

Our Ref: WGS

17 March 2014

The Hon. Peter McClellan AM
Chair
Royal Commission into Institutional Responses to Child Sexual Abuse
GPO Box 5283
SYDNEY NSW 2001

By email: solicitor@childabuseroyalcommission.gov.au

Dear Judge,

RE: KNOWMORE'S SUBMISSION IN RESPONSE TO ISSUES PAPER 5: CIVIL LITIGATION

This submission is provided on behalf of **knowmore** legal service.

As you know, **knowmore** is a free legal service established to assist people engaging with or considering engaging with the Royal Commission. Advice is provided through a national telephone service and at face to face meetings, including at outreach locations. **knowmore** has been established by the National Association of Community Legal Centres Inc, with funding from the Australian Government, represented by the Attorney-General's Department.

Our service was launched in July 2013 and since that time we have provided over 2,500 client advices. Many of the clients that we have assisted have been seeking legal advice about their options, if any, to obtain financial and other redress in relation to childhood sexual abuse they suffered in institutional contexts. Some of these clients have had direct experience with the civil litigation system; usually as a potential litigant seeking advice about commencing proceedings. However, very few have ever actually commenced civil proceedings; the reasons for this are explored below.

knowmore's submission will discuss the legal deficiencies of Australia's current civil litigation systems and make specific recommendations. Our submission is based upon our work with survivors and hearing of their collective experiences as to the problems inherent in current systems, and what they need by way of options for pursuing redress and justice.

In our experience, survivors wish to use the civil litigation system for a number of reasons. Aside from the obvious motive of seeking an appropriate award of financial compensation, many clients wish to utilise a process to obtain various non-financial and/or therapeutic outcomes. These include:

- public affirmation that they were wronged;
- to seek a sense of justice, especially where an offender's death means that the criminal justice system is not an option;
- to obtain a sense of closure;
- to secure an apology and a sense that the institution has been brought to account;
- to ensure that the specific institution implements policy and procedural reforms;
- for the purposes of specific and general deterrence (to reduce the future incidence of child sexual abuse in institutional contexts, and more generally);¹ and
- to obtain personal retribution against their abuser(s) and the institution.

These are all goals pursued in search of social responses to injustice, rather than ones focused on financial redress, and should be borne in mind in considering what governments and institutions should do to address or alleviate the impact of past and future child sexual abuse in institutional contexts.

Many of our clients have already engaged with the Royal Commission by attending private sessions or providing statements, or have advised us of their intention to so engage. Accordingly, the Royal Commission will have heard, or will hear, directly from these clients about their relevant experiences.

1 Introduction

We submit that civil litigation systems across Australia², even with the enactment of necessary reforms, will never by themselves be able to operate in a way that satisfactorily addresses or alleviates, for the majority of the survivors, the impact of childhood sexual abuse in institutional contexts, either through ensuring the provision of appropriate financial compensation by institutions or in delivering the other non-financial and/or therapeutic responses sought by those survivors. For this reason, we advocate for survivors to be able to choose to proceed through an alternate mechanism (an independent, national redress scheme), especially established to provide redress for this form of wrong. However, we propose that the option of civil litigation, with appropriate reform of existing systems, be maintained as an alternative for survivors seeking redress.

The clear reality is that at present Australia's civil litigation system is inaccessible, inadequate and anti-therapeutic, in the sense of being highly re-traumatising, for the overwhelming majority of survivors. In summary, the majority of our clients who have had any experience with actual or contemplated civil litigation as a means of pursuing redress have experienced numerous practical and systemic barriers, inherent in current civil procedure. There are now many recent research studies and other authoritative works that highlight the general inaccessibility of the civil justice system for most Australians. For individual litigants, it has to be accepted that participation in any significant civil litigation matter is highly demanding of resources, time and personal and emotional commitment. Simply put, the current system

¹ The Royal Commission will by now have heard from many survivors expressing that one of their primary motivations in coming forward to share their experience of child sexual abuse is so that *"what happened to me doesn't happen to other children in future"*

² While obviously the various States and Territories of Australia have civil litigation systems that differ from each other in some important respects, for the purpose of this submission it is considered that there are sufficient broad similarities across the various systems, to generalise about many of the relevant procedural and other issues that present for the particular class of litigants who are survivors of childhood sexual abuse in institutions. Accordingly, for ease of reference, the term 'civil litigation system' is used throughout this submission in general reference to the various systems operating in Australia, save for where reference is made to a specific statute

demands more of the individual litigant than the majority of survivors of childhood sexual abuse will ever be able to meet.

Many of the barriers inherent in the current civil system are difficult or impossible to overcome, even with major reforms. They include:

- Many survivors will delay, avoid altogether or subsequently withdraw from a litigation-based redress mechanism that by its inherent nature is extremely adversarial, costly, lengthy and public and extremely re-traumatising.
- Survivors, often holding a profound sense of mistrust or fear of institutions as a consequence of their abuse, will similarly mistrust or fear the litigation system and the courts as state-run apparatus.
- Aboriginal and Torres Strait Islander clients may not be aware of, or be reluctant to engage in, a culturally insensitive and foreign legal system founded on the Western legal tradition.
- Survivors experience huge barriers in accessing and retaining adequate legal assistance and often have had negative interactions with the justice system, whether in relation to a current claim or other legal problems they have experienced.
- Some institutions cannot be identified, no longer exist, no longer hold assets or are otherwise unable to satisfy potential judgments, or their structure (and attitude to defending civil claims) gives them effective immunity from suit.
- Some individual offenders are powerful, deceased or live across jurisdictions. Some may have no assets, and be 'judgment-proof', for all practical purposes.
- If a civil claim is brought, an array of legal issues (procedural and evidentiary) will undermine the chances of the claim succeeding, including:
 - the likely expiration of applicable limitation periods;
 - difficulty in, or the simple unavailability of, extending limitation periods;
 - the need to overcome multiple and technical interlocutory steps in order to initiate proceedings, resulting in appeals, high upfront costs and delay;
 - very few tortious causes of action are maintainable against institutions;
 - the standard of proof often cannot be met due to evidentiary issues that result from perpetrator strategies, power disparities that underlie sexual offending against children, and the continuing adverse impacts of the trauma resulting from the plaintiff's experience of abuse;
 - the destruction of records, the passage of time and the resulting difficulties of credibility for the relevant tribunal of fact;
 - causation issues. Proving that child sexual abuse caused the harm claimed may be difficult, especially for Aboriginal and Torres Strait Islander survivors and in cases of re-

victimisation, where abuse has been repeated and prolonged and has occurred across multiple settings over a survivor's lifespan;

- concerns as to whether all members of the Australian judiciary have an informed and appropriate understanding as to the nature and extent of institutional child sexual abuse, and the nature of its impacts upon survivors; and
 - the current system operates to afford the claimant little bargaining power when participating in early dispute resolution and mediation processes.
- The current civil litigation system operates in such a way that its capacity to compensate survivors and deter institutions that repeatedly fail to prevent child sexual abuse is circumvented. Specific to child sexual abuse, this circumvention shifts huge social, health and financial costs away from institutions and back onto survivors and the broader Australian community.
 - Significantly, the current system operates to drive potential claims *away* from the civil litigation system and, thereby, the reach of the law. The judiciary are therefore unable to fully develop and tailor the common law of torts to adequately respond to the circumstances giving rise to institutional child sexual abuse and the impacts upon survivors of this form of wrong. This 'vacuum' does not seem to have operated in any way as an incentive for Parliaments to frame and enact relevant reforming legislation that overcome these barriers.

2 List of recommendations

In summary, we recommend the following reforms:

1. While noting the focus of this submission is on civil claims, we recommend that an alternative, independent and national redress scheme be established to investigate and determine awards of compensation and other redress for the unique form of wrong constituting child sexual abuse in institutional contexts.
2. That consideration be given to strengthening the civil litigation system with respect to institutional child sexual abuse litigation so as to ensure that the system's deterrence function can be properly fulfilled and so as to also assist in the delivery of therapeutic justice.
3. That a national or harmonious State and Territory legislative framework be established to govern civil litigation relating to child sexual abuse, providing for the following reforms:
 - a. That legislation be enacted to overcome the legal issues arising from the decision in *Trustees of the Roman Catholic Church v Ellis & Anor* [2007] NSWCA 117, including to ensure that survivors can commence proceedings against unincorporated non-government organisations and perpetual succession will apply to the Office of the Archbishop.
 - b. That legislation be enacted to extend and codify vicarious liability, in an 'enterprise risk' manner, with respect to criminal acts committed by employees or people 'akin to employees', so as to overcome the legal issues arising from the decision of the High Court in *New South Wales v Lepore* (2003) 212 CLR 511.

