Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

Combatting Child Sexual Exploitation Legislation Amendment Bill 2019

Submission to the Senate Legal and Constitutional Affairs Legislation Committee

1 March 2019

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Who we are

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

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

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

The ALA office is located on the land of the Gadigal of the Eora Nation.

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the review of the *Combatting Child Sexual Exploitation Legislation Amendment Bill 2019* ('the Bill') that is being undertaken by the Senate Legal and Constitutional Affairs Legislation Committee ('the Committee'). This submission will address the following issues:

    (1) The definition of 'child sexual abuse offence' – section 273B.1;

    (2) New offence – Failing to protect child at risk of child sexual abuse offence – section 273B.4

    (3) New offence – Failing to report child sexual abuse offence – section 273B.5.

2. The ALA is supportive of other aspects of the legislation, including criminalising possession of child pornography or child abuse material, the improvement of the definition of forced marriage and the restricting of the defence of marriage for child sex offences.

Definition of child sexual abuse

3. The ALA supports the object of the Bill to protect children within the care, supervision or authority of the Commonwealth from sexual abuse. However, the ALA strongly recommends that the Bill should also extend this protection to cover physical abuse and psychological abuse. The ALA submits that this can be as traumatic and destructive as sexual abuse and may in many circumstances be difficult to distinguish since it may be a precursor to sexual abuse or may otherwise be associated with sexual abuse. We attach a paper by ALA spokesperson Dr A. S. Morrison RFD SC discussing, *inter alia*, the difficulties of confining the availability of a remedy to sexual abuse [**attached, Appendix 1**]. See paragraph [5] of this paper in particular.

Failing to protect child at risk of sexual abuse offence

4. The ALA supports the new offence of failing to protect a child at risk of child sexual abuse (section 273B.4). The ALA notes that this offence would appear to provide protection to any children who are placed in immigration detention, whether offshore or onshore. The ALA strongly supports the application of this provision to children in immigration detention.

5. Volume 15 of the Royal Commission's final report made detailed findings that conditions in immigration detention are particularly conducive to the risk of child sexual abuse materialising. As with any institutional abuse, it is the power of the institution over the individual that has given rise to the opportunity for the abuse of these children.

6. Those in immigration detention have committed no crime. For the most part they have been accepted as genuine refugees and they are detained for arriving by boat. The Royal Commission found that refugee children are at high risk of suffering abuse: 'research suggests that specific impacts associated with the refugee experience and prior trauma can complicate the development of adult identity among adolescent refugees and may lead to acting out through sexual behaviour… Prior experience of or witnessing rape and sexual violence is commonly reported among refugee children.'[2]

7. The Royal Commission's report was also clear that the 'Australian Government and its contracted service providers are responsible, directly or indirectly, for the safety and wellbeing of children in immigration detention… This includes children in community detention.'[3] Further, the Royal Commission was clear that 'it is the [Department of Immigration and Border Protection, now the Department of Home Affairs (referred throughout as the Department)] that carries ultimate responsibility for responses to child sexual abuse within Australia's immigration detention network.'[4] Where child abuse has occurred in offshore detention, the same Department is responsible for both the abuse and preventing the survivor from coming to Australia.

8. There are several institutional factors that might effectively facilitate child sexual abuse in immigration detention. The culture of secrecy and isolation that exists, especially in immigration detention; the normalisation of harmful and dehumanising practices; and the prioritisation of the Department's reputation over children's safety all increase the risk of abuse, and decrease the likelihood that it will be noticed and appropriately responded to.[5]

9. In relation to onshore detention, 'the Australian Federal Police [submission] to the [Royal Commission] notes instances in which known offenders convicted of child sexual abuse were

[2] Volume 15, 189.

[3] Volume 15, 172.

[4] Volume 15, 172.

[5] Volume 15, 190 (references omitted).

released from corrective service facilities in Australia and placed into immigration detention centres pending the assessment of their immigration status or awaiting deportation. At times, this detention was alongside children.'[6]

10. These practices clearly demonstrate that the Department, as an institution, could arguably be found to be at least equally responsible for failing to protect children in detention facilities for which it has oversight from the risk of sexual abuse. Given that the children were placed in immigration detention by the Commonwealth, they are owed a non-delegable duty of care.[7] These children did not choose to be in immigration detention and have committed no crimes.

