Issues Paper: The civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse: Redress and Civil Litigation Report – understanding the Queensland context

Australian Lawyers Alliance Submission to the Queensland Department of Justice and Attorney General

October 2016
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WHO WE ARE

The ALA is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

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

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

OUR STANDING TO COMMENT

The ALA is well placed to provide commentary to the Issues Paper.

Members of the ALA regularly advise clients all over the country that have been caused injury or disability by the wrongdoing of another.

Our members advise clients of their rights under current state based and federal schemes, including motor accident legislation, workers compensation schemes and Comcare. Our members also advise in cases of institutional abuse, medical negligence, product liability and other areas of tort.

Our members often contribute to law reform in a range of host jurisdictions in relation to compensation, existing schemes and their practical impact on our clients. Many of our members are also legal specialists in their field. We are happy to provide further comment on a range of topics.

¹ Australian Lawyers Alliance, Who we are (2016) Australian Lawyers Alliance <www.lawyersalliance.com.au>
LIMITATION PERIODS

1. Recommendation 85 is limited to child sexual abuse. Should other forms of abuse, for example, physical abuse and related psychological abuse be considered? If so, should there be a threshold of seriousness of abuse and how might that be defined?

The Royal Commission has been clear that it feels that its terms of reference confine it to making recommendations about child sexual abuse, and that other abuse in the absence of sexual abuse or an institutional nexus is beyond its scope. However, in looking to reform limitations periods, a broader approach to the types of abuse suffered by children would be appropriate. To this end, Victoria and NSW offer valuable examples of the types of child abuse that should be free from the constraints of limitations periods.

National consistency on limitations periods is also desirable, according to the Royal Commission. A lack of consistency has given rise to added complexity when claims for child abuse cross state borders.2

It is the firm view of the ALA that the injuries that this reform relates to should not be restricted to those emanating from childhood sexual abuse.

Again this is an important issue for consideration in ensuring consistency with other states. Most importantly, however, such a restriction fails to take into account the full extent of injuries that can occur in cases of abuse, such as physical and psychological abuse, both of which can be significant.

In light of this, it is the view of the ALA that lifting of limitation periods should apply to sexual, physical and associated psychological/psychiatric abuse in line with the precedent set by Victoria and NSW. In this regard we also refer to our submissions to the Parliament of Queensland Legal Affairs and Community Safety Committee dated 16 September 2016.3

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2. Recommendation 85 is limited to child sexual abuse that has occurred in an institutional context. Should child abuse in other or all settings, including the family setting, foster care and out of home care, also be included?

The ALA supports the removal of limitations periods for all child abuse including the family setting, foster care and out of home care. In the context of foster care, it would be manifestly unjust if a survivor abused as a child in foster care was precluded by virtue of the operation of the statute of limitations from bringing a claim against a former foster carer, but that a survivor abused in an institution\(^4\) was able to bring a claim.

It would further be unfair that actions could only lie against institutions for the misconduct of the staff and servants of institutions but not against the same abusive individuals or indeed, abusive individuals generally. Actual abusers should not be effectively immune from suit.

While the terms of reference of the Royal Commission\(^5\) constrain its consideration to abuse linked with institutions, meaning it is only able to make recommendations in this regard, there is no reason to differentiate the class of individuals who might benefit from this reform. If survivors are in a position to sue a perpetrator that is not an institution, it would be unreasonable to prevent them from doing so simply by virtue of the Royal Commission’s terms of reference. This approach would mean that some survivors would end up feeling that they had been abused by the wrong person, and injustice would be the result.

Ultimately, it is likely that abuse committed in an institutional context will be most significantly affected by the reforms, as institutions are more likely to be capable of paying compensation than other defendants. There is no need, however, to enforce this preference by restricting reform of limitation periods.

\(^4\) Defined in *Redress and Civil Litigation Report*, above n 2, 99 as “any public or private body, agency, association, club, institution, organisation or other entity or group of entities of any kind (whether incorporated or unincorporated), and however described, and i. includes, for example, an entity or group of entities (including an entity or group of entities that no longer exists) that provides, or has at any time provided, activities, facilities, programs or services of any kind that provide the means through which adults have contact with children, including through their families; and ii. does not include the family”.

\(^5\) Ibid.
We refer to our submission to the Parliament of Queensland Legal Affairs and Community Safety Committee dated 16 September 2016.\(^6\)

3. Should the removal of limitation periods be limited to child sexual abuse (and not physical or psychological abuse), but include abuse that occurred outside the institutional setting?

The removal of limitation periods should include all forms of childhood abuse, in all settings.

We refer to our submissions to the Parliament of Queensland Legal Affairs and Community Safety Committee dated 16 September 2016.\(^7\)

4. For child sexual abuse not in an institutional context and for abuse, other than child sexual abuse, should the limitation period be removed, or should there be expanded judicial discretion to extend the limitation period in either of these circumstances?