- c. That legislation be enacted to impose a clear legal duty on institutions to adopt reasonable measures and take reasonable steps to prevent child sexual abuse from occurring by its officials.
 - d. That legislation be enacted to provide for dual vicarious liability in cases of institutional child sexual abuse.
 - e. That legislation be enacted to exempt claims related to child sexual abuse from statutory pre-action procedures.
 - f. That legislation be enacted nationally to consistently exempt claims related to child sexual abuse from all statutory and common law limitation periods.
 - g. That legislation be enacted to address the legal issues with respect to causation arising from repeated and prolonged child sexual abuse and intergenerational trauma, as particularly experienced by Aboriginal and Torres Strait Islander survivors.
 - h. That legislation be enacted to provide for certain heads of loss commonly related to child sexual abuse claims.
4. That improved digital records management standards and practices be implemented across Australia for government and non-government records that are likely to be relevant to claims of child sexual abuse, including:
 - a. the removal of State Archive record destruction authorities; and
 - b. compliance audits by the relevant Office of the Information Commissioner or Ombudsman.
 5. That a trauma-informed, national specialist accreditation scheme (or harmonious State and Territory schemes) be implemented for lawyers accepting instructions from survivors of child sexual abuse to make claims for financial and other redress; and that such schemes be supported by refined referral mechanisms and information services offered by relevant legal professional bodies.
 6. That government funding be provided to establish a national legal service to assist and support survivors of institutional child sexual abuse.
 7. That further consideration be given to the issue of whether survivors of child sexual abuse who are under custodial sentences should be exempt from restitution processes attaching to compensation amounts received for child sexual abuse.

3 Responses to the Royal Commission's specific questions

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 child sexual abuse in institutional contexts?
 - 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;

In the case of *Trustees of the Roman Catholic Church v Ellis & Anor* [2007] NSWCA 117 ("*Ellis*"), the New South Wales Court of Appeal held that an unincorporated association, such as the Roman Catholic

Church in the Archdiocese of Sydney, cannot, at common law, sue or be sued in its own name because it does not exist as a juridical entity (the so-called "Ellis defence").³

We note the current Royal Commission public hearing inquiring into the experiences of the plaintiff in this case, John Ellis, and note specifically the following comments from the opening address of Senior Counsel Assisting Ms Gail Furness SC:

"In his statement to the Royal Commission the Cardinal says, and I quote: *'Whatever position was taken by the lawyers during the litigation or by lawyers or individuals in the Archdiocese following the litigation, my own view is that the Church in Australia should be able to be sued in cases of this kind.'*"⁴

We agree with that view. While Cardinal Pell has foreshadowed, on the eve of the Ellis hearing commencing, a significant change in the approach of the Catholic Church,⁵ it is a matter of public record that he will soon be leaving his current role and, in any event, the application or otherwise of the Ellis defence should not be left to the discretion of the institutional defendant.

The Ellis defence creates obvious legal difficulties for survivors when approaching the Catholic Church, as well as other non-government organisations that are similarly unincorporated, for redress. The effective consequence is that these institutions cannot be sued. When entering settlement discussions, either during civil litigation or while participating in institutional redress schemes, this difficulty, despite what institutions admit to, informs discussions and puts the survivor at the institution's mercy. This exacerbates what is already an inherently re-traumatising experience for survivors, where the power relationships inherent in the perpetration of child sexual abuse are replicated for the client. The institution will have the final say about what offer is provided to the survivor, and the terms on which any such offer is advanced, as there is no way to legally compel the institution to act otherwise.

Moreover, survivors are channelled and forced down informal 'redress' pathways when seeking to engage with institutions that are protected by the Ellis defence, given the lack of formal legal redress available. These pathways are beyond the law's reach. In our clients' experience, until recent times (closely relating to the commencement of the Royal Commission), settlement outcomes were usually accompanied by an obligation to execute deeds of settlement which ordinarily contained strict non-disclosure clauses. Institutions, particularly those with a known history of failing to prevent child sexual abuse among their members or employees, are therefore able to circumvent the civil litigation system's deterrent function and release themselves from liability under the veil of secrecy. The lack of transparency and accountability that is present in such schemes contributes to inconsistent and unfair outcomes for many claimants. It also undermines the capacity of the claimant to achieve, and the redress process to deliver, many of the non-financial outcomes referred to earlier in this submission.

Not only cannot these institutions be sued, but other findings in *Ellis*, such as those concerning the relevant Archbishop's personal liability, also operate to limit the other options available to claimants

³ *Trustees of the Roman Catholic Church v Ellis & Anor* [2007] NSWCA 117, [47]; applied in *PAO & Ors v Trustees of the Roman Catholic Church for the Archdiocese of Sydney & Ors* [2011] NSWSC 1216

⁴ Viewed at <http://www.abc.net.au/news/2014-03-10/royal-commission3a-counsel-says-abuse-victims-should-be-able-t/5310006>

⁵ We also note the recent comments made by the Truth, Justice and Healing Council on this point; viewed at <http://www.tjhcouncil.org.au/media/tjhc-blog.aspx>

when seeking to identify potential defendants and to hold them accountable. This point is best illustrated by the experiences of one of our clients. He sought to sue the offender who sexually abused him, as well as the offender's employer, the Anglican Church, for damages with respect to personal injuries he sustained as a result of childhood sexual abuse.

Upon conviction of criminal offences, the offender hid his accounts and assets so as to make himself judgment-proof, should a civil claim be pursued. The relevant institution, in the meantime, did not have insurance for the years that the abuse had been committed. This is despite insurance being a mandatory operational requirement for the particular institution at the time. The individual office holder - the relevant Archbishop who oversaw the employment of the offender - is now deceased. The Anglican Church is taking the view that, as found in *Ellis*,⁶ the Archbishop is neither a statutory, nor a common law, corporation sole with perpetual succession. The current Archbishop cannot therefore be made liable for the torts of his deceased predecessor. Liability does not attach to the office but instead to the office holder. In effect, liability, in most cases, will die with the Archbishop who oversaw the offender's appointment. This is obviously a significant issue in the context of historical child abuse matters.

More generally, and linked to the relevant institution's disparate bargaining power, at least some religious organisations appear willing to exercise discretion as to whether or not the *Ellis* defence will be asserted to defeat a particular claim; presumably a matter to be determined by the relevant Archbishop in each individual case. This contributes another layer of inconsistency and uncertainty for claimants.

Another notable impact is that the operation of the *Ellis* defence hinders the law's development with respect to child sexual abuse claims involving religious clergy. The capacity for vicarious liability to extend to those with responsibility for overseeing religious clergy, for example, remains unsettled in New South Wales and other jurisdictions as a result of a lack of opportunities for consideration of the issues by the judiciary. We will discuss this point further below.

We submit that the legal situation where survivors cannot take effective action against unincorporated religious or other charitable bodies must change in order to provide survivors with meaningful rights of access to the civil litigation system. Such change is also necessary to ensure that the system's deterrent function can be fulfilled and institutions are encouraged to be proactive and preventative in their approach to managing the risks (including the risk to them, and insurers, of heavy financial consequences), of child sexual abuse occurring.

Various options are available to overcome the issue. As noted above, the application or otherwise of the *Ellis* defence should not be left to the discretion of the institutional defendant. One approach is that adopted by the Supreme Court of England where it overcame the potential operation of the *Ellis* defence in 2012, by deeming the relevant unincorporated association a corporate body:

*Because of the manner in which the Institute carried on its affairs, it is appropriate to approach this case as if the Institute were a corporate body existing to perform the function of providing a Christian education to boys, able to own property and, in fact, possessing substantial assets.*⁷

⁶ *Trustees of the Roman Catholic Church v Ellis & Anor* [2007] NSWCA 117, [162], [179] and [181]

⁷ *The Catholic Child Welfare Society and others v Various Claimants and The Institute of the Brothers of the Christian Schools and others* [2012] UKSC 56, [33]

We submit that such a policy-driven approach accords with the broader public interest and the reality of the nature of the responsibilities of relevant institutions. But such an approach is yet to take hold in Australia. The *Corporations Act 2001* (Cth) does not provide for certain bodies, depending on their characteristics, structure and activities, to be deemed a corporation in particular instances. There may be scope for this Act to be amended.

There are other alternatives. The Ellis defence can be overcome by legislation, such as the *Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2012 (NSW)*, or by requiring non-government organisations that have responsibilities relating to children to incorporate in order to access insurance, tax exemptions and other entitlements.⁸

In any case, even if the institution's juridical entity can be established, now or in the future, there may be additional difficulties in establishing the institution's vicarious liability, or that of any relevant office-holder, for an employee's or non-employee's criminal acts. These points will be discussed below.

b. some institutions do not hold assets from which damages could be paid, or they are not insured or their insurance status is unknown;

As noted above, this has not infrequently been the case for some of our clients. In the case of entities which no longer exist, and where there has been no transfer of existing assets or liabilities, the importance of an independent redress scheme is evident.

For existing institutions involved in delivering services to or engaging with children, that lack assets to satisfy a claim, and/or hold no supporting insurance, such issues can perhaps best be overcome through requiring such institutions to be adequately insured, to an extent that will enable satisfaction of any possible claims that might reasonably be anticipated, having regard to the particular institution and the nature of its activities.⁹

c. the circumstances in which institutions are liable for the criminal conduct of their employees or other people;

Criminal conduct on the part of employees

Australian institutions are potentially liable for their employees' criminal acts where those acts occur in the course of employment or constitute a breach of a non-delegable duty of care. The circumstances giving rise to liability in either case are extremely limited. It is therefore our submission that these circumstances should be broadened, preferably by legislation, so as to adequately accommodate for the occurrence of institutional child sexual abuse. Without this broadening, institutions will remain without a clear legal duty to take appropriate measures to minimise the risks of child sexual abuse committed by their employees. The Royal Commission has already heard, on multiple occasions, of the terrible consequences for children in institutional care when institutions have failed to take adequate measures

⁸ Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013), 536

⁹ Similar to the requirements imposed on certain professionals to hold indemnity insurance to cover claims up to a certain amount, calculated in reference to the services delivered, the number of employees and other officers involved in service delivery, and so on

to safeguard those children, to supervise their employees and to effectively implement and enforce child protection policies and procedures.