11. The ALA notes that while it is an important objective for the legislation through this offence to provide protection for children from child sexual abuse, including children in immigration detention, it is disappointing that those abused while in immigration detention are not eligible for redress compensation under the National Redress Scheme.

Failing to report child sexual abuse offence

11. The ALA supports the new offences created by section 273B.5 of the Bill in relation to failing to report child sexual abuse, where the defendant knows of information that would lead a reasonable person to believe or suspect that a person has engaged or will engage in a sexual abuse offence against a child.

12. The ALA submits that failure to report child sexual abuse in such circumstances should be a criminal offence, and that any Commonwealth officer who knows or suspects that a child is being or has been sexually abused in an institutional context should report the abuse to police.

13. The obligation to report child sexual abuse should rest with every person (subject to some exceptions such as for victims and legal privilege). The history of cover-up in institutions strongly suggests that the criminal offence should apply not just to individuals but to the institutions which have failed victims by exposing them to abuse and then, too often, by protecting their abusers.

[6] Volume 15, 188.

[7] *NSW v Bujdoso* (2005) 227 CLR 1; [2005] HCA 76. *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360. Conceded by the Commonwealth in *AS v Minister for Immigration and Border Protection* [2014] VSC 593 at [24].

14. The ALA also considers that the failure to report offence should cover any Commonwealth officer who knows or suspects that a child is being or has been subject to any serious criminal offence, not just sexual abuse.

15. The ALA considers that there is no reason why serious criminal offences of any type (not just child sexual abuse) should not give rise to an obligation to report.

Conclusion

14. The Australian Lawyers Alliance (ALA) appreciates the opportunity to have input into the Senate Legal and Constitutional Affairs Legislation Committee inquiry into *Combatting Child Sexual Exploitation Legislation Amendment Bill 2019*. The ALA would welcome the opportunity to appear before the Committee to further explain its views.

Appendix 1 — *Recent Developments in Relation to Institutional Responses to Child Sexual Abuse*, Dr A. S. Morrison RFD QC

Australian Lawyers Alliance WA State Conference

8 September 2017

Curtin Graduate School of Business

Perth Campus

Recent Developments in Relation to Institutional Responses to Child Sexual Abuse

by

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Wardell Chambers

10/111 Elizabeth Street, Sydney

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Introduction

1. In this paper I discuss recent developments in Australian law in respect of limitation periods in sexual abuse claims,[1] together with a discussion of recent significant authorities on the opportunities to sue at common law. I will also say something about the proposed National Redress Scheme.[2]

Limitation Periods

2. The Royal Commission into Institutional Responses to Child Sexual Abuse, reviewing some thousands of cases following interviews with victims, concluded that the average time from last abuse to first reporting was of the order of 22 years[3], which coincides neatly with an Anglican Queensland survey producing similar results.[4] Limitation regimes in Australia vary enormously from state to state but it would be fair to say that Queensland is towards the tougher end of the spectrum. By legislative amendment, first Victoria[5] and then NSW[6] have amended their limitation periods so as to grant an unlimited period for the bringing of claims of this nature.

3. In Victoria, the wording is "sexual abuse, physical abuse and associated psychological abuse" and the wording in NSW is similar, with the addition of the word "significant" before "physical abuse".

4. With effect 11 November 2016, the Queensland Parliament legislated to remove limitation periods for sexual abuse victims.[7] The Government accepted a submission that all defendants should be subject to the changed limitation regime and not just institutions. However, the Queensland legislation does not extend to physical abuse or psychological abuse. To this extent, the legislation falls into line with Victoria and NSW. However, the Queensland legislation does not extend to physical abuse or psychological abuse.

