STILL AWAITING CLARITY: WHY VICTORIA'S NEW CIVIL LIABILITY LAWS FOR ORGANISATIONAL CHILD ABUSE ARE LESS HELPFUL THAN THEY APPEAR

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In 2017 Victoria became the first Australian jurisdiction to initiate substantive reforms to its civil liability laws, to address barriers faced by plaintiffs seeking to hold institutions liable for child abuse. The new law, based on recommendations arising from a Victorian inquiry, establishes a statutory duty of care owed by organisations to take reasonable precautions against abuse of children under their care or supervision. On its face, the Wrongs Amendment (Organisational Child Abuse) Act 2017 (Vic) looks like a helpful clarification of this complex area of law. However, when viewed within the context of the work of the Royal Commission on Institutional Responses to Child Sexual Abuse, as well as common law principles – particularly strict liability in the areas of non-delegable duty and vicarious liability, and the High Court decision of Prince Alfred College Inc v ADC – we see that barriers and uncertainties remain.

> [O]nly a legislative response can resolve the current issues and uncertainties in the current law, and in doing so, provide clarity for plaintiffs and defendants by clearly specifying the circumstances in which an organisation will be liable for abuse perpetrated by people associated with that organisation.[1]

I INTRODUCTION

Institutional child abuse, including child sexual abuse, has been the focus of a flurry of public and legal activity in Australia in recent years, including the Royal Commission into Institutional Responses to Child Sexual Abuse ('Royal Commission'), state-level inquiries and reports, as well as a landmark decision by the High Court of Australia and ongoing legislative reforms across various jurisdictions. This attention is both overdue and well-deserved. The incidence and impact of institutional child abuse in Australia are now well-documented. As summarised by the Royal Commission: 'It is estimated that over half a million children experienced institutional or other out-of-home "care"

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1 Victoria, *Parliamentary Debates*, Legislative Assembly, 23 November 2016, 4537 (Martin Pakula, Attorney-General) ('*Second Reading Speech*').

in Australia during the 20th century'.[2] A total of 60,000 survivors[3] have been estimated as eligible for a national redress scheme, including almost 16,000 Victorians.[4] Institutional child abuse has serious, long-term impacts on victims, often causing decades of psychological suffering and harm,[5] even extending to intergenerational trauma.

For many survivors, legal recognition of the abuse committed against them is a powerful means of validation and healing.[6] Importantly, civil liability confirms responsibility for these legal wrongs, while providing compensation for the harm caused. For the small number of survivors who do pursue legal avenues for compensation, recourse is often sought against the institution where the abuse occurred. This is not only because the institution is more likely to be a defendant with 'deep pockets' (or liability insurance) than the individual perpetrator – many plaintiffs also seek recognition of the role and responsibility of the institution in creating the opportunity for the abuse. However, as recently recognised by the Royal Commission:

> [M]any survivors do not consider that justice has been or can be achieved for them through existing civil litigation systems or through previous or existing redress schemes that some governments and non-government institutions offer … [F]or many survivors, existing civil litigation systems and redress schemes do not provide, and have not in the past provided, effective avenues to seek or obtain justice in the form of compensation or redress that is adequate to address or alleviate the impact on survivors of sexual abuse.[7]

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2 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report: Preface and Executive Summary, 2017) 39 ('*Royal Commission Preface and Executive Summary*'). Prior to the Royal Commission, research from the early 2000s confirmed the alarming prevalence of child sexual abuse in Australian schools: see Michael P Dunne et al, 'Is Child Sexual Abuse Declining? Evidence from a Population-Based Survey of Men and Women in Australia' (2003) 27(2) *Child Abuse and Neglect* 141.

3 We recognise the importance of language when referring to people who have experienced child abuse as either 'victims' or 'survivors'. With regard to the sources used in this article, a Victorian inquiry report uses 'victim', while the Royal Commission uses 'survivor'. 'Victim' is also the term used by the High Court of Australia. For this reason, we use the terms 'victim' and 'survivor' interchangeably, alongside 'plaintiff' or 'potential plaintiff'.

4 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Redress and Civil Litigation Report, September 2015) 29 ('*Interim Report*').