The leading case in this context is the decision of the High Court of Australia in *New South Wales v Lepore* (2003) 212 CLR 511.¹⁰ In that case, the High Court preferred to determine the institution's liability for child sexual abuse on the basis of vicarious liability, instead of a non-delegable duty of care (in the absence of direct fault). Vicarious liability is traditionally founded on the premise that an employer is liable for an employee's wrongdoing only where that wrongdoing is done during the course of employment.

However, Gleeson CJ, Gummow, Hayne, Callinan and Gaudron JJ all doubted whether a criminal act such as child sexual assault could ever fall within the course of an employee's employment, so as to found vicarious liability.¹¹ That act, in the context of a teacher delivering educational services to children, was viewed as being so 'foreign' and 'inimical' to, 'obviously inconsistent with' and the 'antithesis' of the teacher's role.¹²

We respectfully submit that this perspective fails to recognise the real nature of child sexual abuse, the contexts within which it frequently occurs and the role any institution engaging with children plays in generating and managing the important and appreciable risks of their employees committing such acts. It also fails to recognise the perspective of the child victim who would no doubt assert the close connection between the offender's role, and the trust inherent in their relationship with the child, provided the opportunity for the abuse to occur. As the Honourable Chair of the Royal Commission recently noted in an address:

*It is plain that many in the community do not understand the potential for abuse to occur, the frequency with which it does occur and the consequences for victims and their families.*¹³

The decision in *Lepore* is perhaps consistent with such a lack of understanding.¹⁴ Even though the case was decided some ten years ago, we would respectfully suggest that an informed perspective about issues relating to the risk of child sexual abuse should now recognise that while a school-teacher sexually abusing a child is absolutely antithetical to the proper role of a teacher and the relationship, the risk of such conduct is well-known and serious,¹⁵ and its actual occurrence far from rare.

¹⁰ The uncertainty the various judgments import into cases of institutional child sexual abuse has been criticised elsewhere. See Jane Wangmann, 'Liability for Institutional Child Sexual Assault: Where Does Lepore Leave Australia?' (2004) 28(1) *Melbourne University Law Review* 169; Steven White and Graeme Orr, 'Precarious Liability: The High Court in *Lepore*, *Samin* and *Rich* on school responsibility for assaults by teachers' (2003) 11 *Torts Law Journal* 101; Prue Vines, 'Schools' Responsibility for Teachers' Sexual Assault: non-Delegable Duty and Vicarious Liability' (2003) 27 *Melbourne University Law Review* 612

¹¹ *New South Wales v Lepore* (2003) 212 CLR 511, [54] (Gleeson CJ), [217] (Gummow and Hayne JJ), [342]

¹² *New South Wales v Lepore* (2003) 195 ALR 412, 430, 433 and 434 (Gleeson CJ); 499 - 500 (Callinan J); 464, 468, 469 and 474 (Gummow and Hayne JJ)

¹³ Barney Swartz, 'Royal Commission into child abuse swamped by submissions' (November 12, 2013) *The Age*. Accessible at: <http://www.theage.com.au/victoria/royal-commission-into-child-abuse-swamped-by-submissions-20131112-2xe5w.html>

¹⁴ See also: Jane Wangmann, 'Liability for Institutional Child Sexual Assault: Where Does Lepore Leave Australia?' (2004) 28(1) *Melbourne University Law Review* 169

¹⁵ For example, all jurisdictions have had in place teacher registration requirements for some time, which ordinarily prohibit the registration (or provide for the immediate de-registration) as teachers of persons against whom criminal or disciplinary charges relating to acts of child abuse have been proven

It must be accepted, in determining the proper boundaries of legal accountability, that the institutional context is a primary factor facilitating the employee's offending. It is clearly foreseeable that certain enterprises carry more risks of child sexual abuse than others. Professor Stephen Smallbone has given evidence before the Royal Commission that these risks have an empirical basis.¹⁶ We respectfully agree. Cases before the Royal Commission, such as the case studies involving convicted perpetrators Steven Larkins, Jonathan Lord and Gerard Byrnes, demonstrate that there is a *strong and inherent connection* between certain employment roles or enterprises - the opportunities presented, the relationship of trust and dependence, the locations and modes of service delivery and the freedom they generate, the degree of supervision and monitoring and enforcement of procedural compliance (or lack thereof) of the institutional employer – and an offender's ability to groom children and otherwise sexually abuse them.¹⁷

The 'enterprise risk' approach, which has been increasingly applied by the English and Canadian Supreme Courts to issues of vicarious liability in cases of institutional child sexual abuse, derives from this empirical basis.¹⁸ That approach treats the creation of risk as a basis for the imposition of vicarious liability in cases of abuse. It is captured in the following test applied unanimously by the Supreme Court of England in *The Catholic Child Welfare Society and others v Various Claimants and The Institute of the Brothers of the Christian Schools and others* [2012] UKSC 56:

*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.*¹⁹

The Supreme Court underpinned its test with public policy considerations which, we submit, equally apply in Australia, especially where it is known that certain institutions face appreciable risks in delivering services but continue to fail to prevent employees committing child sexual abuse. We submit that:

1. where an employer puts into the community an enterprise carrying with it certain risks and those risks materialise and cause injury or contribute to causing such injury, it is fair that, having created the enterprise and the risk, the employer should bear the loss; and

¹⁶ The Royal Commission into Institutional Responses to Child Sexual Abuse, Public Hearing – Case Study 2, Expert Report of Professor Stephen Smallbone, Exhibit Number 2-0041, Document ID EXP.0001.001.0001_R, 6

¹⁷ See also: Submissions of Senior Counsel Assisting the Royal Commission, *The Response of YMCA NSW to the Conduct of Jonathan Lord* (2013), [17]

¹⁸ *Maga (by his Litigation Friend, the Official Solicitor) v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] 1 WLR 1441; *The Catholic Child Welfare Society and others v Various Claimants and The Institute of the Brothers of the Christian Schools and others* [2012] UKSC 56

¹⁹ *The Catholic Child Welfare Society and others v Various Claimants and The Institute of the Brothers of the Christian Schools and others* [2012] UKSC 56, [86]

2. holding an employer vicariously liable should have a deterrent effect, causing employers to exercise a greater degree of care in relation to the appointment and supervision of employees.²⁰

We submit that the enterprise risk approach accords with our clients reported experiences as to the circumstances in which institutional child sexual abuse tends to occur. It also acknowledges the significant role that institutions play in creating, maintaining and preventing risks of child sexual abuse by imposing a clear legal duty on institutions to take appropriate measures to minimise the risks of child sexual abuse.

Were the law to adopt such an approach, we would expect the incidence of childhood sexual abuse in institutional contexts to be reduced.

Criminal conduct on the part of other persons

While vicarious liability in Australia is not restricted only to wrongdoing done during the course of employment, there are difficulties in extending this form of liability to intentional criminal acts committed by an institution's non-employees in circumstances where the courts have held that the relationship between the institution and perpetrator is not one that is similar to employment. Child sex offenders are, in our clients' reported experiences, not only employees but also volunteers, members, contractors, religious clergy and other persons over whom an institution may exercise a significant degree of control and direction, but who are not technically employees. This control, or at least the perception of control, is likely to increase the smaller the institution or the smaller and more remote the relevant institutional outpost, such as a surf lifesaving club, scout hall, parish or cadet brigade, as the non-employee is more likely to be, or appear to be, part and parcel of the institution and fully integrated within it.

Two examples illustrate the shortcomings in the law of vicarious liability as it applies to non-employees; volunteers and religious clergy.

Volunteers performing community work but who commit child sexual abuse stand in a specific position vis-a-vis community organisations. In all jurisdictions except Queensland, a volunteer does not, subject to some exceptions, ordinarily incur personal liability for acts done in good faith while carrying out community work.²¹ In these cases, except possibly New South Wales,²² liability will instead usually attach to the relevant community organisation or sometimes the government.

However, in our view, criminal acts committed by a volunteer while carrying out community work fall outside these statutory protections. This means that, for criminal acts, liability will remain with the volunteer personally, who may be judgment-proof (in terms of any meaningful outcome for a victim plaintiff), which then poses the question as to whether vicarious liability can be established on the part of the organisation. It is likely that the current test applied to determine vicarious liability will not extend

²⁰ *The Catholic Child Welfare Society and others v Various Claimants and The Institute of the Brothers of the Christian Schools and others* [2012] UKSC 56, [64]

²¹ *Commonwealth Volunteers Protection Act 2003* (Cth), s 7; *Civil Law (Wrongs) Act 2002* (ACT), s 9; *Personal Injuries (Liability and Damages) Act 2003* (NT), s 7(3); *Volunteers Protection Act 2001* (SA), s 5; *Civil Liability Act 2002* (Tas), s 48; *Wrongs Act 1958* (Vic), s 37(2); *Volunteers and Food and other Donors (Protection from Liability) Act 2002* (WA), s 7; *Civil Liability Act 2002* (NSW), Part 9

²² *Civil Liability Act 2002* (NSW), Part 9 and s 3C

liability for the occurrence of child sexual abuse in these circumstances, leaving the survivor with no option to pursue redress through the civil litigation system.

