilities (i.e. its responsibilities for the protection of children in its custody or care).
70. This is fundamentally a question of policy for the relevant parliaments who pass acts conferring upon public authorities, responsibility for child protection. However, two issues arise for consideration in this context.
71. The first is whether a particular piece of legislation conferring responsibilities upon a public authority in fact imposes common liability for a failure to take care. This is a legal question the answer to which depends upon the content of the statute. A statute may contain an express statement to that effect. If it does not, however, the question becomes one of interpretation of the relevant statute. Absent an express statement imposing a duty of care in the legislation, “...a close examination of the *terms, scope*

²⁹ Under both the *Equal Opportunity Act (2010)*(Vic.) model and the *Sex Discrimination Act (1984)*(Cth.) model, the effect of the relevant provision is to shift the onus of proof from the plaintiff to the employer. The effect is that once the impugned conduct and the employment are established, the employer is deemed to be liable unless the employer can prove that they acted reasonably by taking all reasonable precautions to prevent the contravention. It is doubtful whether either model incorporates the common law “sufficiently close connection” test.

and purpose of the relevant statutory regime' is called for to determine and frame the existence of a common law duty owed by a statutory authority"³⁰).

72. The second issue requires a value judgment as to whether a regulator or statutory authority with statutory responsibilities for child protection ought to be held accountable for negligent acts, in the circumstances.

Applicable Legal Principles

73. As to the first question, as a general rule, for the duty of care to arise, the authority must have a relationship with the person affected by its conduct which is so close and so directly affected by its omission that it ought reasonably to have them in contemplation when it directs its mind to the conduct in question.³¹ But a statutory authority can, by its conduct, place itself in a position that attracts a duty of care particularly where others rely upon it to take care for their safety.³²
74. In some jurisdictions, for example, the United Kingdom, courts have been reluctant to impose a statutory duty of care upon statutory authorities in these circumstances. For example, the House of Lords in *X (Minors) v Bedfordshire County Council*³³ held, on policy grounds, that a common law duty cannot be imposed on a statutory authority if the observance of the common law duty would be inconsistent with or have a tendency to discourage, the due performance by the local authority of its statutory duties. The House of Lords viewed child protection decisions as too delicate and complex to be justiciable. In particular, (at 750) their Lordships found that if liability and damages were imposed, local authorities may well adopt a more cautious and defensive approach to their duties and that they may be a substantial temptation for an authority to postpone making a decision to remove a child until further enquiries have been made.
75. In Australia, the position will be determined by application of well established principles. In *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 29-30, (**Crimmins**) McHugh J set out six factors that the Court, in interpreting the legislation (which is silent on the question), must take into account in determining whether there exists a statutory duty of care.³⁴ These are:
- a. Was it reasonably foreseeable that an act or omission of the defendant, including a failure to exercise statutory powers, would result in an injury to the plaintiff or his or her interests?
 - b. By reason of the defendant's statutory or assumed obligations or control, did the defendant have the power to protect a specific class including the plaintiff (rather than the public at large) from a risk of harm?

³⁰ *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, at 596-7. (**Graham Barclay Oysters v Ryan**).

³¹ *SB v State of New South Wales* (2004) 13 VR 527 at [164]. (**SB v New South Wales**)

³² *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, at pp.459-461.

³³ [1995] 2 AC 619.

³⁴ *Crimmins* at pp.29 and 34 per McHugh J.

- c. Was the plaintiff or were the plaintiff's interests vulnerable in the sense that the plaintiff could not reasonably be expected to adequately safeguard himself or herself or those interests from harm?
 - d. Did the defendant know, or ought the defendant to have known, of the risk of harm to the specific class including the plaintiff if it did not exercise its powers?
 - e. Would such a duty impose liability with respect to the defendant's exercise of "core policy-making" or "quasi legislative" functions? If yes, then there is no duty.
 - f. Are there any other supervening reasons in policy to deny the existence of a duty of care (e.g. inconsistency with a statutory scheme or issues in relation to pure economic loss)?
76. Subject to these questions from the statement of McHugh J in *Crimmins*, it has been recognised and "*it is well settled that a public authority may be subject to a common law duty of care when it exercises a statutory power. It must be exercised with reasonable care. Damages for negligence may be recovered if reasonable precaution could have prevented injury which has been occasioned and was likely to be occasioned by the exercise of that statutory power*".³⁵ In the absence of any express or presumed statutory limitation, the principle issue at trial would be whether the defendant breached his duty of care to the plaintiff, and whether that breach caused injury or loss which was not too remote.³⁶

Examples of Cases where Australian Courts have imposed a Statutory Duty of Care in a child protection context

77. Australian Courts have held that statutory child welfare organisations can be subject to a common law duty of care.
78. For example, in New South Wales and Victoria, a duty has been found to exist: see *TC v New South Wales* [2000] NSWSC 292 (***TC v New South Wales***) and *SB v New South Wales*³⁷.
79. In *TC v New South Wales*, the Plaintiff sued the State of New South Wales in negligence contending it was vicariously liable for the failure on the part of officers of the Department of Youth and Community Services (**YACS**) to exercise the statutory power to investigate and take action in relation to complaints by the father of physical and sexual abuse by the mother. The Plaintiff alleged that the State (through YACS and its officers) owed a common law duty of care to children in respect of whom there had been notification within the terms of s.148B *Child Welfare Act* 1939 (NSW) (***Child Welfare Act***). Studdert J found that there was a duty of care owed by the YACS, enlivened by a notification under s.148B(2) of the *Child Welfare Act*. The content of

³⁵ *SB v New South Wales* at pp.549-550 per Redlich J.

³⁶ *SB v New South Wales*, at p.550. See also *Graham Barclay Oysters v Ryan* at 578 per McHugh J : "*It is sufficient that the risk is one of a class of risk that in a general way the defendant should have foreseen. Reasonable foreseeability involves more than a question of fact. It involves value judgments. Would a reasonable person in the position of the defendant not only foreseen his or her conduct – including omissions – gave rise to a risk of injury, but regarded it as sufficiently serious to consider what steps should be taken to avoid or reduce it.*"

³⁷ *Ibid.*, see fn.52.

the duty was that YACS exercise reasonable care in the discharge of the mandatory requirements imposed upon it under s.148B(5). At para [158], Justice Studdert said:

“I am satisfied that this legislation, and in particular s.148B was introduced for the protection of a limited class, namely children at risk. I find no pointer in the statute that parliament did not intend to create a source of a private cause of action. Indeed s.148 may be regarded as an indicator that parliament intended that a private duty could arise under the statute.”

80. In *SB v New South Wales*, the *Child Welfare Act* provided for the making of notifications to the Director of the NSW Child Welfare Department concerning any child believed upon reasonable grounds to have been assaulted or neglected. Where such notification occurred, the director was required to institute an investigation and, if satisfied that the child may have been assaulted, to take such action as the director believed appropriate. In his judgment, Redlich J held that the NSW Child Protection Authority owed, and was in breach, of a duty of care to a ward who had been sexually abused by a foster parent and then restored to her natural father who, for the balance of the wardship, had pursued an incestuous relationship from which resulted 2 children. At paras [298] to [300], his Honour said:

“the failure to intervene to protect the Plaintiff was not a policy matter for the Defendant. ... The imposition of a duty of care on the Defendant does not cut across the legislative intent of the Act, as was the case in Sullivan v Moody. As the name of the Act indicates, the general legislative intent of the Act is the protection of child welfare. The duty of care toward children injured by reason of the exercise or failure to exercise powers granted under the Act may clearly co-exist with, and be consistent with, the purposes of the Act. Recognition of a duty would serve to emphasise the primary responsibility of the Department and its officers to promote the welfare of children generally and its wards. There is no policy reason to protect authorities exercising statutory powers in circumstances where the child is already a ward of the authority. ... The notion that social workers will become defensive in the making of delicate or urgent decisions should be viewed with serious reservation. ...The existence of a concurrent common law duty, is likely to encourage the maintenance of higher standards in pursuing the paramount objective of the welfare of the child”.