See response to Question 3.

5. Does the Personal Injuries Proceedings Act 2002, create additional or unnecessary obstacles for parties? Should alternative procedures be adopted?

ALA supports the application of the Personal Injuries Proceedings Act 2002 ("PIPA") to claims brought by survivors of childhood abuse. Whilst procedural issues in applying PIPA are heightened when dealing with unrepresented parties and (to a lesser extent) legal practitioners outside of Queensland, ALA nonetheless supports a pre-court process that mandates the parties exchange information within a reasonable timeframe before requiring them to participate in a settlement conference. It is of note that bringing a claim to which PIPA applies allows a claimant to proceed to settlement conference without risk of an adverse costs order, which usually represents a significant hurdle to accessing justice. Of note, under PIPA, potential costs implications for both parties should a matter proceed to a trial where damages are assessed by the court mean that, for the most part, genuine offers of settlement are made at the mandatory settlement conference. There are some aspects of PIPA however that would need to be amended for claimants seeking damages arising out of childhood abuse, regarding service of a Notice of Claim and compulsory settlement conferences:

\(^6\) Australian Lawyers Alliance, above n 3.
\(^7\) Ibid.
Service of a Notice of Claim

A Notice of Claim must be served within 9 months “after the day the incident giving rise to the personal injury happened or, if symptoms of the injury are not immediately apparent, the first appearance of symptoms of the injury”.  

Time for complying with PIPA is suspended while a person is under a disability however the 9-month period starts to run from the date the disability ceases. The practical impact is that a Notice of Claim must be served within 9 months of the date a survivor turns 18.

Where a Notice is not served within the time limit prescribed, the person seeking to bring the claim must provide a ‘reasonable excuse’ for the delay in providing the Notice. It is settled law in Queensland that this excuse must explain the entire period of the delay, and not merely the delay from the expiry of the 9 month period.

It is the experience of ALA members acting in claims where PIPA applies that significant time can be spent in reaching a point where the Respondent to a claim is satisfied with the ‘reasonableness’ of the excuse, and therefore a valid Notice has been provided. In claims for survivors of childhood abuse, where we know that it takes around 22 years for the adult survivor to be able to speak about the abuse, the explanation for the delay in lodging a Notice of Claim may have to deal with a period of not some months, but more usually years or even decades.

The ALA proposes that all time limits prescribed under PIPA expressly not apply to cases involving childhood abuse. This is consistent with Recommendation 85 which recommends removing the limitation period for those seeking to litigate claims arising out of childhood abuse. Whilst we note Queensland has yet to give effect to

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8 Personal Injuries Proceedings Act 2002 (Qld) s 9(3).
9 Ibid s 19.
10 Ibid s 9(5).
13 Redress and Civil Litigation Report, above n 2, 53.
this Recommendation, two Bills proposing the removal of limitation periods are presently proceeding through the Parliamentary Committee process\textsuperscript{14} and appear to have bipartisan support for their enactment.

Without pre-empting the proper Parliamentary process, if we can assume that limitation periods for survivors of childhood abuse bringing proceedings in court will be removed in Queensland, it would be somewhat absurd that time limits for pre-action procedures remained. In our view, this would in any event be inconsistent with Recommendation 85.

**Compulsory Settlement Conference**

Critical to the efficacy of PIPA is the holding of a mandatory settlement conference, on conclusion of which, formal written offers of settlement must be exchanged by the parties, which carry potential costs consequences should the matter proceed to trial. At the Conference, there is typically a joint session with all parties and representatives where each party presents an overview of their case. Inevitably, presentations at the joint session highlight the best case for the respective parties and involve an overview of the factual matrix said to give rise to the claim. On conclusion of the joint session, the parties break into separate rooms while negotiations between (usually) the legal representatives commence.

It is the experience of ALA members practicing in this area that for some survivors, attending a compulsory conference with a representative of the institution that facilitated their abuse would cause significant re-traumatisation. It is noted that Recommendation 5a states “Re-engagement between a survivor and an institution should only occur if, and to the extent that, a survivor desires it”.\textsuperscript{15} Recommendations 96 and 97 recommend guidelines be developed for those responding to civil claims to do so in a way which minimises potential re-traumatisation.\textsuperscript{16}

\begin{footnotesize}
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\textsuperscript{15} *Redress and Civil Litigation Report*, above n 2, 12.