There may be scope for the activities of religious clergy to amount to employment and found vicarious liability in their superiors or the institution. However, this has not been conclusively decided in Australia. In *Ellis*, the New South Wales Court of Appeal observed in obiter dictum that holding an ecclesiastical office is not necessarily incompatible with a legal relationship capable of giving rise to some incidents of an employment relationship and founding vicarious liability.²³ Again, the ability of this point to be further developed by the courts is hindered by the lack of suitable matters being brought before the courts.

While the operation of the *Ellis* defence has assisted in preventing the Court of Appeal's proposition from being further explored in Australian jurisprudence, the proposition has, however, been ventilated in England and Canada, where it has been held that the activities of religious clergy are 'akin to employment', giving rise to vicarious liability in cases of institutional child sexual abuse.²⁴

A note about fiduciary duties

It is worth noting that Australian law also denies survivors of child sexual abuse access to equitable compensation on the basis of breaches of fiduciary duties, such as those ordinarily existing between guardian and ward.²⁵

d. the circumstances in which regulators are liable for failures of oversight or regulation;

Dual vicarious liability

We strongly urge the Royal Commission to take into account how dual vicarious liability operates in the Canadian and English jurisdictions so as to extend liability to regulators in circumstances giving rise to institutional child sexual abuse. Dual vicarious liability is where two different defendants can be liable for the tortious act of a third person.²⁶ This concept has equal theoretical application in Australia where many sites of sexual abuse are managed and controlled by two institutions, such as a government and non-government organisation.

Yet the common law in Australia currently precludes a finding of dual vicarious liability on the part of two institutions.²⁷ Instead, once liability is established in one party, the other's vicarious liability is negated. Leeming JA, in *Day v Ocean Beach Hotel Shellharbour Pty Ltd* [2013] NSWCA 250, has correctly noted that only the High Court of Australia can change this position, unless done so by statute.²⁸

The Australian position is at odds with English and Canadian law. Australia's position can be accounted for by pointing out differences in the development of our tort law, but it can also be accounted for by

²³ *Trustees of the Roman Catholic Church v Ellis & Anor* [2007] NSWCA 117, [33]

²⁴ *The Catholic Child Welfare Society and others v Various Claimants and The Institute of the Brothers of the Christian Schools and others* [2012] UKSC 56, [47] and [54]. See also [2011] EWHC 2871

²⁵ *Paramasivam v Vincent John Adams Flynn* [1998] FCA 1711; *Williams v Minister, Aboriginal Land Rights Act 1983* (2000) Aust Tort Reports 81-578; *Webber v State of New South Wales* [2003] NSWSC 1263; *Tusyn v Tasmania* [2004] TASSC 50; *Michael Brown v State of New South Wales* [2008] NSWCA 287

²⁶ *Day v Ocean Beach Hotel Shellharbour Pty Ltd* [2013] NSWCA 250, [25] – [33]

²⁷ *Day v Ocean Beach Hotel Shellharbour Pty Ltd* [2013] NSWCA 250, [25] – [33]

²⁸ Leeming JA noted section 917C of the *Corporations Act 2001* (Cth) as a provision exemplifying this

the lack of Australian jurisprudence in the area of claims seeking damages for institutional child sexual abuse. As noted, we submit that this stagnation in the law has been caused, to a significant extent, by the limited ability for such claims to progress to a trial court, and in turn appellate level.

The Supreme Court of Canada recently found that where a partnership exists between the Canadian Government and the Church in running an institution, both can be held vicariously liable for sexual assaults committed by an employee of one institution, in an institution which was subject to joint management and control:

In this case, the trial judge specifically found a partnership between Canada and the Church, as opposed to finding that each acted independently of the other. No compelling jurisprudential reason has been adduced to justify limiting vicarious liability to only one employer, where an employee is employed by a partnership. Indeed, if an employer with de facto control over an employee is not liable because of an arbitrary rule requiring only one employer for vicarious liability, this would undermine the principles of fair compensation and deterrence. I conclude that the Church should be found jointly vicariously liable with Canada for the assaults, contrary to the conclusions of the Court of Appeal.²⁹

The Supreme Court of England has also adopted this position in cases of institutional child sexual abuse.³⁰ It would seem that both Courts prefer to take a more pragmatic and policy-orientated approach than that taken to date in Australia.

In our view, extending liability in this way may enable a claimant to sue a defendant that has a legal existence and the capacity to settle damages. It also ensures risk is shared appropriately among those with responsibility for institutions, strengthening the deterrence function of civil liability. This risk sharing may also be particularly important to alleviate financial burdens on smaller institutions (and their insurers), particularly when acting in concert with a government, without leaving the claimant in want of an effective remedy.

e. limitation periods which restrict the time within which a victim may sue and the circumstances in which limitation periods may be extended

When raised by the respondent, limitation periods may present an absolute bar to survivors commencing civil action. These statutory regimes, however, must also be viewed alongside burdensome pre-action requirements. While limitation periods certainly preclude survivors from commencing civil action in the majority of cases, pre-action procedures in some jurisdictions effectively prevent a survivor from even applying to a Court to overcome expired limitation periods. These procedures impose additional requirements on claimants, creating unnecessary cost, delay and suffering, and fail to consider the long journey survivors must take to disclose child sexual abuse, the complex trauma resulting from that abuse, and how the impacts of that trauma adversely affect a survivor's pursuit of redress and support, particularly through the civil litigation system.

Our clients who have engaged with the civil litigation process have reported that defendants who have raised arguments that such claims are statute barred can delay the proceedings to a point where many years pass without any aspect of the substantive claim being heard. This unnecessary delay impacts on

²⁹ *Blackwater v Plint* [2005] 3 SCR 3, 2005 SCC, [38]

³⁰ *The Catholic Child Welfare Society and others v Various Claimants and The Institute of the Brothers of the Christian Schools and others* [2012] UKSC 56, [20]

a survivor's capacity to continue with any claim, including their ability to continue accessing often highly priced legal representation.

Pre-action procedures

Pre-action procedures exist across all Australian jurisdictions in relation to civil proceedings; however, it is our understanding that the statutory requirements in Queensland, the Australian Capital Territory and, soon to be, the Northern Territory, can operate to nullify a claim at a procedural level *before* its substance is dealt with.

The *Personal Injuries Proceedings Act 2002* (Qld), for example, imposes pre-action notice requirements on all personal injury claims arising out of an incident occurring *before*, on or after 18 June 2002.³¹ The Act applies retrospectively to all historical child sexual abuse claims and it is practically impossible for these claimants to comply with the retrospective operation of the legislation. If notice is not provided to the respondent within the allotted timeframe, for example, the claimant is precluded from proceeding further with their claim and it may be struck out accordingly.³² In circumstances of non-compliance, a claimant has two options. They can either apply to the court for permission to proceed³³ or apply to the court for permission to proceed on the basis of urgency.³⁴ The detrimental implications these steps have on extension of time applications under the *Limitation of Actions Act 1974* (QLD) are noted elsewhere.³⁵

Legislation as burdensome as the *Personal Injuries Proceedings Act 2002* (Qld) exists in the Australian Capital Territory³⁶ and is expected to commence in the Northern Territory.³⁷

It is our submission that these procedures should not apply to claims relating to child sexual abuse.

First, these additional procedures impact disproportionately on personal injury claims relating to historical child sexual abuse - in terms of their cost, delay and the accompanying psychological impact on the claimant. This is because the majority of cases will automatically be in non-compliance with the notice requirements, requiring the claimant to apply for leave, and will certainly require further interlocutory steps in future to overcome expired limitation periods.

Second, applications for leave at the pre-action stage of litigation have potential to prejudice any later extension of time applications, which is inevitable in the majority of historical child sexual abuse claims, as the claimant may be required to disclose material relevant to those later applications at an earlier stage, without the benefit of full investigation and disclosure from the respondent.

³¹ *Personal Injuries Proceedings Act 2002* (Qld), s 6(1)

³² *Personal Injuries Proceedings Act 2002* (Qld), ss 9(3) and 18(1)

³³ *Personal Injuries Proceedings Act 2002* (Qld), s 18(1)(c); *Berowra Holdings Pty Ltd v Gordon* [2006] 225 CLR 364

³⁴ *Personal Injuries Proceedings Act 2002* (Qld), s 43(1)

³⁵ See Ben Mathews, 'Queensland Government Actions to Compensate Survivors of Institutional Abuse: A Critical and Comparative Evaluation' (2004) 4(1) *Queensland University of Technology Law and Justice Journal* 23; His Honour Judge Michael Forde, 'Twenty-Five Trip Wires to Successful Litigation (speech delivered at the Australian Lawyers Alliance, Gold Coast, 15 February 2008) (QDC) *Queensland Judicial Scholarship*

³⁶ *Civil Law (Wrongs) Act 2002* (ACT), s 51

³⁷ *Personal Injuries (Civil Claims) Act 2007* (NT)

Third, these additional steps increase *upfront* solicitor fees and fees more generally, which reduces the ultimate settlement amount, if there is one, which a survivor receives.