5. It is most unclear what this means. If, for example, a child is beaten during the course of a rape, it seems at least arguable that the beating forms part of the rape and the

limitation period would be extended for the whole occurrence. But what if the child had been repeatedly beaten on previous occasions so as to be coerced into assenting to the sexual abuse? What about the associated psychological trauma? On one view, these matters are so associated with the sexual abuse that a court would have to take them into account in assessing damages. On another view, they might be separated. The artificiality of distinguishing between sexual and physical and associated psychological abuse is obvious and is a significant defect in what is proposed. In any event, it may well be that at law once the plaintiff has a valid cause of action in respect of sexual abuse, it would be perfectly open to plead and claim for physical and associated psychological abuse during the same period on the basis that they are sufficiently connected in time and sufficiently related in respect of cause of action so as to give rise to a right to pursue the further claim without an extension of time being required..

6. In respect of Victoria, NSW and Queensland, the court has the power to deny an extension of time by staying proceedings where injustice should lead to a stay. This is not, I think, identical with the heavy onus placed on an applicant for extension of time under the High Court decision in *Brisbane South Regional Health Authority v Taylor*[8]. It is not to be readily assumed that lapse of time will make a fair trial impossible. The onus on a defendant seeking a stay will be heavy, given the intention of the legislation is to remedy an injustice which was itself caused by the abuse. The delay was in the ordinary case, a consequence of (directly or indirectly) the abuse. The defendant bears a substantial onus and I would have thought that courts would be loathe to stay proceedings even if some witnesses have died or some documents have disappeared, particularly in circumstances where those occurrences are themselves a consequence of the defendant's tort. Moreover, it is to be borne in mind that criminal proceedings on the much higher onus of proof commonly proceed in respect of matters gong back 50 years and more. There have been recent criminal convictions in South Australia, for example, in respect of abuse at a Salvation Army institution in the early 1960s. I do not think that we should be too concerned about the prospects of a stay.

7. I note that in *Connelan v Murphy* [2017] VSCA 116, a stay was granted in Victoria under this provision but in highly exceptional circumstances and the court emphasised that it would be a rare case where a remedy was denied.

8. There have also been developments in other jurisdictions. With effect 4 May 2016, the Commonwealth has issued a Legal Services Direction not to plead a defence to a time-barred child abuse claim and not to oppose any extension of time. That direction ceases to apply after 30 April 2019.[9] In the ACT, there is legislation currently before the Legislative Assembly to extend the limited removal of limitation periods in institutional child abuse claims to all child abuse claims. However, child abuse is defined as sexual abuse and does not appear to extend to physical or psychological abuse. [10] In the Northern Territory, there is legislation currently before the Parliament to remove the limitation period in identical terms to the NSW legislation, being sexual abuse, serious physical abuse and associated psychological abuse.[11] In South Australia, legislation is currently before the Parliament to remove limitation periods for sexual abuse in an institutional context. This is the most restrictive extension in Australia.[12] Yet the Government has shown little inclination to progress even this small step. In Tasmania, the relevant legislation is the *Limitation Act* 1974. In November 2016, the Tasmanian Government announced its intention to remove time limits for survivors of child sexual and physical abuse but nothing has yet occurred. In Western Australia, legislation is currently before the Parliament to remove all limitation periods for child sexual abuse claims but without mention of physical abuse and psychological sequelae.[13] It is to be hoped that a more hopeful decision may be forthcoming from the new administration.

Developments in the Law on Vicarious Liability

9. The recent case of *Prince Alfred College Incorporated v ADC*[14] is remarkable in several respects. The plaintiff was 12 years old and a boarder at Prince Alfred College, where Dean Bain was employed as a housemaster. He was sexually abused in his dormitory. The plaintiff failed at first instance before Vanstone J in the Supreme Court of South Australia.[15] He succeeded on appeal in establishing vicarious liability but not direct negligence (by a majority) in the Full Court of the

Supreme Court of South Australia.[16] The defendant appealed successfully to the High Court.[17]

10. At first instance, Vanstone J accepted that the appropriate approach was that of Gleeson CJ in *State of NSW v Lepore*.[18] Whilst the relationship between a boarding housemaster and a boarding student would be closer than that of a day student and teacher, the ordinary relationship was not one of intimacy and sexual abuse was so far from being connected to the teacher's proper role that it could be neither seen as an authorised mode of performing an authorised act nor in pursuit of the employer's business, nor in any sense within the course of employment. Vanstone J was of the view that the school did not create or enhance the risk of sexual abuse.