\textsuperscript{16} Ibid 60.
\end{footnotesize}
The conference can be dispensed with “for good reason” if agreed by the parties,\(^{17}\) or by Order of the Court.\(^{18}\) If it proceeds however, each party must attend the compulsory conference ‘unless the party has a reasonable excuse’.\(^{19}\)

To avoid offending Recommendation 5a, ALA advocates for an amendment to PIPA for claims arising out of childhood abuse which expressly permits the claimant to not attend the conference, or at least the joint session. This could be by way of clarification that a ‘reasonable excuse’ as set out in s36(6) would include that the claim was by a survivor of childhood abuse, or by expressly excluding attendance by the claimant (if they choose) at the conference in these sort of claims.

It is to be noted that even if a claimant were not to attend the conference, they would still be required to provide instructions throughout the negotiations – this could be by telephone or by having the claimant present, but absent from the joint session.

For other survivors however, attending a settlement conference with a representative of the organisation causing their abuse is an important step in their healing. Consistent with Recommendation 5c,\(^{20}\) PIPA should be amended to include reference that, if requested by a survivor a senior institutional representative attend the conference and provide:

1. An apology on behalf of the institution;
2. An acknowledgment of the abuse and its impact on them; and
3. An assurance or undertaking that the institution has taken or will take steps to protect against further abuse of children in that institution.

From a practical perspective, to allow appropriate notice to such a representative to be given, it should be a requirement that survivors requesting such attendance be required to provide notice of this to the institution or their representative, for example within one month of receipt of a response to the claim under s20 PIPA. There should be a similarly mandated response by the institution or their representative within a further month as to who that representative will be, and a

\(^{17}\) Personal Injuries Proceedings Act 2002 (Qld) s 36(4).
\(^{18}\) Ibid s 36(5)(b).
\(^{19}\) Ibid s 28(6).
\(^{20}\) Redress and Civil Litigation Report, above n 2, 62.
subsection of PIPA which clarifies that the respondent institution is required to ensure that the availability of such a representative to attend a conference if requested by a survivor should not delay or otherwise thwart the conference process.

6. What processes and procedures could be adopted for dealing expeditiously (to avoid unnecessary costs) with matters where a stay of proceedings may eventuate?

ALA is of the view that the present checks and balances under the inherent jurisdiction of the Court to allow a stay, and the standard of proof required in a stay application, do not require any amendment. This is consistent with Recommendation 87 of the Report.21

DUTY OF INSTITUTIONS

NON-DELEGABLE DUTY

7. Is the imposition of a non-delegable duty the best way to ensure that institutions take reasonable steps to prevent harm caused by child sexual abuse?

No. ALA instead supports the adoption of a “close connection” test such as set out in the case of Lister,22 adopted by Gleeson J in New South Wales v Lepore (“Lepore”),23 and applied in both Canada and England & Wales, explained in further detail below.

To properly understand ALA’s position, it is necessary to understand what is meant by a “non-delegable duty” and by the related concept of “vicarious liability”.

Both are concepts that arise from the notion that an organisation, entity or individual can be liable in law for the negligent act of a third party. For ease of understanding, vicarious liability is considered first.

Vicarious liability

Vicarious liability is the notion that an employer (in this case, an institution) is liable for the negligent acts of an employee. The employer does not need to owe the

21 Ibid 53.
injured person a duty of care, nor be directly at fault – it is sufficient that the employee owe the duty of care and be at fault.

There are a number of issues with the application of vicarious liability to cases of childhood abuse. The first is that it applies only to employees – in many churches for example, priests are not technically employed. It further would not extend to volunteers and other contractors or agents who may have caused the abuse.

A further restriction on the application of vicarious liability to childhood abuse claims is that vicarious liability only extends to acts arising “in the course of employment”. Unlike most other western common law countries, if an act is criminal, vicarious liability does not arise in Australia.

Recently however, decisions within the Australian jurisdiction (in 2003 by the New South Wales Court of Appeal in Lepore\textsuperscript{24} and as recently as 5 October 2016 in a decision of the High Court in Prince Alfred College Incorporated v ADC (”PAC”)\textsuperscript{25} appear to be moving towards a position that vicarious liability may, in fact, lie with an employer notwithstanding the criminal act if the circumstances in which the abuse occurs has a close connection with employment. The position is far from clear however,\textsuperscript{26} and requires legislative clarification.

\textit{Lepore} involved a claim by Angelo Lepore for injuries caused by abuse by a teacher in his state school in the context of being punished for misbehaving. The plaintiff brought a claim against the State alleging both vicarious liability and breach of non-delegable duty (he also brought a claim against the teacher). The plaintiff succeeded against the teacher, but lost against the State on the basis that they had not breached their duty. On Appeal it was held that the State was in principle liable on the basis of a non-delegable duty, and the matter was remitted back to the Supreme Court for a re-trial. The State appealed to the High Court and the matter was heard with two other appeals on point arising out of Queensland.\textsuperscript{27}