Fourth, these additional steps cause unnecessary costs and delay, which may force claimants to accept early settlement offers put forward by defendants, only on a commercial basis, in order to make the matter 'go away'.

It is also our submission that removing time limitation periods from claims relating to child sexual abuse will not, in itself, overcome the fundamental difficulties these pre-action procedures inflict on claimants and their claims.

Time limitation periods

It is a peculiarity of civil limitation laws, where applicable to historical child abuse cases, that the adult survivor is often faced with the Scylla of a constraining 'limitation window' for initiating civil law redress and the Charybdis of psychological incapacity (diagnostically attributable to the abuse) which may prevent the taking of such action until many years after the applicable limitation period has expired. Initiating a timely civil law action risks reviving traumatic memories of abuse – not least in terms of the minute scrutiny to which the allegations of abuse will be subjected in a court setting – at a time when the victim may not be mentally prepared for this; while delaying such action until the process of recovery from trauma is more advanced risks the loss of rights through the operation of civil limitation laws [...] The civil wrongs capable of being classified under the rubric of 'child abuse' in a sense contain the seeds of their own 'forensic destruction' because, arguably, woven into the fabric of such wrongs (particularly child sexual abuse) is the resultant incapacity of an adult survivor to pursue timely legal redress against the abuser.³⁸

The public policy rationale for imposing limitation periods has been addressed at length in other legal and academic commentary; similarly there has been much commentary highlighting the prohibitive, inappropriate and unjust application of time limitation periods to cases of child sexual abuse.³⁹ No doubt, for these reasons, the issue lay at the heart of the Parliament of Victoria Committee report *Betrayal of Trust* and that Committee's recommendations.⁴⁰ Our focus, therefore, will be on particular examples and issues illustrated by our clients' circumstances, which bring these problems into sharp focus.

Many clients present to us with *prima facie* evidence of serious physical and/or psychological injury, child sexual abuse and institutional negligence. Yet, often, we are instructed that claims founded on this evidence have been struck out by the Court on the basis of a statute of limitations defence, primarily

³⁸ Hamish Ross, 'Adults as grown-up children – a perspective on children's rights' (2013) 27 *Australian Journal of Family Law* 235, 245

³⁹ Ben Mathews, 'Limitation periods and child sexual abuse cases: law, psychology, time and justice' (2003) 11(3) *Torts Law Journal* 218; Annette Marfording, 'Access to justice for survivors of child sexual abuse' (1997) 5 *Torts Law Journal* 1; Hamish Ross, 'Adults as grown-up children – a perspective on children's rights' (2013) 27 *Australian Journal of Family Law* 235, 245

⁴⁰ Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013), 537 – 543

asserted by Australian Governments,⁴¹ or that the client has been advised by their solicitor against commencing action, due to the likelihood of such a defence being maintained and upheld.

For other clients, if there is a possibility of pursuing action, the solicitor has asked for substantial fees upfront to protect themselves against the risk associated with overcoming a limitation period defence.

Many of our clients have presented in circumstances of financial disadvantage. Many report difficulty in securing and obtaining employment, as a direct consequence of the ongoing trauma arising from their childhood sexual abuse. This cohort of clients generally lack the means to instruct lawyers on a private fee/disbursement paying basis. With the widespread unavailability of any legal aid funding for civil proceedings, such clients are in reality only able to contemplate civil litigation if a lawyer agrees to act on a 'no win, no fee' basis. In this context, the apparent expiration of the relevant limitation period operates as a significant disincentive for many lawyers to even contemplate taking on a client's case.

It has come to our attention through our advice work that survivors in Western Australia face specific barriers in commencing action. Survivors whose cause of action accrues prior to 18 November 2005 will be caught by the provisions of the *Limitation Act 1935* (WA). That Act does not empower a Court to extend the time within which a claimant may commence proceedings.⁴² Furthermore, an out-dated notification clause still applies to protect the Crown from suit, requiring the claimant to commence proceedings within one year; or six years where the Court grants leave or the defendant so consents.⁴³ No civil remedy therefore exists for this category of survivors.

Positioning time limitation periods in a complex trauma framework

Current time limitations do not take into consideration the common experience of survivors' memories of abuse being outside of their awareness for many years. Dissociating or 'splitting off' traumatic material is well understood as one of the brain's coping/survival strategies. Trauma is a state of high arousal that impairs integration across many domains of learning and memory. In many cases, memories may suddenly emerge many years later following a seemingly unrelated triggering event – often, though not always, either witnessing or experiencing another traumatic incident.

Limitation periods also do not take into account the staged nature of recovery of complex trauma – safety, remembering and mourning and reconnection. For many survivors of child sexual abuse, becoming physically and psychologically safe takes many years. If this first stage of recovery is not firmly in place, speaking about trauma in the way necessary for engaging in a legal process such as civil litigation, poses significant risks to wellbeing.

Survivors of child sexual abuse commonly experience complex, long-term psycho-social impacts which can impair their capacity to engage with a variety of systems. These include economic disadvantage, unstable employment, housing issues, physical health problems, relationship difficulties and mental health issues, as well as barriers to accessing support for these problems. The Royal Commission will by now have extensive insight into these impacts, from its work in hearing from many hundreds of survivors during private sessions.

⁴¹ On this note, see the tragic decision in: *Carter v Corporation of the Sisters of Mercy of the Diocese of Rockhampton* [2000] QSC 306 (Unreported, Supreme Court of Queensland, White J) – a decision concerning alleged abuse involving the Neerkol Orphanage

⁴² *Bean v Minister of Health* [2009] WADC 202, [15]

⁴³ *Limitation Act 1935* (WA), s 47A

When a survivor is dealing with chronic homelessness, complex family and relationship issues, flashbacks, panic attacks, depression, insomnia, dissociative episodes, addictions, eating disorders and/or ongoing emotional dysregulation (just some of the ongoing consequences of childhood trauma), it is extremely difficult for them to consider pursuing legal action and to take the necessary steps to prioritise any such action within a set timeframe.

Implementing reforms

In our view, a significant practical issue the Royal Commission will face, and therefore should consider, is how statutory limitation periods across Australia could consistently and harmoniously be reformed, given any reforms would need to be implemented at the State and Territory levels, unless a referral of powers were to occur. The issue is significant because one might well reasonably anticipate that State and Territory governments may not implement reforms where such reforms are likely to expose them to significant, unbudgeted liabilities. In this sense, there is an inherent conflict of interest when governments legislate with respect to harm that they may have caused or contributed to. It is for this reason that many clients perceive State and Territory governments as being at once in a position of 'perpetrator, judge and jury'.

A Human Rights Perspective

We strongly urge the Royal Commission to take a human rights perspective on ensuring survivors of childhood sexual abuse, whose fundamental human rights have been grossly violated, are given accessible, effective and enforceable remedies in Australian courts and are able to obtain reparations where violations have occurred.⁴⁴ We urge the Royal Commission to investigate whether it is viable for the Commonwealth Parliament to legislate with respect to securing these remedies.

f. the requirements for bringing a class action, if victims from the same institution wish to sue as a group;

We are only able to make limited submissions about class actions.

Certainly a number of clients who have participated in class actions have reported to us feeling that they were coerced into settling claims where they were told that if they did not accept the amount on offer they would receive nothing. Members of such actions have reported that settlement amounts have been manifestly inadequate and other clients report that they feel they were arbitrarily removed from a class action because they were not seen as a desirable litigant.

It is clear that for some clients who have participated in class actions and settlements that the proceedings have not resulted in the clients achieving many of the non-financial or therapeutic outcomes sought through their participation in the civil justice system.

g. the existence of relevant records, locating them and retrieval costs;

The importance of records

Legal claims relevant to child sexual abuse, and the ability of lawyers to provide timely and accurate legal advice to clients about their rights regarding those claims, are vitally dependent on the existence of and

⁴⁴ *International Covenant on Civil and Political Rights*, Article 2

access to relevant institutional records. There are many evidentiary and practical reasons for why this is so, including:

- at the most fundamental level, records may establish the presence of the plaintiff in the relevant institution, thus identifying relevant defendants. We have spoken with clients whose claims for redress have faltered, almost at the outset, when met with a claim by the institution that “*we have no record of you ever being here*” (either because there are no records relating to that specific client, or no records whatsoever relating to that institution and/or period);
- records may contain direct evidence of sexual abuse or injury, such as contemporaneous police reports, forensic samples or health records;
- due to the age of the survivor, the lack of witnesses and delay in complaint, records are often the only way to corroborate a client’s version of events with probative inferences, such as identifying behaviour symptomatic of sexual abuse, periods of hospitalisation; the presence of the claimant in an institution at the same time as when a proven offender was known to be employed and committing sexual abuse of other children, and so on;
- records may also be the only way to establish a client’s version of events or instructions, as the client may not be able to recall the abuse due to lapse in memory (whether lost or repressed), due to the level of trauma accompanying the memories and/or the passage of time (often decades);
- records might contain further lines of inquiry or reveal potential witnesses or factors that might explain delay in commencing proceedings;
- records might identify the offender; and
- lawyers may not be prepared to assist a client with a claim unless the basis of the claim is sufficiently communicated to them.