81. In making his decision in the case just referred to, Redlich J made reference to what he referred to as a trend on the part of courts (at least in cases concerning statutory authorities conferred with powers and responsibilities in relation to children’s welfare) to recognize such a duty in the context of such statutory schemes.³⁸

³⁸ Ibid at p.599 per Redlich J.

Case Study: Victorian Statutes where such a duty may arise

82. In Victoria, there have been no cases which deal with whether a Victorian government agency is subject to a duty of care in relation to the exercise of its statutory powers relating to child protection³⁹.
83. However, there are a number of Victorian statutes that deal with the welfare of children (i.e. where statutory bodies are invested with powers in relation to the management and protection of children), and in respect of which statutory duties of care may therefore exist. For example,
- a. The *Children Wellbeing and Safety Act 2005* (Vic): this act sets out the overarching principles for the provision of services for children and families in Victoria. Section 5(2)(a) provides that services for children and families should be designed to readily identify harm and damage to children and families; and for intervention to remove or ameliorate the cause of the harm or damage. The Act also establishes the *Victorian Children's Council* and the *Children's Services Co-ordination Board*. The *Victorian Children's Council* is an external expert group advising the Victorian Government on policies and services that enhance the health, well-being, development and safety of children. The *Children's Services Co-ordination Board* comprises the heads of the relevant Victorian Government departments and is tasked with coordination of government activities relating to children. It reports annually to the Minister for Children and Early Childhood Development and the Minister for Community services.
 - b. The *Children, Youth and Families Act 2005* (Vic): with respect to the safety and wellbeing of children, this Act provides for the establishment of child protection service by the Department of Human Services as well as the functions of the Secretary of the Department (or his or her delegate) in ensuring the safety and protection of children through, amongst other things (i) processes for the protection of children at risk of harm; (ii) a framework for registration and quality assurance of community carers; and (iii) clearly authorised information-sharing to promote children's safety, well-being and development
 - c. The *Working with Children Act 2005* (Vic): this act provides a legislative framework for the Secretary of the Department of Justice (or his or her delegate) to assess the criminal history of, and other relevant information about, people who engage in certain types of work, to determine their suitability to work with children and, if deemed suitable, provides for the issue of a Working With Children Check Card.
 - d. The *Commission for Children and Young People Act 2012* (Vic): this Act establishes the Commission for Children and Young People. The Commission's functions include promoting children's safety and well-being and monitoring out of home services. The Commission also has the capacity to initiate its own enquiries. These enquiries could be individual inquiries in relation to the safety and

³⁹ The case of *SB v New South Wales* was in relation to the actions of the New South Wales Department of Youth and Community Services under the *Child Welfare Act*.

well-being of a vulnerable child, or systemic inquiries, where the Commission identifies persistent or recurring issues in health services, human services or schools which are impacting on the safety and well-being of children and young people.

- e. The *Education and Training Reform Act 2006* (Vic): this Act provides for the registration and regulation of both government and non-government schools. The Act also establishes the *Victorian Institute of Teaching* and the *Victorian Registration and Qualification Authority*. The *Institute* is an independent statutory authority for the regulation of all teachers in Victorian schools (both government and non-government). All teachers in Victoria must be registered and recorded on a register. Other functions of the *Institute* include the investigation of the conduct, competence and fitness to teach of registered teachers and the imposition of sanctions where appropriate. Under s. 2.6.29 of the Act, the *Institute* is also required to cancel the registration of any teacher who is convicted or found guilty of a sexual offence involving a child.

84. In none of the statutes just referred to, has the Parliament of Victoria expressly stated that the authority concerned is subject to a common law duty of care. Accordingly, whether a court would extend a common law duty of care to any of these authorities will depend on the application of the principles outlined above. In doing so, it is likely that a Victorian court will interpret these statutes with regard to section 17(2) of the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic). Section 17(2) of that Act provides that “*every child has the right to such protection as is in his or her best interests and is needed by him or her by reason of being a child*”.

Potential Statutory Reforms – The Position of UCA (Victoria & Tasmania)

85. As to the second question, the UCA (Victoria & Tasmania) believes that all parties who have responsibility for the protection of children should be accountable in law for their actions and inactions. As already stated, the UCA (Victoria & Tasmania) accepts that with the advent of greater responsibility in law, will come further change to institutional response to child abuse in institutional settings.
86. There is no reason in principle why statutory authorities should be immune from liability for their actions, any more than any other institution, Government or non-Government, which deals with children and/or has responsibility for their welfare. If this is so, then action should be taken (by amendment of relevant statute) to clarify the law in this area to make the liability of authorities clear. This can be done by amendment to relevant statutes, so as to include an express statement as to the liability in the statute itself. Such statement would create certainty in the law, avoid wasted expenditure (by both claimants and relevant authorities) testing the existence of duty on the part of the authorities concerned and promote lasting changes to the way authorities manage their responsibilities and those of entities for which they are responsible.
87. Given the importance of the welfare and protection of children in modern society, the approach in the United Kingdom has little to commend it. The rationales for not

imposing a statutory duty identified by the House of Lord in *X (Minors) v Bedfordshire County Council*⁴⁰ are, with due respect, weak.

Issue 1(e):- Limitation periods which restrict the time within which a victim may sue and the circumstances in which limitations periods may be extended.

88. Unlike criminal cases to which no statutory limitation period applies, civil claims in Australia (including claims for personal injuries), are subject to fixed time limits within which claims for damages can be brought. In the event that these time limits are exceeded, statutes provide defendants to claims with a complete defence to any action thereafter commenced. The defendant can choose whether to take the defence, which must be pleaded. The fundamental reason for these statutory time limits is the effect of delay on the quality of justice. In short, it is universally accepted that justice delayed is justice denied.

The state of Legislation in Victoria (limitation periods for sexual abuse claims)

89. In Victoria, claims for sexual abuse, must be commenced within the periods provided for such claims in the *Limitation of Actions Act 1958* (Vic) (**Victorian Limitations Act**). The current limitation periods for injuries caused by child sex abuse are governed by Part 2A, Division 2 of that Act, for actions commenced after 1 October 2003⁴¹.

90. The Victorian Limitations Act provides a more generous limitation period for minors injured by close relatives or a close associate of a relative than it does for other victims of child sex abuse. Section 27I provides that if a person who was a minor at the time of alleged abuse, brings a claim against a parent or a guardian of the victim or a close associate of a parent or guardian of the victim, then the cause of action is deemed to be discoverable: (a) when the victim turns 25 years of age; or (b) when the cause of action is actually discoverable by the victim, whichever is the later.⁴² The person then has 6 years from that time to bring the action.

91. Section 27I (1)(b) of the Act provides for a long-stop limitation period in cases involving abuse by a parent, guardian or close associate or parent of guardian (i.e. claims must be brought before the person turns 37 years old).

92. For other child abuse claims (i.e. where it is not alleged that the perpetrator was a parent, guardian or close associate of a parent or guardian (which may well represent the vast majority of cases where a victim alleges institutional sex abuse), the relevant provision is section 27E(1). It provides that an action shall not be brought after: (a) the period of 6 years from the date on which the cause of action is discoverable by the plaintiff; or (b) the period of 12 years from the date of the impugned conduct, whichever is the earlier.⁴³

93. A cause of action is discoverable by a person when he or she knows or ought to have known of all of the following facts about the injury: (a) when it occurred; (b) that it was

⁴⁰ Ibid.