\textsuperscript{24} Ibid.
\textsuperscript{25}Prince Alfred College Incorporated v ADC [2016] HCA 37.
\textsuperscript{26} Three of the seven members of the High Court in \textit{Lepore} were of the view that vicarious liability could never arise from criminal conduct.
\textsuperscript{27} Rich \textit{v State of Queensland \& Ors; Samin \textit{v State of Queensland \& Ors} [2001] QCA 295 – both arose out of abuse by a state school teacher and was pleaded solely on the basis of a non-delegable duty.
Whilst the judges were able to reach majority agreement (6-1) as to the outcome of the appeals, the judges’ reasons for their decision varied greatly. Two of the judges relied on the principle of vicarious liability and appeared to approve the approaches of other common law jurisdictions on point. Gleeson CJ in his judgment undertakes a comprehensive review of the case law in the area in Australia and other common law jurisdictions and applied a ‘sufficient connection’ test in relation to the job the employee was employed to do, and the conduct.

PAC was a claim by a former student arising out of abuse when he was 12-years old at the hands of a boarding master. The master groomed children, including the plaintiff, under the guise of supervising their bedtime activities, and ultimately abused them. There were two issues in the case: the first was whether an extension of time to bring proceedings should be allowed. The second was whether vicarious liability could extend to criminal sexual abuse. At the initial trial of the claim, the plaintiff lost. On appeal he won, but the school appealed to the High Court.

The appeal was allowed on grounds that a fair trial was no longer possible given the extraordinary delay in bringing his claim. The Court however went on to consider the issue of vicarious liability. In doing so, the 2003 decision of Lepore was analysed together with decisions from the UK and Canada all of which demonstrated a finding of vicarious liability to be appropriate in circumstances where it was the position in which the employer had placed the employee vis-à-vis the victim that had led to the harm. In the Canadian cases in particular, reference was made to “power, trust or intimacy with respect to the children”.

Unfortunately, as the plaintiff in PAC lost on the extension of time point, an opportunity for clarity on the law relating to vicarious liability of an employer in the context of a criminal act was also lost. The High Court however appears to have

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28 The State’s appeal in Lepore was allowed and the matter returned to the District Court for a new trial; Samin and Rich had their appeals dismissed but were granted leave to amend their pleadings to plead vicarious liability.
29 Gleeson CJ and Kirby J
30 The abuse occurred in 1962, the claim was commenced in 2008.
adopted the approach taken by Gleeson CJ in *Lepore* – that criminality of itself does not defeat vicarious liability, and that the appropriate question instead is whether the authority placed the abuser in such a position of power and intimacy as to make it just to hold the institution liable to the victim for the consequences of the abuse.

It should be noted that when considering the cases already decided on the issue of vicarious liability, the High Court in *PAC* did not consider cases decided beyond *Lepore* in 2003 – in other words the judgment in *PAC* still falls short of a fulsome consideration of the case law in both Australia and other common law jurisdictions. For example, given the abuser in *PAC* was employed, the Court did not consider the expansion of vicarious liability to non-employees, whereas a number of decisions in superior courts in England & Wales and Canada have continued to expand the notion that vicarious liability can exist notwithstanding a criminal act of sexual abuse.

The concept that a deliberate criminal act not be excluded from the notion of vicarious liability is consistent with Recommendation 89 which recommends a non-delegable duty being imposed for childhood sexual abuse, despite it being the ‘deliberate criminal act of a person associated with the institution’ (note however the ALA has concerns with the concept of non-delegable duty which is discussed below).

Courts in other common law jurisdictions have further held that vicarious liability can be found even outside the employee/employer relationship taking into account all the circumstances of the abuse. For example, in England & Wales, it was held that the trustees were vicariously liable for the sexual abuse and rape by a Catholic priest of a girl in a children’s home in Hampshire. In another case, the De La Salle Institute was held vicariously liable for the sexual misconduct of brothers teaching in a school.

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even though they were not employed by the De La Salle Institute. In Maga, the wearing of a clerical collar during youth club activities was sufficient to make the trustees of the Roman Catholic Church liable, even though the abused boy was not part of that Church’s congregation.

Non-delegable duty

A “non-delegable duty”, unlike that of vicarious liability, is a duty owed directly to an individual by another individual or organisation to take reasonable care to prevent harm. This duty cannot usually be delegated, so that if the first individual or organisation allows a second individual or organisation to carry out some aspect of discharging that duty of care, the first organisation must also ensure that the second organisation take reasonable care – they will remain liable for the second individual or organisation’s negligence.

Confusion between vicarious liability and a non-delegable duty can arise, as both are found in the context of an employer/employee relationship; however a non-delegable duty can be found wherever there is a special relationship between the defendant and the plaintiff, and where the defendant is in a special position with respect to the plaintiff. Relevantly, in the context of childhood abuse it applies to the school/student relationship. A non-delegable duty can apply to acts by non-employees, such as volunteers.