11. On appeal, the majority in the Full Court, Kourakis CJ and Peek J would not have found the school negligent in respect of the appointment of the teacher as a housemaster or supervision of him (Gray J dissenting). However, the court unanimously found the school vicariously liable, applying the Gleeson CJ version of the "close connection" test.

12. In the High Court, the Court, French CJ, Kiefel, Bell, Keane and Nettle JJ held that the school's appeal should be allowed on the basis that the plaintiff should not have been granted an extension of time under the *Limitation Act* given the extraordinary delay and given a fair trial on the merits was no longer possible. The court went on to express a view as to whether or not criminality precluded vicarious liability. The decision in *Lepore* was analysed. No basis was said to be shown for disturbing the decision that non-delegable duty of care was not an appropriate remedy. The court considered the decisions of the House of Lords in *Lloyd v Grace, Smith & Co* [1912] AC 716 and *Morris v CW Martin & Sons Ltd* [1966] 1 QBE 716. It was said [56] that those cases were decided by reference to the position in which the employer had placed the employee vis-à-vis the victim. The court went on to analyse the Canadian decisions in *Bazley v Curry* [1999] 2 SCR 534 at 559 and *Jacobi v Griffiths* [1999] 2 SCR 570 at 610. The court also referred to *John Doe v Bennett* [2004] 1 SCR 436 at 446 and *EB v Order of the Oblates of Mary Immaculate in the Province of British Columbia* [2005] 3 SCR 45, where reference was made to "power, trust or intimacy

with respect to the children". The analysis of the United Kingdom cases included *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at 224.

13. It seems extraordinary that the court's discussion stops at that point, prior to the High Court decision in *Lepore*, when the law in the United Kingdom has been expanded enormously by subsequent decisions in cases such as *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256, *JGE v The English Province of Our Lady of Charity and the Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938, *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 and most recently, the important Supreme Court decision in *Cox (Respondent) v Ministry of Justice (Appellant)* [2016] UKSC 10. The failure to mention these important decisions may be a reflection of a failure on the part of counsel to draw them to the Court's attention, as appears also to have been the case in the Full Court in South Australia. However, if that is the case, it reflects an extraordinary lack of research on the part of all concerned.

14. Ultimately, the court decided [85] that much of the evidence relating to the housemaster's position of power had been lost. On that basis, the questions of power and intimacy could not be determined.

15. Given the in loco parentis authority of a housemaster over boys under his care, that seems a somewhat surprising basis on which to decide that an extension of time should not have been granted. Who else would have been legally entitled to enter a child's dormitory after lights out? Presumably, evidence could and should have been called, going back to the 1960s as to the power and authority of housemasters in that school at the time and in boarding schools generally. The failure to do so appears to have caused the refusal of the extension of time. Yet the position of a housemaster has not changed and such evidence would be readily available.

16. However, the court, by implication, appears to have adopted the approach taken by Gleeson CJ in *Lepore* and as a consequence, has determined that criminality of itself does not defeat vicarious liability and the appropriate question 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. [84].

17. It was to have been hoped that this case would have advanced beyond the decision in *State of NSW v Lepore* [2003] 212 CLR 511 but the High Court does not even consider employment-like cases given that the case it was concerned with involved true employment. It is to be anticipated that these issues will require revisiting in the near future, hopefully with the more recent English cases under consideration.

18. A separate judgment by Gageler and Gordon JJ agreed that an extension of time should not have been granted but adopted the Canadian approach in *Bazley v Curry* and *Jacobi v Griffiths*. They at least referred to the more recent English decision in *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1 at 26.