⁴¹ see s 27N of the *Victorian Limitations Act*.

⁴² s 27I (1)(a) of the *Victorian Limitations Act*.

⁴³ s27D(1) (a) of the *Victorian Limitations Act*.

caused by the fault of the defendant; and (c) that it is sufficiently serious to justify the bringing of an action on the cause of action⁴⁴.

94. Claims brought outside these periods will be statute barred, although ss.27K and 27L provide for the limitation period to be extended in certain circumstances. Extending the limitation period for personal injury actions is dealt with in Division 3 of Part 2A of the Victorian Limitations Act. By s.27K(2)(b), the Court must decide if it is “*just and reasonable*” to order the extension of the period of limitation. Section 27L provides a list of non-exhaustive factors that the court is required to consider when deciding whether or not to extend.

Limitation Periods in other States

95. Similar limitations regimes operate in New South Wales and Tasmania. In New South Wales, for actions commenced post 2002, s.50C of the *Limitation Act 1969* (NSW) (***NSW Limitations Act***) provides that an action is not maintainable if brought after the first of the following to expire: (a) the three year post discoverability period, which is the period of three years running from and including the date on which the cause of action is discoverable by the plaintiff; or (b) the twelve year long-stop limitation period, which is the period of twelve years running from the time of the impugned conduct. Section 50E of the NSW Limitations Act also provides a special limitation period for minors injured by a parent or guardian of the victim or a close associate of a parent or guardian, which is in identical terms to the Victorian provision. No other Australian state has a special limitation period for minors injured by a close associate.
96. In Tasmania, under s 5A of the *Limitation Act 1974* (Tas) (***Tasmanian Limitations Act***) the limitation period for personal injury actions expires three years after the date the cause of action was discoverable by the plaintiff or twelve years after the impugned conduct. There is no discretion to extend the limitation period in New South Wales or Tasmania once the initial three year post-discoverability period has expired, however there is the ability to extend the twelve year long-stop period in both jurisdictions..
97. South Australia, Queensland and Western Australia have different limitation regimes for personal injury claims to Victoria.
98. In South Australia, under s 36(1) of the *Limitation of Action Act 1936* (SA) (***SA Limitations Act***), all damages claimed which consist of or include damages in respect of personal injuries to any person, shall be commenced within three years after the cause of action accrued but not after. Section 36(1a) would also be relevant to child sex abuse victims. It provides that in cases of personal injury that remain latent for some time after its cause, the period of 3 years begins to run when the injury first comes to the person’s knowledge.
99. In Queensland, section 11 of the *Limitation of Actions Act 1974* (Qld) (***Qld Limitations Act***) provides that an action for damages for negligence, trespass, nuisance or breach of duty in which damages claimed by the plaintiff consist or include damages in

⁴⁴ see s 27F(1) of the *Victorian Limitations Act*.

respect of personal injury to any person shall not be brought after the expiration of three years from the date on which the cause of action arose.

100. In Western Australia, s 14(1) of the *Limitation Act 2005 (WA)* (**WA Limitations Act**) provides that an action for damages relating to a personal injury to a person cannot be commenced if 3 years have elapsed since the cause of action accrued. Section 38(1)(b) also prescribes a time limit of four years for actions for trespass to the person, assault and battery and by section 38(1)(c)(vi) a period of six years for negligence. Sections 30 to 33 of the WA Limitations Act also prescribe a regime for the applicable limitation period for persons between the ages of 15 to 17, which takes into account whether the person is with or without a guardian during those ages. Thus in Western Australia, a victim of child sex abuse may have up until between 22 and 24 years of age to commence a proceeding depending on the action.
101. In South Australia, Queensland and Western Australia, the discretion to extend is limited by the discoverability test. Under section 31(2) of the Qld Limitations Act, the plaintiff must demonstrate that a material fact of a decisive character relating to the right of action was not within his or her means of knowledge before the expiry of the limitation period. If this discoverability test is met, the Court, under s 31(2) has the power to extend the limitation period up to one year from the date of discoverability. By section 48(3)(b)(i) of the SA Limitations Act, the plaintiff must demonstrate that a material fact had only been ascertained by the plaintiff in the twelve months before the claim was lodged. In Western Australia, under s 39(3) of the WA Limitations Act, the discretion to extend is limited to considering whether the plaintiff actually or constructively knew about the injury, the cause of the injury and the identity of the tortfeasor. By section 39(4), if the discretion to extend is enlivened, the Court may extend time up to three years from the date on which the plaintiff acquired knowledge (constructively or otherwise) of the facts.

Utility of Limitation Periods

102. Statutory limitation periods are often perceived as an unwarranted obstacle to the ability of victims to commence sexual abuse claims in the civil litigation system. This perception is particularly strong, in cases involving Old Claims, where the impugned conduct (essentially criminal conduct) happened many years ago at a time when such abuse was rarely reported and when the true nature of the injury and the damage suffered was not understood.
103. The following issues are frequently raised as reasons why limitation periods are seen as obstacles to commencing civil litigation: (a) the time taken to enable a victim of sexual abuse to feel sufficiently 'safe' to report the abuse and to have the emotional fortitude to do so, means that limitation periods work against plaintiffs; (b) the fact that medical and legal assistance is not sought until much later in adult life, also means that limitation periods are working, again, against victims; and (c) the "very strict technical defences" based on the expiration of the limitation period that NGO's are able to take once proceedings are commenced.
104. A number of these criticisms found voice at the *Victorian Parliamentary Report*. The response of the *Parliamentary Committee* was to recommend that the State

Government consider amending the Victorian Limitations Act to do away entirely with limitation periods for claims involving sexual abuse.⁴⁵ It making these recommendations, the *Parliamentary Committee* seemed particularly influenced by a view that: (a) some non-government organisations have aggressively pursued limitation defences; and (b) limitation defences adversely affect the bargaining position of victims in settlement negotiations.

105. The starting point to an evaluation of the utility of statutory limitation periods as a defence to civil claims (including sexual abuse claims), is understanding the key rationales for them.
106. In the High Court case of *Brisbane South Regional Health Authority v Taylor*⁴⁶ (***Brisbane South v Taylor***), McHugh J identified the following as important rationales for having statutory limitation periods: first, as time goes by, relevant evidence is likely to be lost; second, it is oppressive to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed; third, people should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them⁴⁷; fourth, it is in the public interest that disputes be settled as quickly as possible. Another rationale referred to was that, in some circumstances, it is unjust and unfair to make third parties ultimately liable for a wrong of the distant past.
107. These rationales apply to personal injury claims as much as they apply to economic loss claims. They recognise, as is the fact, that it can impose an oppressive burden on defendants (even if they are insured) to allow plaintiffs to bring claims arising from conduct which took place many years ago as, “*a fair trial (which must surely include a fair opportunity for the defendant to investigate the allegations) ... is, in many cases, likely to be found quite simply impossible after a long delay.*”⁴⁸
108. But against these rationales, there is the competing public policy in ensuring that a plaintiff’s access to justice is not unfairly impeded where there is no risk of prejudice, or to put it another way, where a fair trial can take place. A fortiori, in cases where the extent of the plaintiff’s injuries are crippling and the nature of the defendant’s conduct is abhorrent.
109. In the case of personal injury, limitation periods promulgated in state legislation are typically 3 years.⁴⁹ This is understandable. For example, in the case of accident, the injury is usually physical and damage occurs and is manifestly apparent at the time of the accident. The shorter limitation period reflects the fact that claims that can be brought within a reasonable period of the event and in the interests of justice, should be.