Further to the decision of the High Court in Leighton however it is now settled law that a non-delegable duty can, in fact, be delegated. Even before Leighton, the presiding judges in Lepore differed on the application of a non-delegable duty in the context of childhood abuse cases, and some thought it could be delegated. Given the uncertainty in the law around the application of non-delegable duties, the introduction of a non-delegable duty in the context of childhood abuse is an unsatisfactory remedy, and will likely lead to more uncertainty for survivors seeking justice. It is important to note in this context that few cases involving childhood abuse

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37 The Catholic Child Welfare Society & Ors (Appellants) v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools & Ors (Respondents) [2012] UKSC 56.
39 Leighton Contractors Pty Ltd v Fox [2009] HCA 35.
sexual abuse are litigated to trial\textsuperscript{40} and such incremental reform of the common law is at odds with the Recommendations of the Royal Commission.\textsuperscript{41}

Summary of issues arising out of vicarious liability and non-delegable duty

The present state of the law in Queensland (and Australia generally) in relation to vicarious liability and non-delegable duty in the context of childhood abuse is unsatisfactory for the following reasons:

- Vicarious liability only applies to employees of an institution. Priests, for example, are not employees;
- Vicarious liability does not extend to criminal acts committed outside the “course of employment”;
- Whilst other common law jurisdictions have long recognised scope to extend vicarious liability to relationships outside the employer/employee relationship, Queensland has not;
- Whilst other common law jurisdictions have long recognised scope to extend vicarious liability to deliberate criminal acts, Queensland has not;
- A non-delegable duty has been found, in fact, to be delegable; and
- Differing views within the High Court exist as to the extent of the non-delegable duty in childhood sexual abuse claims.

ALA’s proposal: the “close connection test”

The unsatisfactory state of the law in relation to vicarious liability and non-delegable duty requires that Queensland legislate to clarify when liability will attach to an institution for the acts of its employees and other agents in a claim by an abuse survivor to ensure that survivors of abuse have access to justice in the broadest possible circumstances.

\textsuperscript{40} ALA is only able to find two matters run to Trial in the Supreme Court in Queensland in the last ten years.

\textsuperscript{41} Redress and Civil Litigation Report, above n 2.
It is settled law in Canada\textsuperscript{42} and England & Wales\textsuperscript{43} that the courts charged with considering whether liability attaches to an institution in the context of abuse of a child in that institution consider not whether the abuser was an employee, but whether there is sufficient close connection so as to found vicarious liability in an employment-like situation which could extend not just to employees but to those in employment-like situations, including volunteers and unpaid clergy. Further, when considering deliberate criminal acts, a close connection test that considered whether risk of abuse by an associated individual was created or increased by the nature of the enterprise of the institution. Relevant to that increased risk will be matters such as (but not confined to) disparity of authority and/or power between the organisation or the associated individual and the victim, including but not confined to vulnerability or intimacy in the relationship so created.

Fundamentally, if an organisation creates a situation of power and intimacy in the course of carrying out its organisational objects, it should be liable if its employee or volunteer abuses children in the course of the activity that the organisation has permitted to be pursued in its name.

This, for example, would mean that a school teacher who, with parental consent, took a child to a school sporting activity and who took advantage of the opportunity to abuse the child, would render the school liable. On the other hand, if the teacher, having met a parent socially at a school activity, obtained parental consent to take the child to a non-school activity, this would, on the face of it, be outside the close connection test.\textsuperscript{44} This distinction is one which seems to us to do justice between the parties.

Legislating for a non-delegable duty in line with the Recommendation 89\textsuperscript{45} may be one alternative but\textsuperscript{46} Lepore casts doubt on the effectiveness of this; there, delegation of non-delegable duties was permitted. The preferable alternative is to legislate the “close connection test” for vicarious liability applied in\textit{Lister} by the House of Lords and consistently followed in the Supreme Court of England & Wales. It is close to the test for vicarious liability applied by Gleeson CJ in\textit{Lepore}.

We submit that “close connection” should be defined in the following terms:

\begin{itemize}
\item Bazley v Curry [1999] 2 SCR 534;
\item The Catholic Child Welfare Society & Ors (Appellants) v Various Claimants (FC) and the Institute of the Brothers of the Christian Schools & Ors (Respondents) [2012] UKSC 56
\item Redress and Civil Litigation Report, above n 2, 77.
\end{itemize}
Close connection means that an organisation will be vicariously liable for the conduct of an associated individual where the risk of abuse by that individual was created or increased by the nature of the enterprise engaged in by the organisation. Relevant to that increased risk will be matters such as (but not confined to) disparity of authority and/or power between the organisation or the associated individual and the victim, including but not confined to vulnerability or intimacy in the relationship so created.