19. It follows that Australia still lags behind most of the common law world in the application of the close connection test to vicarious liability but at least there is a basis for recovery without fault on the part of the institution. Clearly, the issue will have to be revisited in the High Court. See the recent paper by Dr James Goudkamp and James Plunkett, 'Vicarious Liability in Australia: On the Move?' [19]

Vicarious Liability and the Catholic Church

20. In *Trustees of the Roman Catholic Church v Ellis*[20], the Church argued that its trustees do not employ priests and the current bishop or archbishop was not responsible for them. In any event, the unincorporated association known as the Catholic Church was too amorphous to be capable of being sued by the traditional actions against unincorporated associations. This argument was accepted by the NSW CA, leaving Mr Ellis with no remedy for the abuse perpetrated on him.

21. In the United States, Canada and Ireland, the courts have treated the Catholic Church as a corporation sole, making it liable to suit in abuse or negligence cases. That does not appear to be so in Australia. *PAO, BJH, SBM, IDF and TMA v Trustees of the Roman Catholic Church for the Archdiocese of Sydney & Ors*[21] affirmed that no

action lies against the trustees of the diocese which held the property of the school where abuse occurred.

22. However, the archbishops of Melbourne and Sydney, Archbishop Denis Hart and Archbishop Anthony Fisher, were announced by the Hon. Justice Peter McClellan AM on 15 July 2015 to have stated publicly that it is the "agreed position of every bishop and every leader of a religious congregation in Australia that we will not be seeking to protect our assets by avoiding responsibility in these matters" and that "anyone suing should be told who is the appropriate person to sue and ensure that they are indemnified or insured so that people will get their damages and get their settlements".[22]

23. This would seem to be a reversion to the pre-*Ellis* position, where the Church accepted that its trustees were the appropriate body to be sued whether in respect of sexual abuse by clergy or negligence injuring pupils attending parochial schools (18½% of the Australian school population). Francis Sullivan of the Truth, Justice and Healing Council issued a press release on 22 May 2015, calling for legislation to implement the right to sue and said, "If a survivor wants to take a claim to court, then at the very least they must have an entity to sue".

24. The NSW legislation is the *Roman Catholic Church Property Trust Act* 1936 as amended. In Queensland, the relevant legislation is the *Roman Catholic Church (Corporation of the Sisters of Mercy of the Diocese of Cairns) Land Vesting Act* 1945 (Qld), *Roman Catholic Church (Incorporation of Church Entities) Act* 1994 (Qld). This legislation whilst not identical, is relevantly similar to that in other states and territories.

25. Prior to the *Ellis* decision, the Church in Australia accepted that the trustees who hold all the property of the Church in each diocese or archdiocese are the appropriate body to sue. That remains the case in England and Wales, where the Church accepts that its trustees are its secular arm.

26. It might have been thought that the archbishops' undertakings and the comments from Francis Sullivan indicated a reversion to that position. Regrettably, however, it would

seem that some elements of the Church have recanted. In late 2015, the Archdiocese of Sydney issued on its website a document entitled "The *Ellis* Decision - a Re-statement of the Law", saying "There is no such thing as the '*Ellis* defence'. The *Ellis* Decision did not create new law."[23]

> "While the Court found that the body corporate was not responsible for the assistant priest, it did not set up a so-called "*Ellis* defence" or any new law. This decision is consistent with the longstanding rule of law that you cannot be liable for the criminal actions of others unless you are directly or indirectly responsible for supervising their conduct, and there has been negligence or other actionable conduct."[24]

Francis Sullivan issued a further press release, in which it was said that the Church should assist victims in finding someone to sue. The whole point of the *Ellis* defence is that there is no-one to sue.

27. It would seem that the Catholic Church, alone amongst churches and other non-government bodies in Australia, does not accept responsibility for its clergy or its lay members on the basis of vicarious liability. This means that if a child is injured by a teacher's negligence in a parochial school, it is entirely at the whim of the local bishop as to whether or not he will offer up the trustees, who hold the school's property, to be sued. This is wholly unacceptable. Legislative reform is required along the lines proposed in the Shoebridge Bill circulated in the NSW Upper House.[25] The NSW Government has issued a consultation paper and ALA will put in submissions in accordance with its best practice document, circulated to all governments and ALA branches.