⁴⁵ Page 543 of the *Victorian Parliamentary Report*.

⁴⁶ (1996) 186 CLR 541,552-553.

⁴⁷ This is important because actions are not restricted to claims against perpetrators. They can affect other parties (often innocent), for example, businesses/employers, public institutions, churches, insurers who may have a direct or indirect involvement. These bodies have a significant interest in knowing that they have no liabilities beyond a definite period.

⁴⁸ *A v Hoare* [2008] 1 AC 844, 866 per Lord Brown of Eaton-Under-Heywood. This is especially so if witnesses are dead or incapacitated or if evidence, documentary or otherwise, has been lost.

⁴⁹ E.g. ss.5(1AA) of the *Victorian Limitations Act*. See generally Benjamin P Matthews in ‘*Judicial Considerations of Reasonable Conduct of Child Sexual Abuse*’ in (2004) University of New South Wales Law Journal 1, at p.7.

Sexual Abuse of Minors

110. Cases involving sexual abuse of minors are different. First, they frequently concern children who do not understand fully acts and their consequences and consequently cannot meaningfully be subject to limitation periods, at least until they attain the age of 18. This is reflected in the legislation in some states where time does not begin to run under limitations provisions until a child reaches adulthood (i.e. 18 years old). In the jurisdictions where time does run against minors (Victoria and New South Wales), it does so only if the child resides in the custody of a parent or close guardian, the rationale being that the child's interests are thereby protected.
111. Secondly, in sexual abuse cases involving minors there are other considerations which have been recognised as justifying a longer limitation period. These include: (i) the nature of the claim (i.e. criminal acts against minors who have a limited understanding of the nature of the wrong and of the harm to which they have been exposed) and thus a limited ability to understand litigation as a remedy; and (ii) the nature of the injury (psychological injury may be hard to recognise even in adulthood).
112. However, one of the most powerful factors supporting an extended limitation period in child sexual abuse cases is the fact that the injury is usually mental, not physical (i.e. psychological harm) and may take years to manifest and/or to be clinically recognisable and recognised. This makes it difficult for a victim to link the occurrence of the injury with the impugned conduct which may have happened years, or even decades before. Without an understanding of the nature (i.e. psychological damage) and extent of the injury it is difficult for a victim to understand the degree of the harm suffered and therefore to evaluate the merits of any legal claim. In such cases, short limitation periods could work an injustice to a victim, depriving him or her of the opportunity to make a genuine claim.
113. There is also the problem in sexual abuse cases (particularly of minors) that mere grief, distress, fear or anxiety is insufficient to amount to an actionable wrong because it does not amount to a psychiatric illness.⁵⁰ At the same time, as the Victorian Court of Appeal stated in *Rawlings v Rawlings*⁵¹ (albeit in a non sex abuse context):
- “Although human beings may suffer all sorts of significant emotional and mental problems from time to time, neither they nor anyone else, short of a psychiatrist or psychologist is ordinarily likely to perceive the problem as arising out of a permanent severe mental or permanent severe behavioural disturbance or disorder. In most cases, it is only when and if they are so diagnosed that they are capable of knowing that the incapacity of which they were aware arises out of that condition.”*
114. So in the search for what is just, an important question in sexual abuse cases becomes, when was the disturbance or disorder discoverable by the person affected?

⁵⁰ *Tame v State of New South Wales* (2002) 211 CLR 317.

⁵¹ [2010] VSCA 306 at [47].

Balancing competing policy considerations

115. As the question just posed demonstrates, the difficulty, in assessing both the efficacy of limitations legislation and potential modification to existing laws, is balancing the competing considerations.
116. That balancing act is ultimately one for the legislature. In enacting limitation periods, Parliaments have sought to balance the rights of plaintiffs to justice with the potential risk of injustice to defendants arising from the bringing of stale claims. It is for this reason that it is wrong to regard limitation periods as some arbitrary cut-off point quite unrelated to the demands of justice or the general welfare of society.⁵²
117. For example, the factors justifying a longer limitation period in sexual abuse cases, were identified in the Commonwealth *Review of the Laws of Negligence* in 2002 (**Ipp Report**).⁵³ The Victorian and New South Wales provisions which provide special limitation periods for minors injured by close associates (i.e. s.271 of *Victorian Limitations Act*) were enacted following publication of the Ipp Report and in response to it.
118. Having said that, limitation periods for sexual abuse claims clearly differ from State to State.⁵⁴ As these analyses demonstrate, in almost all States, the legislation is complex and convoluted. What should be a simple scheme to determine the time limits for injury claims is in fact complicated and difficult to understand.

Findings of the Victorian Parliamentary Inquiry

119. As already noted, the Victorian Parliamentary Report found that the Victorian Limitations Act does not allow enough time for victims to bring a case for criminal child abuse and that limiting the time period within which a civil claim can be brought does not serve the public interest, principally because of the time it may take for a victim to understand the harm they have suffered. The Committee found that many of the public interest arguments (including those identified in the Ipp Report and by McHugh J in *Brisbane South v Taylor*) supporting a statute of limitations were unconvincing in the context of criminal child abuse. In determining that the “*lifelong consequences of criminal child abuse outweigh the public benefit of giving certainty to defendants and speeding up the litigation process*”, the Parliamentary Committee agreed with the following passage from the judgment of La Forest J in the Supreme Court of Canada in a case of criminal child abuse:

“There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations. In my view this is a singularly unpersuasive ground for a strict application of the statute of limitations in this context. While there are instances where the public interest is served by granting repose to certain classes of defendant...there is absolutely no corresponding public benefit in

⁵² Ibid at 9.

⁵³ *Ipp Report* at p.96.

⁵⁴ Apart from the summary above, a useful analysis of the relevant legislation applicable in each state to personal injury actions (with helpful comparisons), can be found (at pages 9 and 10) in a 2011 paper prepared by the Law Council of Australia *Law Council of Australia: - A Model Limitation Period for Personal Injuries Actions* – published in June 2011.

protecting individuals who perpetrate incest from the consequences of their wrongful actions. The patent inequity of allowing these individuals to go on with their life without liability, while the victim continues to suffer the consequences, clearly militates against any guarantee of repose.”

120. The Parliamentary Committee recommended that the Victorian Government adopt the approach of some states in Canada in abolishing limitation periods for sexual assault civil actions.

The view of UCA (Victoria & Tasmania) – the current law and potential reforms

121. Whilst the UCA Victoria accepts that limitation reform is desirable and necessary (see discussion below), it does not agree with these recommendations of the Parliamentary Committee. Its position is as follows.
122. For the reasons already stated, there is a clear case for longer limitation periods in the case of sexual abuse. But this does not mean limitation periods should be abandoned altogether. The existence of statutory limitation periods play a vital role in protecting the rule of law in the civil litigation process by disallowing the issue of cases where there is a real risk that a fair trial is no longer possible. If many years are allowed to pass between alleged abuse and engagement of the litigation process, it is beyond argument that a point in time is reached when the conduct of litigation is no longer just because a fair trial is no longer possible. As McHugh J stated in the *Brisbane South v Taylor* case (just referred to):

*“Sometimes the deterioration in quality is palpable, as in the case where a crucial witness is dead or an important document has been destroyed. But sometimes, perhaps more often than we realise, the deterioration in quality is not recognisable even by the parties. Prejudice may exist without the parties or anybody else realising that it exists. As the United States Supreme Court pointed out in *Barker v Wingo*, ‘what has been forgotten can rarely be shown. So, it must often happen that important, perhaps decisive, evidence has disappeared without anybody knowing that it ever existed. Similarly, it must often happen that time will diminish the significance of a known fact or circumstance because its relationship to the cause of action is no longer as apparent as it was when the cause of action arose. A verdict may appear well based on the evidence given in the proceeding but, if the tribunal of fact had all the evidence concerning the matter, an opposite result may have ensued. The longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose.”⁵⁵*

123. Relentless pursuit of a litigation solution in these circumstances leads to unreliable judicial outcomes thereby undermining the rule of law. This point becomes even more important when it is understood that it is not just alleged perpetrators who can be sued under civil law. Public institutions, government agencies and bodies such as insurers can be joined as defendants to these claims. If claims are brought decades after the

⁵⁵ Ibid at p.8 per McHugh J.

events in question, there is a heightened risk that a fair trial cannot take place. In these circumstances a decision to simply abandon limitation periods for sexual abuse claims could lead to real injustice.