The Queensland Parliament should not wait for Australia to catch up with the bulk of the common law world in respect of protection of the most vulnerable individuals from abuse from those in employment-like relationships and undertaking activities associated with that organisation.

8. Should legislation define 'non-delegable duty' and the extent of the duty or, should defining the nature and extent of a non-delegable duty be left to the courts? Please explain which approach you favour and why.

For the reasons set out above, the ALA advocates for a “close connection” test founding vicarious liability, rather than a non-delegable duty.

9. Recommendation 90 of the Commission identifies which institutions should be in scope for the purpose of imposing a non-delegable duty. Are there any institutions or types of institutions that should be in or out of scope? Please explain why you think an institution should be included or excluded?

For the reasons set out above, the ALA advocates for a “close connection” test founding vicarious liability, rather than a non-delegable duty. In terms of those institutions set out in Recommendation 90, the “close connection” test should be applied to all. Specifically however the ALA considers that the “close connection” test should also apply to foster care.

10. Recommendation 92 of the Commission identifies the types of ‘relationships’ (e.g. employees, members, officer holders, volunteers) that should be captured under the proposed statutory non-delegable duty. Are there any relationships that should be in or out of scope? Please explain why you think the relationship should be included or excluded?

ALA advocates the adoption of vicarious liability rather than any reverse onus of proof and considers that that vicarious liability should extend to all relationships of the type listed in

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46 Redress and Civil Litigation Report, above n 2, 77.
Recommendation 92.47 The introduction of a “close connection” test founding vicarious liability would permit the courts to consider the true nature of the relationship that existed between the institution, abuser and survivor, having regard to “power, intimacy and control”, regardless of who the abuser was or how they were defined. In formulating such a test, no relationship would be excluded.

11. If implemented should the legislation include a test for what constitutes reasonable care to prevent child sexual abuse in an institutional context? What would the test include?

ALA does not consider that a legislative test prescribing what will be “reasonable care” in the context of preventing child sexual abuse is necessary – it should be a question to be determined on the evidence by a court. Institutions should use all means reasonable to keep children safe. As set out below however, a code of practice would be a useful tool for institutions to indicate how they may keep children safe, and thereby discharge their duty.

12. Should a complementary code of practice or standards be developed to provide guidance to institutions in respect of discharging the duty? What should the code or standards cover?

ALA supports the concept of a code of practice or standards to provide guidance to institutions to not only discharge their duty, but, more importantly, to keep children safe.

ALA would appreciate the opportunity to comment on any draft code.

13. Should the implementation of recommendation 89 be broadened to include other forms of abuse, for example, to impose a non-delegable duty on institutions to prevent serious physical and related psychological abuse in an institutional context?

ALA strongly believes that merely imposing a non-delegable duty is not sufficient. We suggest that vicarious liability would be appropriate. The liability should be imposed in accordance with the “close connection” test. See the response to Question 7.

14. What are the financial and other associated impacts for institutions in implementing recommendations 89, 90, and 92 as regards to non-delegable duty? What are the implications for the cost and availability of insurance?

47 Ibid.
As a starting proposition, ALA is of the view that the aims of Recommendations 89, 90 and 92 are better served by introducing the “close connection” test founding a claim in vicarious liability (see response to Question 7). In addition to allowing access to justice in as broad a circumstance as possible, legislative clarity around such a test would also clarify risk for institutions that will need to be addressed in the same way as other organisational risks. Whilst there is usually a cost associated with understanding and mitigating risk in an organisation, ALA is of the view that the cost to society as a whole in not clarifying this risk, requiring organisations to put in place measure to address it is far greater than the cost to individual institutions.

As to the cost and availability of insurance, this is a multi-faceted issue. In the first instance there would need to be an insurance product available which was capable of assuming the risk as defined. The second issue is the cost of that insurance. ALA is of the view that until the legislative response to other issues raised in the Issues Paper is determined, it is premature to consider issues around insurance. For example, if the close connection test we advocate for were to be adopted, insurance would have to assume risk including that of a deliberate criminal act being committed. Such analysis would likely involve actuarial analysis and review of insurance industry data.

ALA would welcome the opportunity to provide further comment on this issue in the future.

**REVERSE ONUS OF PROOF**

15. Recommendation 91 of the Commission provides that all institutions should be liable for child sexual abuse, unless the institution can prove that it took reasonable steps to prevent the abuse. Do you agree that the reverse onus should apply to all institutions? Please explain why you agree or disagree with the Commission's recommendation and which institutions should be included or excluded?

ALA strongly believes the proposal merely to reverse the onus of proof is markedly inferior to the vicarious liability adopted at common law in England & Wales and in Canada as set out above. Merely reversing the onus of proof means that many survivors will continue to be denied a remedy and would leave Queensland behind the rest of the common law world in its approach to these issues.