Other Cases

28. In *Erlich v Leifer & Anor*[26], the plaintiff sued for psychiatric injury as a result of the sexual abuse by the first defendant/headmistress. The plaintiff attended an ultra-orthodox Jewish school from ages 3 to 18 and it was found that, over a period of about 3 years, she was sexually abused by the headmistress. The headmistress left the jurisdiction with the active assistance of the school community as soon as the allegations became known and has successfully resisted extradition from Israel. Rush J concluded that the school was vicariously liable because the relationship "was

invested with a high degree of power and intimacy" and the headmistress used that power and intimacy to commit sexual abuse. [1-8]. Rush J found that the plaintiff, as a result of the abuse, had suffered a major psychiatric illness with profound effects. [168].[27]

29. In *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church*[28], the plaintiff, aged about 12 or 13 in 1975 and 1976, was sexually abused by Father Clonan. In the English Court of Appeal, Lord Neuberger MR (Longmore and Smith LJJ agreeing) upheld the trial judge's finding that the claimant was not out of time to sue and that the finding of sexual abuse was supported by the evidence. He followed the *Lister* close connection test because Father Clonan obtained access to the boy through his clerical garb and youth work. Vicarious liability was therefore established.

30. In *JGE v The English Province of Our Lady of Charity and The Trustees of the Portsmouth Roman Catholic Diocesan Trust*[29], the preliminary issue was whether the Trustees of the Roman Catholic Church could be liable to the plaintiff for sexual abuse and rape by a Roman Catholic clergyman now deceased. This occurred when she was a young child in a children's home in Hampshire between 1970 and 1972 conducted by an arm of the Church. The defendant contended that the clergyman was not its employee and nor was the relationship akin to employment. It argued the action should be struck out because vicarious liability could not arise. Significantly, however, the Roman Catholic Church in England and Wales accepted that its Trustees stood in the shoes of the bishop for present purposes and accepted that, for the purposes of litigation, its trustees holding its property were its secular arm and were a proper defendant if vicarious liability arose. MacDuff J noted the test of vicarious liability had changed to give precedence to form over function. Vicarious liability does not depend upon whether employment is technically made out. He noted that in Canada, the Supreme Court in *Doe v Bennett & Ors* [2004] ISCR 436, held a bishop vicariously liable for the actions of a priest who had sexually abused boys within his parish. An appeal to the English Court of Appeal was dismissed.

31. The next case was *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.

32. At issue was who, if anyone, was liable for a large number of alleged acts of sexual and physical abuse of children at a residential institution for boys in need of care, originally operated by the De La Salle Institute, known as Brothers of the Christian Schools and operating as St William's School. The appeal to the English Supreme Court required a review of the principles of vicarious liability in the context of sexual abuse of children. The claims were brought by 170 men in respect of abuse between 1958 and 1992. The Middlesbrough defendants took over the management of the school in 1973, inheriting the previous liabilities. They used a De La Salle brother as headmaster and contracted four brothers as employee teachers. The Middlesbrough defendants were held vicariously liable for the acts of abuse by those teachers, and this was not challenged on appeal. However, the Middlesbrough defendants challenged the findings below that the De La Salle order was not vicariously liable for the actions of its brothers and therefore liable to contribute in damages. The Middlesbrough defendants' appeal seeking contribution had been rejected in the Court of Appeal, but leave was granted to appeal to the Supreme Court.

33. Lord Phillips (with whom the other members of the Court agreed), noted the views on vicarious liability expressed in the Court of Appeal in *JGE* and the impressive leading judgment of Ward LJ [19]. The following propositions were said by Lord Phillips to be well-established.

(i) It is possible for an unincorporated association to be vicariously liable for the tortious acts of its members.

(ii) One defendant may be vicariously liable for the tortious act of another defendant even though the act in question constitutes a violation of the duty owed and even if the act in question is a criminal offence.

(iii) Vicarious liability can even extend to liability for a criminal act of sexual assault. *Lister v Hesley Hall*.

(iv) It is possible for two different defendants to be each vicariously liable for the single tortious act of another defendant.[30]

34. Lord Phillips held that the relationship between the De La Salle Institute and the brothers teaching at St William's, though not one of employment, was capable of giving rise to vicarious liability. He referred to JGE, Maga and *NSW v Lepore* but not to the NSW CA decision in *Ellis*.