Records also might bring therapeutic benefits to clients. These include establishing their identity, making sense of their experiences, discovering why they were in the care of an institution, locating family members or discovering what the institution did to assist them.⁴⁵

Our experience with record retrieval

Record management

Despite the importance of records, a frequent complaint we receive from clients is that government and non-government institutions have destroyed, lost or cannot locate their records. The older the record, the more likely the record cannot be retrieved. Our own experience in locating and retrieving clients’ records confirms our clients’ complaints.

Institutions often claim that they had poor or arbitrary record management at the relevant time; records were destroyed in natural disasters; the relevant State Archives authorised destruction; or the records may exist but, due to record keeping standards, the records cannot be identified or located. Nothing can

⁴⁵ We have previously made submissions about these issues and the importance of appropriate record-keeping in our submission to Issues Paper 4, at p.9

undo these historical practices despite how detrimental they are to client wellbeing and claims for compensation.

We submit that, if limitation periods are reformed in Australia, consideration should also be given to whether relevant State Archives should extend record retention periods and suspend or revoke destruction authorisations for certain classes of records. Such records might include police reports and forensic evidence, court records related to sexual abuse, health records, schooling records and records related to a child's time in state care.

Cost, access and delay

Generally, the cost and delay of accessing records can be a barrier for clients in accessing relevant documents. In situations where a solicitor is advising a client on the prospects of a civil claim, access to any available records is necessary to be able to provide prudent and accurate advice.

While most jurisdictions' right to information schemes will allow clients to access personal information for free, the provisions are inconsistent among States and Territories. Further, while a fee may not be applied to some records, such as ward files, it may cost to access other information, such as hospital and education records.

Further, in our experience, accessing records, especially files from state child protection agencies, can take considerable time. Within the context of a civil claim, any such delay may contribute to delay in the litigation process or the ability for the client to receive proper advice on the prospects of a claim.

It should also be recognised that many clients lack the capacity and personal resources to themselves pursue access to their records, without assistance. In this respect, we commend the excellent work and support provided around Australia by the various agencies under the 'Find and Connect' services. This support is integral to the capacity of survivors to make informed choices about pursuing redress options, including civil litigation.

We recommend that consideration be given to the States and Territories introducing consistent and harmonious right to information schemes to ensure consistent processes for survivors in accessing records, including with respect to fees (allowing for fee reduction or waiver on all records) and priority access for clients requesting records for the purposes of litigation or other redress claims.

Detrimental impact on accessing legal assistance

Below we discuss how we are increasingly required to act as an intermediary to facilitate clients obtaining legal assistance with civil claims. Part of this involves locating and retrieving evidence on a client's behalf with a view to preparing a brief for other firms.

h. the process of giving evidence and being subject to examination and cross-examination;

The Royal Commission will by now have accumulated great insight into how most survivors of child sexual abuse experience severe anxiety in speaking out about the abuse they experienced. The reasons for this are varied and complex, but for many stem from threats made to them by perpetrators at the time of enduring the abuse, for example, threats that awful things would happen to them, or to people they care about, if they ever disclosed the abuse; and that no-one would ever believe their account over that of the alleged perpetrator and other institutional figures.

In addition to the impact of this secrecy and fear in the lives of survivors, many institutional child sexual abuse survivors' trauma has frequently also been compounded by experiences of being blamed, disbelieved, punished or shamed when they have previously sought help by disclosing the sexual abuse to others.

The minimising, trivialising and denying of abuse survivors' experiences not only invalidates the profound violation already experienced by survivors, but creates a dissonance between survivors' lived and embodied experiences of abuse and the human need for survival and belonging within socio-cultural contexts. Many survivors develop coping strategies, including substance abuse, to bridge this disconnect between the abuse that was experienced and invalidating contexts that have surrounded them. Most survivors will choose not to speak of their abuse until contextual safety is assured.

The process of giving evidence and being subject to cross examination aimed at invalidating a person's abuse experience and, in fact, their personal credibility, conflicts profoundly with survivors' hard-fought instinctive survival mechanisms, and in most cases replicates the trauma of being discredited, attacked and blamed for speaking out about the abuse originally. Given this systemic traumatisation inherent within the civil litigation process, coupled with other substantial psycho-social barriers often confronting survivors, it is unsurprising to us that civil litigation is not an option that many survivors of institutional child sexual abuse have chosen to subject themselves to.

As noted earlier in this submission, participation in civil litigation places demands on the individual plaintiff that far exceed the capacity and emotional resources that most survivors can contribute, especially over a sustained period and in an adversarial context.

i. proving that the victim's injuries and losses were caused by the abuse;

Survivors who experience repeated and prolonged physical, emotional and/or sexual abuse across multiple settings during childhood, or subsequent re-victimisation as adults, often experience difficulty in establishing that the abuse complained of caused the loss now claimed. Research indicates that the vast majority of survivors of child sexual abuse are at increased risk of subsequent re-victimisation. One study, for example, found that up to 81% of female survivors of child sexual abuse reported subsequent sexual victimisation as an adult.⁴⁶

As noted in **knowmore's** submission to Issues Paper 4, many clients who spent time in out-of-home 'care', for example, were physically, emotionally or sexually abused *prior* to being placed in State care; in fact, in many cases, this abuse is the very reason why they were placed in State care. Compounding this initial abuse, these clients frequently experienced similar abuse *while* they were in state care, sometimes across multiple institutional contexts, and *after* they left State care, as adults. One client, for example, experienced sexual abuse within her family home. As a result of this abuse, she was placed in a children's home where she experienced physical, emotional and sexual abuse. Before she reached age 18, she was later placed back in her family home only to experience further sexual abuse. Another client experienced repeated sexual abuse across five different boys' homes in Victoria. Such reports are far from uncommon from our clients. Clients who spent time at the Parramatta Girls Training School in New South Wales, as the Royal Commission has recently heard, have given evidence of experiencing repeated

⁴⁶ Teague, R., Mazerolle, P., Legosz, M., & Sanderson, J., 'Linking childhood exposure to physical abuse and adult offending: Examining mediating factors and gendered relationships' 25(2) *Justice Quarterly* (2008) 313-348; Cathy Widom, Sally Czaja and Mary Dutton, 'Childhood victimisation and lifetime revictimisation' 32(8) *Child Abuse & Neglect* (2008) 785-796

sexual abuse by numerous perpetrators at different times within the same institution as well as experiencing abuse by police and in previous foster care placements and other institutions.

Clients in these circumstances will often experience insurmountable difficulty in proportioning liability between the relevant acts and the respondents. It is practically impossible to isolate the damage caused by abuse committed prior, during and after specific periods of institutionalisation. It is also highly prejudicial given that abuse prior and subsequent to specific periods of institutionalisation is often resultant upon prior institutionalisation itself. This is significantly the case among Aboriginal and Torres Strait Islander communities, where the impacts of child sexual abuse are often intergenerational.

Aboriginal and Torres Strait Islander survivors face particular disadvantages when proving causation. Child sexual abuse trauma converges with intergenerational trauma related to colonisation, ongoing disadvantage and sometimes the removal of a survivor's children by the state, which often recommences the intergenerational cycle. This convergence compounds the injuries the survivor sustains, which makes it practically impossible, within the restrictive framework of the current civil litigation system, to isolate the damage caused by the acts of institutional child sexual abuse complained of.

j. the way in which damages are assessed;

Following from the commentary above, this can be a difficult exercise in the case of damages sought for institutional childhood sexual abuse.

As a further example, many clients who grew up in institutions such as orphanages have reported receiving little or no education, in turn impacting on their prospects in life and consequent employment opportunities, and ultimately their earning capacity and the calculation of pecuniary loss.

Consistency across civil claims, as well as victims' compensation claims, may be enhanced by allocating additional heads of loss to the particular injury suffered. As an example, we note that the Queensland Victims of Crime Assistance scheme provides that for sexual offences, injury also means the totality of the following adverse impacts of the sexual offence suffered by a person:

- sense of violation
- reduced self-worth or perception
- lost or reduced physical immunity
- lost or reduced physical capacity (including the capacity to have children), whether temporary or permanent
- increased fear or increases feelings of insecurity
- adverse effect of others reacting adversely to the person
- adverse impact on lawful sexual relations
- adverse impact on feelings.⁴⁷

⁴⁷ *Victims of Crime Assistance Act 2009* (QLD), s 27(1)(f)

k. the cost of litigation and access to funding and legal services.

It is our experience that one of the greatest barriers a survivor faces in pursuing a civil claim is accessing and retaining competent legal assistance. From our experience, while many of these barriers are overcome through the effective use of a practice model of trauma-informed, multidisciplinary service delivery, the flaws inherent in our current civil system that contribute to these barriers cannot be overcome without reform.