124. In this context, the Parliamentary Committee's view, namely, that lifelong consequences of criminal child abuse outweigh the public benefit of giving certainty to defendants and speeding up the litigation process, does not accurately state the competing public policy considerations. Limitation periods may provide certainty for defendants, but that is not the rationale for them. The real public interest lies in ensuring that justice is done and the rule of law not undermined.
125. Similarly, the passage from the judgment of La Forest J with which the Parliamentary Committee agreed, needs to be treated with caution, if for no other reason than because it is burdened with a false assumption. That assumption is that in any case, the guilt of a defendant can simply be assumed. In balancing the competing policy considerations, it is important not to lose sight of one of the fundamental principles underpinning Australian law; namely that defendants are innocent until proven guilty.
126. Sexual abuse is a crime. Whilst, under the criminal law, there are no statutory limitations on the bringing of claims, guilt must be established "*beyond reasonable doubt*". The seriousness of the consequences (loss of liberty etc.) dictate strict proofs. Under civil law peoples' claims for civil damages arising from sexual abuse must be proved at the civil standard, on the balance of probabilities, but the seriousness of the allegations again demand strict standards of proof (*the Briginshaw Standard* applies and the *Longman* warning adapted to a civil context⁵⁶) is relevant. The plaintiff in a civil action has the burden of establishing his or her case to the *Briginshaw Standard*; a defendant is not deemed to be liable unless proven otherwise. Again, the consequence, in terms of both monetary damages, damages to reputation and the breakdown of family relationships and friendships are potentially enormous.
127. Limitation periods are not, as the passage from La Forest's J judgment quoted by the Parliamentary Committee would suggest, about "*protecting individuals who perpetrate incest from the consequences of their wrongful actions.*" They are about balancing the rights of plaintiffs in having their claims heard, with the rights of defendants to a fair trial and a just outcome.
128. Having said that, there is a clear and strong public interest in ensuring that victims of sexual abuse have access to justice so that genuine claims can be heard and compensation granted.

Potential Reforms to Existing Laws

129. Whilst the Parliaments of the various States have each considered these issues and balanced competing public policies, limitation provisions laws are nevertheless not consistent. They should be. There is no compelling reason for different laws in different States. Moreover, they should be simplified so they can be easily understood and applied.

⁵⁶ We discuss the *Briginshaw Standard* and the *Longman* principle below in our discussion of causation under heading 1(i).

130. A balanced and fair approach to this issue demands the following:

- a. there should be statutory limitations on the ability of persons to bring stale claims even in sexual abuse cases. To suggest, as the Parliamentary Committee did in the Victorian Parliamentary Report that there should be no limitation periods in relation to sexual abuse claims is to go too far. Such a recommendation ignores the role played by limitation periods on the quality of justice and in ensuring the integrity of our justice system and the rule of law.
- b. On the other hand, there are good reasons why longer limitation periods should apply in relation to the egregious conduct involved in the abuse of children. These have been identified above.
- c. Accordingly, existing laws should be modified as follows:
 - i. Laws throughout the country should, so far as is possible, be made uniform. This promotes certainty and negates any suggestion of arbitrary or capricious differences in state regimes.
 - ii. Claims involving sexual abuse against minors should not be subject to limitation periods until the victim attains the age of 18. This is consistent with the broadly held view (supported by the *sui juris* legal principle) that persons under the age of 18 years are not of full legal capacity and not necessarily in a position to make fully informed decisions.
 - iii. Once the age of 18 is reached, the limitation period should only commence to run from the time when the injury is discernible by the victim (***discoverability***). This reflects the nature of the injury most common in sexual abuse cases and the reasons, social and clinical, behind the fact that victims of abuse often take years to reach a point where they can bring legal claims.
 - iv. A question arises as to what discoverability means in this context. Does it connote a subjective consideration of when the victim actually discovered his or her injury (the subjective test) or an objective consideration of when a reasonable person, in the plaintiff's position, ought to have known (an objective test)? UCA (Victoria & Tasmania) would support a law which made the discoverability test subjective only. Such a law errs on the side of caution in favour of the victim. It also prevents unnecessary and time consuming arguments as to what the victim ought to have known at a particular time.
 - v. The limitation period should be at least three years from the date of discoverability. A three year limitation period, would promote uniformity by making the limitation period consistent with other laws applying to personal injury claims. Once a plaintiff actually knows the facts necessary to be able to bring a claim, a period of at least three years provides a reasonable period for this to be done. But it would be open to the Commission to recommend a period of more than three years were that felt desirable.

- vi. A long-stop provision should be included. A long-stop period was recommended in the Ipp Report as a means to providing an end date for all claims, regardless of whether the plaintiff has discovered his or her injury. Such a provision specifically contemplates cases where the onset of damage is long after the impugned conduct or is difficult to detect. A long-stop period which expired at the age of 40 (for a plaintiff who was abused as a minor) is a lengthy period. A longer long-stop provision could prove unfair to defendants. A shorter period may prove unfair to plaintiffs. The choice of 40 years of age is necessarily arbitrary, but as suggested in the Ipp Report, it is an attempt to strike a reasonable balance between competing public policies. At 40 years old, it would be a minimum of 22 years since the occurrence of the impugned conduct. Beyond that time, it is difficult to avoid the conclusion that a fair trial concerning events that happened more than 2 decades before, is not possible.⁵⁷
- vii. If the long-stop period is included, then it does not really matter whether the expiry period is 3 years from discoverability or a longer period (say 6 years). The existence of the long-stop period means the period for the bringing of claims is not endless. Were the long-stop time to expire when the complainant reaches 40 years of age, with time not running until the date of discoverability, there is no need for any provision enabling limitation periods to be extended. Moreover, giving the court discretion to extend in such circumstances would not only be unnecessary but would also promote uncertainty.

131. Limitation provisions such as those just outlined would provide uniformity, and simplicity, and would tend to preserve the integrity of our justice system. They would also go a long way toward balancing the competing public policy considerations in this very difficult area of law.

132. Importantly, the expiry of limitation periods should not necessarily mean a complainant has no access to redress for wrongs committed. For example, it may become possible for a victim of child sex abuse whose injuries are discoverable after the age of 40 to secure some alternative form of redress, for example under a statutory compensation scheme of some form (i.e. a scheme that may become available as an alternative to civil litigation for victims of child sexual abuse). This is a matter for submission at another time. But the point is that civil litigation does not have to be the only avenue of redress for victims of child sexual abuse. On the contrary, this discussion on limitation periods perhaps demonstrates that other avenues for redress need to be considered.

⁵⁷ The Parliamentary Committee criticised long-stop provisions essentially because they set a maximum period for the bringing of claims. If it be accepted that limitation periods are desirable for the reasons stated in this submission, the significance of the long-stop provision is that it provides certainty and simplicity, and obviates the need for provisions providing a right for extension.