35. Lord Phillips concluded [86] (with the concurrence of the balance of the Supreme Court):

> "Vicarious liability is imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a strong causative link.
>
> [87] These are the criteria that establish the necessary 'close connection' between the relationship and abuse."[31]

36. Accordingly, in England, Canada, Ireland and the United States, the Roman Catholic Church has accepted or been held liable through its Trustees for the criminal misconduct of priests or teachers. Only in Australia has a contrary view been taken in the *Ellis* decision. That decision sits ill with the views expressed in *Lepore* and is at odds with the rest of the common law world.

37. In *Cox (Respondent) v Ministry of Justice (Appellant)* [32], Lord Reed (Lord Neuberger, Lady Hale, Lord Dyson and Lord Toulson agreeing) held the Ministry of Justice liable for injury to a catering manager even though it did not employ the prisoner, who, whilst assisting in the kitchen, accidentally injured her. Lord Reed, quoting the words of Lord Phillips in *Various Claimants* case, where he said, "The law of vicarious liability is on the move", added "It has not yet come to a stop".

38. In *DC v State of NSW*[33] and *TB v State of NSW* [34] *(Below: TB and DC v State of NSW & Anor*[35]), each of the plaintiffs had a long history of sexual abuse as young girls from their stepfather. There was also physical violence involved. In April 1983, the elder girl complained to YACS (predecessor of DOCS) about the abuse. She, her sister and her mother were interviewed and the YACS officer assessed that the abuse had occurred. The girls were charged with being neglected children but the stepfather was not reported to police. In September of that year, the stepfather admitted to the YACS officer the abuse, about which he was unrepentant. The YACS officer had sought to avoid the stepfather seeing the girls alone but was aware he was regularly at their home. The girls, now women, sued in negligence, complaining that they suffered continued abuse through the failure to report. At the time of the original complaint, the stepfather had a history of sexually abusing children and was on bail for rape of his son's 15 year old girlfriend, for which he was subsequently convicted. Many years later, he was charged and convicted in relation to sexual abuse of the two stepdaughters.

39. The plaintiffs succeeded by a majority on appeal but the State of NSW obtained leave to appeal to the High Court. After hearing full argument, the HCA acceded to the respondent/plaintiffs' application and revoked the appellant's leave to appeal on the grounds that the case was now purely factual and raised no issue suitable for the High Court. Accordingly, the decision in favour of the plaintiffs in the NSW CA stands.[36]

The National Redress Scheme

40. The national redress scheme proposed by the Royal Commission to supplement common law rights has been supported by the Commonwealth. The States have been cautious in their response, apart from South Australia, which has opposed it outright. The Irish scheme had a cap of €300,000, which could be exceeded in some circumstances.[37] The Royal Commission proposed a cap of $200,000. The Commonwealth has proposed a $150,000 cap. South Australia will not go beyond its own scheme, which has a $100,000 cap. Clearly, there will be great difficulty in obtaining appropriate contribution from the institutions without mandatory legislation.

41. In the Federal budget, the Commonwealth allocated $33.4 million in 2017/18 for its own share of a national redress scheme but at present, no state has committed itself or funding. Whilst the Catholic and Anglican churches appear supportive, it appears likely that the only useful way of putting pressure on some recalcitrant institutions would be to make participation a condition of retention of their charitable status. However, the Commonwealth has not yet proposed using what in effect is the only weapon in its armoury.

Conclusion

42. Clearly, there is still significant work to be done in some jurisdictions in respect of extending the limitation period to physical and associated psychological abuse and in South Australia, in getting rid of the restriction to abuse in an institutional context. There is a need for legislation to make the trustees of the Catholic Church liable for the conduct of clergy and volunteers in the same way as any other non-government organisation. The redress scheme is inadequate but might assist some victims if intergovernmental agreement can be achieved. The High Court will have to reconsider the issue of vicarious liability in the light of the more recent English Supreme Court decisions relating to the application of the close connection test. The Government consultation paper gives an opportunity for NSW to lead the way.