48 Redress and Civil Litigation Report, above n 2, 77.
We are of the view that a better position is as set out above on pages 15-17, namely that rather than a reverse onus of proof, vicarious liability for the negligence of abusers be adopted utilising the “close connection test” as explained.

The approach of Gleeson CJ in Lepore is very similar to the “close connection” test and should be followed.

16. Recommendation 92 of the Commission identifies the types of ‘relationships’ (e.g. employees, members, officer holders, volunteers) which should be captured by the proposed reverse onus requirement. Are there any relationships that should be included or excluded from the types of relationships captured? Please explain why you think a relationship should be included or excluded?

See response to Question 10, above.

17. Should the scope of recommendation 91 be broadened to include liability for other forms of abuse, for example, serious physical and related psychological abuse in an institutional context?

ALA prefers a close connection test founding vicarious liability to a reversal of the onus of proof and considers all forms of abuse in all contexts should be covered.

18. What are the financial and other associated impacts for institutions in implementing recommendations 91 and 92 as regards to the reversal of the onus of proof? What are the potential implications for the cost and availability of insurance?

ALA prefers applying vicarious liability to institutions over any reverse onus of proof, in the event a reverse onus position is adopted. We would welcome the opportunity to provide further submissions with respect the impact on the cost and availability of insurance of any reforms. See further our response to Question 14, above.

IDENTIFYING A PROPER DEFENDANT

19. Should the claimant/plaintiff be required to enquire as to the correct defendant, or the nature of entities related to the defendant in order to identify any related property trusts, before commencing proceedings? Should the defendant have a responsibility to nominate an additional related entity with capacity to meet any award of damages or costs?
In Recommendation 94, the Royal Commission recommended that state and territory governments introduce legislation to provide that any property trust associated with an institution against which a claim of institutional child sexual abuse has been made, should be made the proper defendant to litigation. Any liability of the institution arising from the proceedings should be met from the assets of the trust.

In respect of the Roman Catholic Church, under the various legislative regimes in all parts of Australia, all of the assets are held by trustees and the Church lacks any legal entity. The Ellis defence means that this legal arrangement renders the Roman Catholic Church able to evade its responsibilities to individuals injured by the actions of priests or other associated persons. Whilst unincorporated associations can be sued at common law, in Ellis it was held that the Church is too amorphous to permit nominated representatives to be sued. Effectively it, and more significantly its enormous assets, are immune from suit. In every diocese in Australia the assets of the Catholic Church are held by trustees. Until the Ellis decision, the Church accepted that its trustees were the appropriate body to sue. In England & Wales that continues to be the Church’s position, where the trustees are regarded as the Church’s secular arm.

Permitting a bishop or archbishop to be sued individually may not give access to insurance or funding. At the Royal Commission into institutional responses to child sexual abuse, the Church made it clear that its internal insurance would not necessarily cover an action against a senior Church official in negligence or for abuse. That would be discretionary.

It is also clear that in every diocese in Australia, all of the assets, including all of the assets at parochial schools, are held by the trustees. To allow the nomination of an entity other than the trustees would effectively permit liability to be avoided. This means that a child injured through negligence (quite apart from sexual or physical abuse) has no-one to sue unless the bishop consents to the trustees being sued. That applies to all Catholic parochial schools and therefore, 18.5 per cent of all Australian school children. That is unacceptable.

Given that other churches employ their staff and that the problem lies in the legislative structure of the Catholic Church, the only remedy for the Church’s intransigence is legislative reform. It should now, by amendment, be made to accept responsibility and to meet the

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49 Redress and Civil Litigation Report, above n 2, 78.
50 Trustees of the Roman Catholic Church v Ellis [2007] NSWCA 117.
undertakings given by Archbishop Hart and Archbishop Fisher to the Royal Commission before the Church later recanted.

It cannot be acceptable that the right of nearly 20 per cent of Australian school children attending Catholic parochial schools to sue for injury or abuse is wholly dependent on the whim of the local bishop. It is not acceptable that they have no rights in law.

Legislation would likely need to be by way of amendment to the *Roman Catholic Church Lands Act 1985* (Qld) in claims of childhood sexual abuse:

- (i) To allow the trustees in each diocese/archdiocese to be sued in respect of claims against clergy, officials, teachers or other associated persons and to recover as a debt against the trustees (as holders of property) any judgment given.
- (ii) The legislation would need to be retrospective in its effect.

In effect, such legislation would be simply doing that which Archbishop Fisher requested publicly and which he and Archbishop Hart, on behalf of all bishops in Australia, undertook to provide for victims.

Whilst the principle should have general application, only one church does not accept responsibility for the criminal conduct of its clergy and others, such as youth workers, given positions of authority on an unpaid basis. That is why specific legislation to amend the *Roman Catholic Church Lands Act 1985* (Qld) is required.