Issue 1(h):- The process of giving evidence and being subject to examination and cross examination

133. The process of giving evidence and being subject to cross examination may be, or certainly may be perceived as, an obstacle by plaintiffs seeking damages in a civil proceeding for child sex abuse. If that is so, it arises from the following realities which attend the litigation process:

- a. The parties in any sexual abuse case will need to give evidence of the alleged abuse in open court. This involves public agitation of what are, for most victims, intensely private matters. This must be a very difficult experience for a victim, especially a person who has taken a lengthy time to recognise or come to terms with their injuries. This point is exacerbated by the requirement that plaintiffs in sexual abuse cases satisfy the test in *Briginshaw v Briginshaw* (1938) 60 CLR 336 (a point discussed below under the heading - Causation).
- b. The cost involved in securing and preparing presenting relevant testimony (i.e. factual and expert proofs) can be extensive. This is particularly so in the case of Old Cases.
- c. Evidential rules as to admissibility cannot be ignored in this context. They can pose obstacles for a plaintiff in all cases of sexual abuse. For example, the evidence of a contemporaneous complaint of the sex abuse (for example to a teacher or a parent) might not be admissible or relevant to support the credit of a plaintiff in a civil action in determining whether the sex abuse occurred. In *AM v KB* [2007] VSC 429, Justice Kaye at [9] and [41] raised this admissibility question and, in doing so, referred to the decision of *DeB v DeB* [1950] VLR 242. In that case, the Victorian Supreme Court found that in a petition for divorce on the grounds of sodomy, evidence was not admissible that the petitioner had made a complaint of the offence to a third person in the absence of the respondent. This may, depending upon the facts of a particular case, be an example of an evidential rule that has a limiting effect in terms of the evidence a victim can call in support of their case.
- d. There is, in all litigation, including sexual abuse cases, the prospect that the plaintiff will be subject to cross-examination. This raises two potential difficulties:
 - i. emotionally it may be difficult for a victim of sexual abuse to be cross-examined about the specific acts constituting the abuse;⁵⁸ and
 - ii. perpetrators of sexual abuse (who may be members of religious organisations who have taken a vow of poverty) may often defend themselves (i.e. be self-represented), with the risk that a victim may be cross-examined by the alleged wrongdoer.⁵⁹

134. These issues may make civil litigation a challenging process for a victim of sexual abuse. However, these issues may be difficult problems to resolve without serious

⁵⁸ A case where the plaintiff was cross examined in a sex abuse case is in *Varmeduja v Varmedija* [2007] NSWDC 385 at [60].

⁵⁹ *AM v KB*, *ibid*, was a case where the plaintiff found him/herself in this invidious position.

interference with the administration of justice. For example, it is not hard to see how denying a defendant an opportunity to cross-examine could risk a miscarriage of justice and undermine confidence in the civil justice victim.⁶⁰

135. A solution may, however, lie in the way in which the judge chooses, within the powers vested in him or her, to run the proceeding.
136. For example, in Victoria, the Court has wide ranging powers in relation to how the evidence is given in a civil trial pursuant to s 49 of the *Civil Procedure Act 2010* (Vic) that may be used to protect a victim of child abuse. The Court's power includes giving any direction that it deems appropriate in relation to the giving of evidence⁶¹. Such directions may include: (i) the order in which evidence is to be given; or (ii) limiting the time to be taken in examining, cross examining and re-examining witness; or (iii) limiting the issues and matters that may be subject of examination and cross examination; or (iv) orders in relation to the place, time and mode of the trial; or (v) evidence, including, but not limited to whether evidence in chief should be given orally, by affidavit or by witness statement.
137. These powers can be used by the court to facilitate trial procedure and the giving of evidence (i.e. minimising or reducing the potential to prejudice to any party). As the Act confers wide powers upon the court for the management of the proceeding, many of these issues are at the discretion of the trial judge. Orders can be made suitable to the particular facts and circumstance of the case and the sensitivities of a particular plaintiff.
138. Of course, litigation may not be the solution for the resolution of plaintiffs who confront these difficulties. It is hard to escape the conclusion that the civil litigation system may present as an emotionally draining option to a victim seeking compensation or other relief for sexual abuse. This highlights why alternative redress schemes which provide an alternative form of redress need to be considered. This point is developed in more detail under the next heading.

Issue 1(i):- Proving that the victim's injuries and losses were caused by the abuse

Is there an issue for plaintiffs?

139. Causation issues can present problems for a plaintiff seeking damages in a civil proceeding, particularly in proceedings that are brought many years after the conduct complained of. The problems relate to the exactness of the proof required to establish liability and damage. It can affect a plaintiff's ability to bring a proceeding as well as the cost of doing so. The point can be explained as follows.
140. In any civil sex abuse action, the plaintiff will have the onus of proving the allegations made, on the balance of probabilities.
141. The key issues requiring proof to the relevant standard are: (i) that the sexual abuse occurred; (ii) that the plaintiff sustained an injury (in the case of sexual abuse, it is

⁶⁰ *Reid v Kerr* (1979) 9 SASR 367,374.

⁶¹ See generally 49(3) of the *Civil Procedure Act 2010* (Vic).

usually necessary that the plaintiff establish that he or she has suffered a psychiatric illness); and (iii) that the plaintiff's injury (i.e. the psychiatric illness) was caused by the impugned conduct.⁶²

142. Given the seriousness of the allegations, a plaintiff in a sexual abuse case, must establish the key matters just referred to, to the "*Briginshaw*" standard.⁶³ In *Briginshaw v Briginshaw* (**the *Briginshaw* standard**), Dixon J stated the principle as follows:

"The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence of existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be provided by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact of facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given discretion, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency. Thus, Mellish L.J. said: 'No doubt the court is bound to see that a case of fraud is clearly proved, but on the question at what time the persons who have been guilty of that fraud commenced it, the court is to draw reasonable inferences from their conduct'. In the same way, in dealing with the question in what county the publication of a criminal libel had taken place, Best J. said: 'I admit, where presumption is attempted to be raised, as to the corpus delicti, that it ought to be strong and cogent; but in a part of the case relating merely to the question of venue, leaving the body of the offence untouched, I would act on as slight grounds of presumption as would satisfy me in the most trifling cause that can be tried in Westminster Hall'. It is often said that such an issue as fraud must be proved 'clearly', 'unequivocally', 'strictly' or 'with certainty'. This does not mean that some standard of persuasion is fixed intermediate between the satisfaction beyond reasonable doubt required upon a criminal inquest and the reasonable satisfaction which in a civil issue may, not must, be based on a preponderance of probability. It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained. When, in a civil proceeding, a question

⁶² In most jurisdictions in Australia, the issue of causation is now subject to statutory formulation. For example, in Victoria, the *Wrongs Act 1958* (Vic) (s.51) distils causation to two essential questions: (1) whether the negligence was a necessary condition of the harm suffered (factual causation); and (2) whether it is appropriate for liability to be extended to the defendant's negligent conduct (scope of liability). In similar vein to the common law position, under the statutory formulation the plaintiff bears the burden of proving, on the balance of probabilities, any fact relevant to causation (s.52).