The barriers survivors face in this context are multifaceted and cumulative:

- due to the legal difficulties these claims often face, many claims of historical child sexual abuse have low prospects of success and professional rules may operate to dissuade solicitors from pursuing such claims;⁴⁸
- solicitors may require upfront payments to secure funding for 'speculative' applications, such as extension of time applications;
- the legal profession, acting within the confines of the deficient laws stated above, may inadvertently inflict anti-therapeutic consequences on clients, similar to those inflicted by institutions, such as invalidating a client's experiences or informing a client that redress is not possible under the law;
- many Aboriginal and Torres Strait Islander survivors distrust the legal system and its agents, due to institutionalised racism and a history of police and courts being used to carry out policies of forced removal of children;
- culturally safe support services to facilitate access to the legal system are lacking, especially in remote, rural and regional areas;
- there are relatively few legal practitioners who have experience in understanding and assisting clients who suffer ongoing complex trauma as a result of institutional childhood sexual abuse, and experience in pursuing such historic claims, and for these reasons many clients will struggle to find lawyers who can and will proceed competently with their case; many survivors, especially where the state's agents were the perpetrators of abuse, distrust the legal system and its perceived agents;
- survivors of child sexual abuse are likely to avoid stimuli relating to the trauma and abuse that they experience, including relaying their experiences to the legal profession, particularly to the level of detail that may be necessary to enable legal advisers to properly assess and pursue a claim;
- new legal issues may arise for a client while they are obtaining legal assistance, as trauma resurfaces;
- survivors may have relocated since the abuse occurred, requiring them to seek legal assistance on an interstate basis (i.e. accessing a local lawyer to pursue a claim in another jurisdiction),

⁴⁸ See, for example, *Legal Profession Act 2004* (NSW), s 345

which is often very difficult to do in Australia in relation to these types of claims. Additionally, many of our clients have reported suffering abuse in a number of different institutions in different States and Territories, potentially founding claims ranging across two or more jurisdictions and multiple defendants;

- many claimants may face entrenched financial, social and cultural disadvantage and be dealing with more pressing legal issues caused by their disadvantage, such as homelessness, housing, consumer disputes, crime or debt;
- empirical data exists as to the various barriers to accessing legal assistance for people with a mental illness;
- survivors often lack the financial resources to engage and continue to instruct a solicitor, including the difficulty in paying any disbursements, let alone professional fees, on an ongoing basis;
- legal contingency funds to assist with payment of disbursements are generally only available where cases are assessed at an early stage of having strong prospects of success, which is often not the case in these matters; and
- legal aid funding does not ordinarily extend to grants of aid to support the prosecution of even meritorious civil claims.

Naturally, some of these barriers arise for many potential plaintiffs and in the context of other civil claims more generally. But they are also exacerbated by the entrenched financial, social and cultural disadvantages survivors of childhood sexual abuse experience, which are primarily in turn caused by the psychological injuries complex trauma causes for survivors of such abuse, and their accompanying incapacity.

The legal profession as anti-therapeutic

Therapeutic and anti-therapeutic consequences flow to survivors from other sources within the civil litigation system. A key source of these consequences for survivors is the legal profession. In our experience, there are few Australian law firms specialising in these matters or who can provide survivors with adequate and holistic legal assistance. The firms that do exist are effective because they are experienced, trauma-informed, have links to survivor groups, are aware of other institutional redress schemes that exist parallel to the civil litigation system and offer reasonable cost arrangements to clients. That these firms exist gives credence to our recommendation (discussed below) that specialist accreditation for lawyers assisting in these matters is possible and desirable.

The frequent complaints we receive about the legal profession include:

- failure to focus on client well-being as opposed to monetary and commercial benefits;
- charging excessive amounts for professional costs, at times out-stripping the amount ultimately received by the client;⁴⁹

⁴⁹ Further information is provided below

- failure to adequately acknowledge clients' socio-economic disadvantage and to fully explain legal procedures, concepts and agreements in plain English. This is important because it relates to transparency in the legal process and ensures that the power relationships that gave rise to the clients' experience of childhood sexual abuse are not replicated. As we have noted, many Australians who spent time in residential homes received little formal education, impacting on their literacy levels;
- failure to explain concepts such as reasonable prospects of success in a trauma-informed way. The consequence being that clients are left with the impression that they are lying or have not produced adequate evidence to support their experiences;
- failure to engage in a manner that best assists the client, given their circumstances. For example, many **knowmore** clients have indicated difficulty in being able to travel even short distances to attend appointments such as legal conferences, due to various reasons, including cost, physical disability and mental health.⁵⁰ For these clients, an outreach model is preferable for some service delivery.
- clients informally being told by legal practitioners that compensation amounts will be received that are unrealistic;
- negative experiences around costing agreements and understanding fully the implications of such agreements;
- negative experiences derived from adversarial legal processes and interaction with the defendant's legal representatives, such as a commercial focus on pursuing costs against a survivor should a claim not be upheld;
- failure to appreciate how legal relationships can be therapeutic as part of the client's journey towards healing; and
- failure to acknowledge the importance to survivors of achieving some of the non-monetary outcomes sought by the client as a result of their participation in the civil justice system (such as holding the institution to account, and receiving public acknowledgment of being seriously wronged).

From our experience, these anti-therapeutic consequences can be overcome to a significant extent by adopting a trauma-informed approach to legal service delivery. Simply respecting, listening and validating a client's experience can bear positive results for the client, irrespective of the ultimate legal outcome of any redress claim.

In this regard, we advocate for government funding to be provided to establish a national, multidisciplinary legal service. That service would operate without regard to restrictive commercial interests, would be able to address systemic and cross-jurisdictional issues through law and policy

⁵⁰ See the recent report of the Law and Justice Foundation of New South Wales: *Barriers to Obtaining Advice for Legal Problems in New South Wales*, Report No 39, March 2014 (viewed at [http://www.lawfoundation.net.au/ljf/site/templates/UpdatingJustice/\\$file/UJ_39_Barriers_to_legal_problems_advice_FINAL.pdf](http://www.lawfoundation.net.au/ljf/site/templates/UpdatingJustice/$file/UJ_39_Barriers_to_legal_problems_advice_FINAL.pdf)) where one barrier identified by survey respondents was that "advisers were too far away or too hard to get to".

reform, brief law firms with respect to personal injury claims and advocate for non-financial outcomes that survivors may also want to pursue.

We also raise for the Royal Commission's consideration whether there may be merit in relevant legal professional bodies extending existing specialist accreditation schemes to provide better guidance for members of the public seeking legal services to advance claims relevant to institutional child sexual abuse. Fundamental requirements for accreditation should include significant experience with the civil litigation system and historic abuse claims, and in working in an appropriate, sensitive and trauma-informed way (in conjunction, where necessary, with other disciplines) with clients who are survivors of childhood sexual abuse.

Specialist accreditation status may also assist in attracting suitable practitioners to specialise in this area of the law, which may in turn address some of the problems outlined below.

What working with survivors has taught knowmore

Our experience working with survivors of child sexual abuse mirrors much research that already exists about the legal needs of people experiencing acute disadvantage. The Law and Justice Foundation of New South Wales, for example, conducted the *Legal Needs of People with a Mental Illness Project* in 2006.⁵¹ The key findings in that report indicated that various barriers exist to accessing legal assistance for people with a mental illness. We identify with these barriers when assisting our clients and referring clients to other legal services. In particular, clients are often:

- mistrustful, or frightened of, divulging personal information to legal service providers;
- express challenging behaviours such as hostility, aggression and suicidal behaviours;
- exhibit communication problems such as speech impediments and disorganised thought; and
- require assistance over extended periods of time; **knowmore's** statistics show that 61% of our clients, for example, required follow-up work after their first call to us, including further calls, letters, face to face meetings or referrals for counselling support; and 33% required minor casework assistance (such as assisting with statements, seeking records and so on).

These barriers increase clients' reliance on non-legal support services and our need to liaise closely with these services to adequately assist our clients. This in turn increases the length of time required to assist clients and increases our need to be flexible with clients.

It has also increasingly been the case that we must act as an intermediary to facilitate clients accessing legal services for the purpose of obtaining further and detailed legal advice about redress options (the giving of such advice being beyond **knowmore's** funded purposes). We respond to this by contacting firms, deciphering firms' expertise and collecting evidence on clients' behalf with a view to preparing a brief for referral of the client to firms. Clients may call several firms, all of which decline to offer assistance, either because initial views about time limitation issues are formed, credibility is perceived to be lacking in the client, shortfalls in evidence are discovered, the client presents with mental health

⁵¹ Maria Karras, Emily McCarron, Abigail Gray & Sam Ardasinski, 2006, *On the edge of justice: the legal needs of people with a mental illness in NSW*, Law and Justice Foundation of NSW, Sydney (accessible at: <http://www.lawfoundation.net.au/report/mental>)

issues or the defendant is viewed as an aggressive litigator. These responses are anti-therapeutic and often replicate a client's experience in dealing with the criminal justice system, particularly with police and prosecutorial bodies, where evidentiary issues and onerous standards of proof are central.

Throughout this referral process, we experience difficulties that impede a client's ability to obtain legal assistance. The most pronounced difficulty is access to, and the existence of, records and other documentary evidence. Obtaining records, as noted above, is often key to verifying the client's account, obtaining instructions and assessing a claim's merit. The existence of these records is often important to persuading a firm to take on a matter. Many clients report that they have, throughout their life, attempted to seek advice from solicitors about the potential of seeking compensation. Clients have routinely reported that the advice received is that there is not enough corroborative evidence. Clients report that this advice is often given without the solicitor considering any records that may be held by government and non-government agencies, where many solicitors are unwilling to assist clients in accessing these records and clients are unable to access their own records or unaware as to how to do this. One client reported that he was told by a solicitor to access his records and then come back to that practitioner for subsequent advice. That client reported that they were unaware as to how to access such records, so "gave up" on his attempt to seek compensation.