The approach to liability in general could be ameliorated by taking the approach seen in *Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2014* (NSW), introduced by David Shoebridge into the NSW Parliament in 2014. While the issue of limitations periods discussed in that Bill is now being considered in Queensland, the other elements of that Bill could usefully be adopted to implement Recommendation 94.52

ALA is of the view that there should be a positive obligation on the respondent to a claim to nominate any additional related entity with capacity to meet any award of damages.

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52 *Redress and Civil Litigation Report*, above n 2, 78.
It is noted that under s10(3)(c) of PIPA, in the event the Respondent to a claim considers they are not a proper Respondent, they must within one month of receiving the Notice, notify the claimant and provide them any information they have that will assist them in identifying the proper Respondent.\textsuperscript{53} PIPA could be amended to also require the Respondent, at this stage, to nominate any additional related entity to satisfy the damages. This obligation (to notify of any additional related entities that could satisfy the damages) should be framed as a positive obligation that continues throughout the claim. Further, that full disclosure in that regard has been given should be part of what a Respondent is required to certify pursuant to s37 prior to attending a compulsory conference.\textsuperscript{54} It is noted that a practitioner who, without reasonable excuse, signs a certificate of readiness knowing that it is false or misleading in a material particular commits professional misconduct.

20. Should the court have the power to appoint an expert to investigate and identify the appropriate entity to be joined in proceedings, upon application by the claimant/plaintiff? (Note the current powers contained in the Uniform Civil Procedure Rules 1999 (Qld) (UCPR), in particular, rule 429G Appointment of experts and rules 429J to 429M dealing with powers to facilitate the preparation of the report.)

ALA is of the view that this is not necessary.

21. Should the court have the power to direct the related entity to make a payment in satisfaction of any award of damages or costs, notwithstanding the terms of any deed of trust, or statutory instrument establishing the trust?

Yes. ALA is firmly of the view that related entities with the ability to satisfy payments should be ordered to pay.

22. Are the existing powers of the court contained in the UCPR sufficient for these purposes?

In responding to this Question, ALA wishes to make clear that we have read the Question in terms of the proposal in Question 21, in other words: Are there sufficient powers contained within the UCPR to direct the related entity to make a payment in satisfaction of any award of damages or costs, notwithstanding the terms of any deed of trust, or statutory instrument establishing the trust?

\textsuperscript{53} Personal Injuries Proceedings Act 2002 (Qld) s 10(3)(c).

\textsuperscript{54} Personal Injuries Proceedings Act 2002 (Qld) s 37.
The short answer is no. To create the necessary authority would require as a minimum a legislative power, likely falling outside of the UCPR, and almost certainly amendment of one or more statutes dealing with trusts for the Catholic Church. It is a complex area however and in the ALA’s view, requires more analysis: any power so created would need to be capable of dealing with a multiplicity of legal entities including (but not limited to) charities/not for profit organisations, religious organisations, statutory bodies, public and private companies, unincorporated associations and trusts. There will likely be a number of current statutes requiring amendment and a fulsome analysis of those is thought to be outside the scope of this Issues Paper.

ALA supports legislative amendment to give full effect to Recommendation 94 and would welcome the opportunity to provide further input into any draft proposal or Bill in that regard. We are of the view that any legislative response would need to be clear that where a Respondent nominates a related entity, and the related entity has insufficient asset or insurance to meet the claim, then any further associated entity (including, but limited to, trustees) holding property or insurance of the organisation should be answerable to the extent of any deficit.

23. For example, the UCPR provide for the court to include a person as a party at any stage of a proceeding (rule 69). If the recommendation is adopted, would it be desirable to have an additional provision that specifies that, in exercising its discretion to join an entity as a party to proceedings, the court should give consideration to the following factors:

- whether the entity has sufficient connection with the institution named as the defendant;
- whether the entity has sufficient resources to meet the potential liability; and
- whether it is fair and reasonable in all the circumstances for the entity to be joined in the proceedings.

ALA is of the view that the existing powers under the UCPR and the inherent jurisdiction of the court are sufficient.

24. With respect to recommendation 95, would the imposition of a requirement for government funded organisations providing children’s services to have insurance to cover liability for child sexual abuse, have any operational consequences for those organisations? What are the implications for the cost and availability of insurance?

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55 For example, Roman Catholic Church Lands Act 1985 (Qld)
See response to Question 14, above.

OTHER ISSUES

REDRESS

The Royal Commission’s report notes the need for urgent and appropriate redress. ALA strongly supports this view and calls on the Queensland Government to show leadership with respect to redress, both in terms of its response through COAG but also in terms of the preparedness of the Queensland Government to provide redress above and beyond that provided after Forde in accordance with Recommendation 30.56

56 Redress and Civil Litigation Report, above n 2, 67.