⁶³ See *GGG v YYY* [2011] VSC 429 at [102] per Osborn J referring to *Briginshaw v Briginshaw* (1938) 60 CLR 336 per Dixon J at 361.

arises whether a crime has been committed, the standard or persuasion is, according to the better opinion, the same as upon other civil issues. But, consistently with this opinion, weight is given to the presumption of innocence and exactness of proof is expected.”⁶⁴

143. In *AM v KB*⁶⁵, a recent civil case involving allegations of child sexual abuse, Justice Kaye conveniently summarized what establishing evidence to the *Briginshaw Standard* entailed in such a case. His Honour said:

“Before I summarise the evidence, I shall state some of the principles which I consider I should apply in examining the evidence and in making findings on the evidence. The claim by the plaintiff involves particularly serious allegations against the defendant, including that the defendant engaged in conduct which constituted a grave criminal offence. The nature of the allegations made by the plaintiff, and the consequences of any findings which I might make in this case, are important considerations in determining whether the proofs put forward by the plaintiff are sufficiently clear and cogent to satisfy me of them on the balance of probabilities”.⁶⁶

144. In *GGG v YYY*⁶⁷ Osborn J recognised the importance of ensuring that the *Briginshaw Standard* was adhered to in sexual abuse cases. He underlined the significance of adhering to the standard by noting that the making of findings in a civil case involving allegations of sexual abuse, requires a judgment to be made upon evidence which, were the case a criminal one, would attract a *Longman* warning⁶⁸ (absent statutory provisions to the contrary). This underpins the notion that “exactness of proof” is expected in sexual abuse cases.
145. In terms of causation issues, this standard also applies to the question whether the conduct of the defendant caused or materially contributed to the injury or damage alleged (i.e. the plaintiff’s psychiatric illness).⁶⁹
146. In determining this question, the court is likely to rely on extensive opinion evidence from psychologists and psychotherapists. Indeed, it is not uncommon for a court to have to evaluate the evidence of 5 or 6 medical experts to determine this issue. For example, in the case of *GGG v YYY* just referred to, the plaintiff called opinion evidence from 6 psychologists or psychotherapists. In another case, *McCrae v the Boy Scout Association (NSW Branch)*,⁷⁰ opinion evidence was called from 5 psychologists or psychotherapist. It is trite that such opinion evidence would entail significant cost to the parties both in terms of the preparation of this evidence and the testing of it in court.

⁶⁴ (1938) 60 CLR 336, at p.361.

⁶⁵ [2007] VSC 429.

⁶⁶ *Ibid* at [6] and [7], per Kaye J.

⁶⁷ [2011] VSC 429 at [103].

⁶⁸ In *Longman v R* (1989) 168 CLR 79, 90-91 Brennan, Dawson and Toohey JJ said: “The jury should have been told that, as the evidence of the complainant could not be adequately tested after the passage of more than twenty years, it would be dangerous to convict on that evidence alone unless the jury, scrutinizing the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy”.

⁶⁹ *Tubemakers of Australia Ltd v Fernandez* (1976) 10 ALR 303; *Public Trustee v Sutherland Shire Council* (1992) 75 LGRA 278 at 287 per Gleeson CJ. *Purkess v Crittenden* (1965) 114 CLR 164 at 167-8.

⁷⁰ [2007] NSWDC 196.

147. In a practical sense, much of the court's time in these cases will be involved in resolving the causation related questions: i.e. (as to liability), whether the claimant is suffering from a mental illness which can be attributable to the sex abuse; and (as to damages), for example, whether the plaintiff's inability to work is attributable to the sex abuse? These sought of questions require factual analysis where the Court will very closely examine the opinion evidence to determine which medical opinion is "*more convincing, reflective of the objective reality and more objectively based*".⁷¹
148. In decisions such as *AM v KW* and *GGG v YYY*, referred to above, the courts have analysed lengthy opinion evidence to determine these causation questions (e.g. whether the sex abused caused the claimant's injuries).

Finding a just solution

149. In the UCA (Victoria's) view, the requirement for exactness of proof, in the *Briginshaw Standard* sense, is an indispensable part of the litigation process in sexual abuse cases.
150. Although made in a civil context, an allegation of sexual abuse is a most serious one with serious repercussions for a defendant(s). The nature of the issue necessarily affects the process by which reasonable satisfaction (in terms of proof) is attained.
151. But, the fact that the process of litigation of a sexual abuse claim does not lend itself to inexact proofs or vague testimony, has a practical consequence. Complainants will find it more difficult to prove cases to the requisite standard where the complaint is made (and the proceedings brought) years, even decades, after the impugned conduct. Moreover, the requirement for exact proofs of causation will require the plaintiff to call opinion evidence from a variety of experts, which will almost invariably be met with an array of proofs from the defendant. This can make the question of exact proof problematic. It can also add considerably to the cost of the litigation.
152. However, it does not follow from these points that the litigation process is flawed or that it should be changed. Quite to the contrary, dispensing with the *Briginshaw Standard*, for example, would potentially damage the litigation process by increasing the risk of miscarriage of justice thus undermining public confidence in the civil litigation system.
153. What can be said on this topic (as has been pointed out in some of the other topics discussed in this submission) is that litigation may not be a solution for the resolution of all sexual abuse claims. It is one means of potential redress for sexual abuse claims, but not necessarily the only one.
154. In the Victorian Parliamentary Report, the Parliamentary Committee found that there are other potential avenues for redress and it identified and discussed them. The Commission has already indicated that it proposes to examine some of these alternatives in other issues papers, and the UCA (Victoria & Tasmania) may choose to make submissions on these issues at the appropriate time. Relevant to Issues Paper 5, however, the point to be made is that the civil litigation system may not be the best system for the resolution of all cases of sexual abuse, particularly Old Claims where the impugned conduct happened long ago.

⁷¹ *Mc Crae v The Boy Scout Association (NSW Branch)* [2007] NSWDC 196 at [52] per Chief Judge Johnstone.

Issue 1(j):- The way in which damages are assessed

155. The question of what redress is available to a victim by way of damages is a relevant question not only to an understanding of what the civil litigation system can provide to a victim of sexual abuse, but also as a way of gauging the potential effectiveness of other forms of redress. This may assist in any comparative analysis the *Commission* may care to undertake.
156. Victims of sex abuse who have been successful in civil litigation have sought and been awarded (depending on the circumstances of the case) damages on the following bases: (i) special damages; (ii) general damages (i.e. damages for loss of enjoyment of life and pain and suffering); (iii) aggravated damages; and (iv) exemplary damages, as is set out below. These categories of damages are generally in keeping with the categories broadly available to plaintiffs in personal injuries actions, dependent on the facts and circumstances of a particular case.
157. As with personal injuries actions more generally, the type of damages available to a plaintiff in a sexual abuse case, and the manner in which the court assess the damages, very much depend on the particular facts. As Justice McCallum said in *XY v Featherstone* [2010] NSWSC 1366 at [44] “*care must be taken when comparing individual [sexual abuse] cases for the purpose of assessing damages*”.

Assessment of damages as a global sum

158. Generally speaking, the assessment of damages is awarded by way of a global sum for all the abuse. A court does not award specific amounts by reference to separate incidents⁷². In *Varmedja v Varmedja* [2008] NSWCA 177, Tobias JA said of this approach, “*when one adopts a lump sum value with respect to a series of assaults and batteries, one is required to give the assessment a sense of proportion*”.⁷³

Special Damages

159. Special damages compensate for losses that can be proved with relative precision. In *Paff v Speed*,⁷⁴ Fullagar J said of special damages, “*they are capable of precise arithmetical calculation or at least of being estimated with a close approximation of accuracy*”. For example, if the plaintiff’s psychological problems for which the plaintiff received past psychological care were solely caused by the sex abuse, such psychological expenses could be claimed as special damage. Such damages are generally agreed between the parties.

General Damages

160. General damages include past and future losses sustained by the plaintiff that are not capable or susceptible to precise quantification: *Wilson v McLeay*.⁷⁵ In a sexual abuse

⁷² *AM v KW* [2005] NSWSC 876 at [50] and [51] per Associate Justice Harrison.