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[1] I am particularly grateful to Anna Talbot, Vici Jacobs and Toks Oqundari of ALA for their research into the status of legislation throughout all Australian jurisdictions.
[2] This is a shortened and updated version of a paper originally presented on 17 February 2017 to the ALA Queensland State Conference.
[3] Royal Commission Interim Report on Redress and Civil Litigation Vol 1 at 5.1 on p 158
[4] Patrick Parkinson, Kim Oates, Amanda Jayakody 'Study of Reported Child Sexual Abuse in the Anglican Church' (May 2009) at p 5 - average of 23 years.
[5] *Limitation of Actions Act* 1958 as amended by *Limitation of Actions Amendment (Child Abuse) Act* 2015 (Vic) with effect 21 April 2015.
[6] s 6A of the *Limitation Act* 1969 (NSW) has retrospectively removed all limitation periods for chid sexual abuse or significant physical abuse and associated psychological sequelae. The amendments were assented to and commenced on 17 March 2016.
[7] *Limitation of Actions Act* 1974 as amended by the *Sexual Abuse and Other Legislation Amendment Act* 2016, with effect 11 November 2016.
[8] (1996) 186 CLR 541.
[9] Legal Services Direction - time-barred child abuse claims, 4 May 2016.
[10] ACT Justice and Community Safety Legislation Amendment Bill 2017.
[11] Limitation Amendment (Child Abuse) Bill 2017 (NT).
[12] Limitation of Actions Institutional Child Sexual Abuse) Amendment Bill 2016 (SA).
[13] Limitation Amendment (Child Sexual Abuse Actions) Bill 2015 to amend the *Limitation Act* 2005 (WA).
[14] [2016] HCA 37.
[15] [2015] SASC 12 (Vanstone J).
[16] [2015] SASCFC 161.

[17] [2016] HCA 37.
[18] (2003) 212 CLR 511 at [40-54].
[19] Oxford University Commonwealth Law Journal 25 May 2017.
[20] [2007] NSWCA 117.
[21] [2011] NSWSC 1216 (Hoeben J).
[22] Speech by the Hon. Justice Peter McClellan AM to the Triennial Assembly of the Uniting Church in Australia, on 15 July 2015.
[23] Sydney Catholic Archdiocese "The *Ellis* Decision - A Re-statement of the Law", [undated], available at https//www.sydneycatholic_org/4/justice/royalcommission/ellis.asp.
[24] Ibid.
[25] Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2014 (NSW)
[26] [2015] VSC 499 (Rush J).
[27] General damages for pain and suffering etc. were assessed at $300,000. Past economic loss, including superannuation, was allowed at $50,358 and future economic loss, including superannuation, was allowed at $501,422. It is worth noting that superannuation was allowed for past and future at 9% of net rather than gross loss and no allowance was made for increasing rates of superannuation in the future. These calculations appear to be in error. Medical expenses were allowed in the sum of $16,641 after a reduction for the vicissitudes of life of 15%. Such a reduction is, of course, contrary to High Court authority. Sharman v Evans [1977] HCA 8. The sum of $100,000 was awarded by way of exemplary damages against the school in the light of its conduct in assisting the headmistress and her family to leave the jurisdiction. The sum of $150,000 in exemplary damages was awarded against the headmistress personally.
[28] [2010] EWCA Civ 256.
[29] [2011] EWHC 2871 (QB).
[30] Note, however, at this point that in NSW, the Court of Appeal, without reference to the English Supreme Court decision, said in *Day v The Ocean Beach Hotel Shellharbour Pty Ltd* [2013] NSWCA 250 at [697] that dual vicarious liability is not permissible at law.
[31] [2012] UKSC 56 at [86] and [87].
[32] [2016] UKSC 10.
[33] [2016] NSWCA 198.
[34] [2016] NSWCA 198.
[35] [2015] NSWSC 575 (Campbell J).
[36] New South Wales v DC & Anor [2017] HCA 22 (14 June 2017).
[37] €300,000 is approximately AU$434,000 at current exchange rates.