There are also other shortcomings in existing referral pathways for clients. Existing referral procedures within Australian law societies, for example, do not specify whether firms are prepared, or have the specific expertise, to assist with sexual abuse claims. Instead, these procedures only identify 'personal injury law' as the broad area of expertise, leaving clients to contact firms who may only be experienced in insurance-based claims, such as motor vehicle accidents and public liability claims. This also means that referrals are by word-of-mouth, which presents particular barriers to survivors of child sexual abuse who experience difficulties in communication. In our experience, there are few law firms in Australia that are prepared, or have sufficient experience, to take on claims relating to institutional child sexual abuse. We submit that this inexperience can largely be attributed to the difficulties that the law generates for these claims and the unlikelihood that many claims can be successfully litigated in the current system.

We suggest there may be merit in the relevant Australian legal professional bodies refining their referral schemes, to provide prospective legal consumers seeking to pursue claims arising from institutional childhood sexual abuse, with more detailed information about suitable firms that will accept referrals and assist clients effectively.

Some clients have also relayed their experiences about legal costing issues to us.

One client, for example, instructs us that a settlement had been reached with the relevant institution during court-ordered mediation. However, as the client had also joined the offender to the proceedings, and that offender was judgment-proof, the offender's solicitors sought costs against the client. The client had difficulty reconciling how such an application could be made and he experienced high levels of distress, perceiving that such an act was calculated to re-victimise and re-traumatise him.

Another client experienced concerning and, unknown to him, illegal costing arrangements with a law firm. He entered into a conditional costs agreement, which, in addition to a contingency fees arrangement, provided that the client must pay a break fee of \$5,000, plus expenses incurred to date, if the *solicitor* terminates the agreement or \$10,000 if the client terminates the agreement. These provisions effectively trapped the client, who was in no position to pay these sums of money. This is an

example of how vulnerable, confused, uneducated and desperate clients with poor literacy levels can be exploited.

A further client, having been advised not to institute civil proceedings (due essentially to the expiration of the relevant period), was advised to seek redress through negotiation with a religious institution. The client had already received an award under the relevant State victims of crime compensation scheme. Ultimately, after a painful and protracted process, a negotiated settlement was arrived at, which made no provision for the client to meet his obligation to refund the victims award under the provisions of the relevant statutory scheme. While ultimately the institution agreed to cover the cost of that obligation, had it not done so the client would have participated in a lengthy and difficult exercise, incurring significant legal fees, for no practical, net outcome. As it was the client understandably found this process to be highly re-traumatising.

It has also been the case that new legal issues arise for a client as a result of engaging in legal processes relevant to the abuse and trauma that they have experienced. Some clients have experienced unemployment and even homelessness *upon* and *after* engaging with the Royal Commission, due to the significant impact the trauma has inflicted on their functioning. This is so, despite the considerable and best efforts of the government and the Royal Commission to provide support to those engaging with it (as opposed to the civil justice system, which makes extremely limited provision for supporting vulnerable and disadvantaged litigants).

One client, for example, experienced an industrial dispute with his employer after he required further time off from work while engaging with the Royal Commission. He ultimately needed to retire from work and to consider accessing his superannuation early to cover the costs of living. The client then experienced further difficulty in accessing his superannuation on the basis that the trauma he experienced rendered him incapable of working. In the context of civil litigation, the impact of trauma on a client's functioning is likely to increase the occurrence of multiple legal issues and disadvantage and reduce the client's ability to engage with the legal issues they face, including their civil claim. This often means that clients will avoid making a claim, withdraw from their claim after its initiation or require ongoing support from multiple legal and support services.

Clients have also reported that the ability to seek an initial view from a solicitor on the merits of potential clients can be difficult. Many clients have reported that solicitors have requested amounts of up to \$500 to provide initial advice on merits. Any such outlay is simply beyond the means of many clients living a day to day existence and facing multiple financial commitments.

These barriers impact on a client's willingness to engage with the legal system, and often result in such clients ceasing their interaction with the legal system, including solicitors, at a very early stage. This potentially adversely impacts on a client's ability to successfully take action in the future, as the client has been put on notice of the possible existence of a civil claim. Such knowledge, in most jurisdictions, can impact on an extension of time application and may make any such application unsuccessful.

2. Are there other elements of the civil litigation systems that raise issues for the conduct of litigation brought by people who suffer child sexual abuse in institutional contexts? If so, what are they and what issues do they raise?

Prisoners and restitution

A prisoner may incur a victim's compensation debt owing to the state in relation to a claim made by victims of their own offending. In such cases, if the prisoner, as a survivor, subsequently receives compensation through civil litigation or under redress schemes for the abuse they experienced as a child, the state may recover the debt the prisoner owes from that pool of compensation.⁵² We submit that recovering a debt from the pool of compensation awarded to the prisoner for suffering previous childhood sexual abuse is not appropriate. This is because the compensation is awarded to recognise past wrongdoing - which assists the prisoner to recover from the effects of the abuse, which are, in most cases, life-long - and assists in shifting the financial, health and social burden away from the Australian community and the survivor and back onto the relevant institution. It may also be the case that the abuse the prisoner experienced causally contributed to the prisoner's offending, whether that be sexual or other offending.⁵³

We recognise this issue is difficult, and that many public policy considerations operate in this context. However, we would at least recommend that the Royal Commission consider the disproportionate impact the restitution process has on prisoners, especially those with life-long custodial sentences, who are also survivors of child sexual abuse.

Accordingly, we raise this matter for further consideration.

3. How well do early dispute resolution or mediation processes work as part of the civil litigation systems for people who suffer child sexual abuse in institutional contexts?

Many clients express views that out of court settlements, particularly where agreements contain confidentiality terms, are "hush money" or "blood money", contributing to feeling degraded or "swept under the carpet". This relates back to the multifaceted goals sought by survivors, especially where public affirmation, exposure and deterrent outcomes are sought.

Some clients, for example, felt insulted that there was an assumption that they could be paid off, and held to silence; instead, preferring to pursue parties for millions of dollars, leading naturally to highly adversarial proceedings.

The difficulties that face clients in directly participating in settlement processes are apparent from all we have set out above about this particular client cohort and the barriers and disadvantages they face in accessing the legal system. All of those factors contribute to what might be summarised as "an uneven playing field." Many of our clients have reported that participating in mediation processes, especially

⁵² See, for example: *Victims Rights and Support Act 2013* (NSW), Part 5; *Victims of Crime Assistance Act 2009* (Qld), Part 16; *Victims of Crime Act 2001* (SA), s 28

⁵³ See, for example, Geoff Thompson, ABC News Online Investigative Unit, '35 violent deaths linked to 'school for killers' (December 14, 2011), ABC News. Accessible at: <http://www.abc.net.au/news/specials/school-for-killers/>

where there is direct contact with representatives of the institution responsible for their abuse, was an extremely traumatising and disconcerting experience, to the point of compelling them to accept settlement amounts they regarded as clearly unsatisfactory, in order to bring a speedy resolution to the case and an end to that triggering context.

The comments we make below about apologies to clients are also of some relevance in this context.

4. What changes should be made to address the elements of the civil litigation systems that raise issues for the conduct of litigation brought by people who suffer child sexual abuse in institutional contexts?

Refer to the separate recommendations made throughout this submission.

5. Do people who suffer child sexual abuse in institutional contexts want forms of redress in addition to, or instead of, damages or financial compensation? Can these other forms of redress be obtained through civil litigation?

Throughout this submission we have commented on the non-financial outcomes many clients seek, through taking civil or other action against an institution and/or their offenders.

Many clients are focused on psychological restoration, which may or may not flow from or be linked by them to the receipt of financial compensation. Clients' reported experiences reflect that the amounts of compensation awarded to survivors varies significantly depending on who is the respondent, and where the matter is litigated. State governments, for example, are notorious for failing to compensate survivors at all or offering comparatively low amounts of redress, while substantial compensation payments have been paid by some, but not all, religious organisations. While these payments are not generally released into the public realm, survivors talk to each other about their redress awards. These significant differences tend to trivialise some survivors' experiences and create the impression that a hierarchy exists among survivors. This distracts from achieving other therapeutic options.

Many clients want to receive a sincere apology from the institution as acknowledgment of the wrongdoing and harm done. Although some civil liability laws make it clear that an apology does not constitute an express or implied admission of fault or liability,⁵⁴ some institutions still refuse to apologise for the conduct complained of and their response to that conduct. Or if an apology is offered, it is heavily qualified, to an invalidating extent; for example *"we are deeply sorry you believe these things happened to you in our home..."*

Some clients also insist on ensuring that the institution implements reforms to their policies and systems to ensure that the abuse does not occur again and children in future are protected. In our view, there are few direct mechanisms through which such reforms can be enforced. This is another reason why changes are necessary to ensure that the civil litigation system's deterrent function can properly operate

⁵⁴ See, for example: *Civil Liability Act 2002* (NSW), s 69.

to influence the conduct of institutions and their office-holders, thereby reducing the incidence of child sexual abuse.

Thank you for considering our submission and its accompanying recommendations. Should you wish to discuss our submission further, I may be contacted on 02 8267 7400.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'W. Strange', written over a horizontal line.

WARREN STRANGE
Principal Lawyer