⁷³ See paragraph [155].

⁷⁴ (1961) 105 CLR 549, at pp.558-559.

⁷⁵ (1961) 106 CLR 523

case (depending on the facts of the case) general damages may include damages (a) for loss of enjoyment of life; (b) for pain and suffering; (c) future medical costs; and (d) loss of income.

161. The one common feature in the case discussions on the topic of general damages is that judges are reliant on psychological evidence in determining the quantum for pain and suffering and loss of enjoyment of life.
162. *AM v KB* [2007] VSC 429 is an example of how a court may approach the task of assessing general damages in a child sex abuse case. There the court found that a 26 year old woman had been sexually assaulted by her parent's next door neighbour when she was a minor. Kaye J accepted the evidence of 2 psychologists that the abuse compromised the plaintiff's developmental process and that the plaintiff developed complex self-destructive mechanisms. His Honour awarded: (a) \$65,000 by way of general damages. At [76] he said:

"The quantification of general damages in a case such as this is not without its difficulties. However, in my view, the amount to be awarded to the plaintiff must adequately cater for the substantial diminution of the quality of her life during her childhood and adolescence, together with catering for the ongoing sequelae of the defendant's molestation of her during her childhood. In my view, taking those matters into account, I consider that it is appropriate to award the plaintiff the sum of \$65,000 by way of general damages". The Court also awarded \$7,000 by way of special damage to enable the plaintiff to undertake the further psychological treatment that was recommended by her psychologists.

163. In relation to loss of income, it is not uncommon for courts to award an amount based on average weekly earnings for the period that they are available and thereafter, average weekly earnings. Examples of this can be found in *XY v Featherstone* [2010] NSWSC 1366 McCallum J and *McCrae v the Boy Scout Association (NSW Branch)* [2007] NSWDC 196.
164. The courts will also discount an award of damages to take into account that a plaintiff's psychological harm may have been caused by a number of vicissitudes in life, which are independent of the sex abuse, the subject of the claim. Such a discount was undertaken in *YYY v GGG*,⁷⁶ where Justice Osborn found that the plaintiff's past relationship problems, loss of employment, ADHD, and substance abuse, also contributed to his psychological injuries.

Aggravated damages

165. In *Lamb v Cotogno*,⁷⁷ the High Court described aggravated damages as "*compensatory in nature, being awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like*". On this point, see also *Carter & Anor v Walker & Anor* where the Victorian Court of Appeal said: "*Aggravated damages may be awarded where the defendant has acted, either in committing a tort or thereafter, with 'contumelious disregard' of the plaintiff's rights, in an insulting or high-handed way, or*

⁷⁶ [2011] VSC 429.

⁷⁷ (1978) 164 CLR 1, at p.8.

with malice. It is a key requirement that such conduct increased the plaintiff's suffering. The theory is that aggravated damages are compensatory".⁷⁸

166. Australian courts have been prepared to award aggravated damages to plaintiffs in sexual abuse cases. For example, in *Hook v Hook*,⁷⁹ the court awarded aggravated damages in the amount of \$100,000. His Honour there felt that the amount was fair and reasonable in circumstances where there were in excess of 500 sexual assaults over 13 years. He concluded that they involved extreme insult and humiliation.
167. In *GGG v YYY*,⁸⁰ Osborn J awarded aggravated damages of \$20,000. At [231] he said:

"I accept the defendant's submission that the emotional hurt inflicted by the abuse is substantially compensated for by an appropriate award of general damages. Nevertheless, a further amount is properly awarded for the plaintiff's mental anguish and humiliation flowing from the manner in which he was abused. The plaintiff's evidence records domination and consequent humiliation for which compensation must be given beyond that for pain and suffering and psychological consequences".

Exemplary Damages

168. The final category of damages that courts can award in sex abuse cases is exemplary damages.
169. In *Lamb v Cotogno*⁸¹ the High Court described exemplary damages, as *"[going] beyond compensation and are awarded as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself"*. (Citations Omitted).⁸²
170. In *AM v KB* [2007] VSC 429, Kaye J awarded \$7,500 as exemplary damages. At para [80], he said:

"The conduct of the defendant was particularly egregious. On more than one occasion he sexually assaulted a young child who was entirely helpless to resist. His conduct was calculated to produce significant long term injury to the plaintiff. It destroyed and violated the innocence of her childhood, and was calculated to diminish significantly the enjoyment by her of her childhood and adolescence, and to cause serious long term injury to her. Notwithstanding the amount of general and special damages which I have awarded against the defendant, I have come to the conclusion that, in the circumstances of this case, it is both appropriate and necessary to make an award of exemplary damages, to deter the defendant and other like minded wrongdoers, and to mark the Court's condemnation of the defendant's behaviour".

⁷⁸ [2010] VSCA 340 at [283].

⁷⁹ [2002] VSC 584.

⁸⁰ [2011] VSC 429

⁸¹ *ibid*, at p.8.

⁸² See also *Carter & Anor v Walker & Anor* [2010] VSCA 340 at [283] to [285].

171. In *GGG v YYY*,⁸³ Osborn J awarded exemplary damages at \$30,000. The defendant was in his 80's at the time of the judgment. At [233], his Honour said:

"In my view the Court must award a further amount beyond compensatory damages to reflect its condemnation of the gross breach of trust involved in the deliberate continuing sexual abuse of a child which occurred between the defendant and the plaintiff. Despite the defendant's age, there is also in my view a legitimate element of deterrence in such an award. The compensatory damages I have assessed are not sufficient to render exemplary damages unnecessary".

172. To secure damages under any of the heads described above, a plaintiff in a sexual abuse case faces the rigors of giving evidence, establishing causation and quantifying damages. The burden, evidentially and financially, to a plaintiff in these cases, has been discussed already in other sections of this submission. There is also the emotional cost, which has also been referred to. To a significant degree, these features of the civil litigation system reflect the community's view that such matters are an acceptable cost of ensuring that the adversarial system of justice is able to evaluate the evidence and arrive at the correct outcome, including a just outcome on quantum.

173. The approach of courts on the question of damages set out in the judgments above, highlights the point made elsewhere in this submission, that litigation need not be the only means of redress for victims of child sex abuse. Moreover, other forms of redress may be more sympathetic to plaintiffs.

174. *Potential Reforms*

175. The question that may become important here is whether alternative forms of redress (to that available under civil litigation systems) can meaningfully (i.e. based upon a proper assessment) offer compensation in the same way as that offered by the civil litigation process. The difficulty lies in the standards of proof that are necessary to enable a court to establish (as opposed to guess) the quantum of the loss suffered.

176. The rules and standards that apply in civil proceedings allow courts to assess damages with some degree of precision (assisted by application of, and adherence to, the recognised principles outlined above). Alternative forms of redress cannot replicate this process because cases will not be determined upon these strict protective rules. This is not a reason for rejecting alternative models but it may be a reason for adopting an approach which caps the relief available to a plaintiff who chooses an alternative form of redress, or for whom an alternative form of redress is available⁸⁴. The cap would reflect the reduced burdens upon a plaintiff (with the corresponding disadvantage to a defendant) associated with establishment of liability and damages. This is a point that may be developed by the *UCA* further in response to an issues paper dealing with this topic.

DATED 31 March 2014

⁸³ Ibid.

⁸⁴ Damages for sexual abuse claims are generally excluded from the statutory monetary caps that are to be found in legislation. For example, in Victoria, the monetary caps that apply for economic and non-economic loss under ss 28C and 28LC of the *Wrongs Act 1958* (Vic), have no application to civil sexual abuse claims.