5 See, eg, Paul E Mullen et al, 'The Long-Term Impact of the Physical, Emotional, and Sexual Abuse of Children: A Community Study' (1996) 20(1) *Child Abuse and Neglect* 7, 21; Joseph H Beitchman et al, 'A Review of the Long-Term Effects of Child Sexual Abuse' (1992) 16(1) *Child Abuse and Neglect* 101, 118; J D Hawkins, Richard F Catalano and Janet Y Miller, 'Risk and Protective Factors for Alcohol and Other Drug Problems in Adolescence and Early Adulthood: Implications for Substance Abuse Prevention' (1992) 112(1) *Psychological Bulletin* 64.

6 On the value of tort liability and damages in providing vindication to survivors, see Allison Silink and Pamela Stewart, 'Tort Law Reform to Improve Access to Compensation for Survivors of Institutional Child Sexual Abuse' (2016) 39(2) *University of New South Wales Law Journal* 553 ('Tort Law Reform'). See especially the sources cited at footnote 6 on page 554. Conversely, the negative impacts of child sexual abuse 'may be exacerbated … where the abuse occurs within institutional settings, by the institution's failure to prevent the abuse or to respond appropriately after its occurrence': Ben Mathews, 'Optimising Implementation of Reforms to Better Prevent and Respond to Child Sexual Abuse in Institutions: Insights from Public Health, Regulatory Theory, and Australia's Royal Commission' (2017) 74 *Child Abuse and Neglect* 86, 86. Of course, litigation can also be a re-traumatising, harrowing and costly process for survivors: see John Ellis and Nicola Ellis, 'A New Model for Seeking Meaningful Redress for Victims of Church-Related Sexual Assault' (2014) 26(1) *Current Issues in Criminal Justice* 31. From a regulatory and child protection perspective, and in light of the systemic nature of institutional child abuse in many cases, 'the civil law offers even greater potential than criminal laws to address institutions, organisations and third parties to criminal activities, and to perform the function of truth recovery by exposing the organisational processes implicated in abuse': Kate Gleeson, 'Why the Continuous Failures in Justice for Australian Victims and Survivors of Catholic Clerical Child Sexual Abuse?' (2016) 28(2) *Current Issues in Criminal Justice* 239, 242.

7 *Interim Report* (n 4) 431.

In particular, plaintiffs have faced a range of legal barriers to recovery, such as the application of statutory time limits on commencing legal actions, and difficulty establishing an appropriate defendant, particularly in the case of unincorporated non-government organisations such as religious institutions. The latter barrier is commonly known as the '*Ellis* defence', in reference to the New South Wales Court of Appeal's decision in *Trustees of the Roman Catholic Church v Ellis* ('*Ellis*')[8] – a case of child sexual abuse by a priest, where an appropriate defendant could not be established due to the unincorporated nature of the Roman Catholic Church and the fact that church trustees did not manage the appointment or removal of priests.

With regard to the question of when and how an institution may be held responsible for abuse of a child under its care or supervision, three main avenues have been attempted, each with its own hurdles (see Table 1). As recognised by state-level inquiries and the Royal Commission, courts have traditionally been very reluctant to recognise institutional liability for child abuse, under all three avenues.[9]

8 (2007) 70 NSWLR 565 ('*Ellis*').

9 Further detail about these reports, and their understanding of the common law barriers, is provided in Part II below.

Table 1: Avenues of institutional liability for child abuse, and relevant barriers under each[10]

	A. Liability in negligence	**B. Vicarious liability**	**C. Non-delegable duty**
General principles	Liability for carelessness causing actionable harm. Plaintiff must establish that the defendant owed them a legal duty of care, that the defendant failed to take reasonable care, and that the carelessness caused a recognised form of harm that was not too remote.	Liability for tortious (wrong) conduct by another. Plaintiff must establish the wrongdoer's own potential liability, and then impute that liability to the defendant. The wrongdoer must have been an agent or employee of the defendant, and must have been acting in the course of their employment at the time.	A specific duty owed historically only by specific institutions to specific classes dependent upon them – schools to pupils, hospitals to patients and workplaces to employees. Liability can be imputed to the organisation even where the tortious conduct was committed by a contractor rather than an employee.
Challenges in application to institutional child abuse	Depends on establishing that the institution owed a duty of care to protect from harm by a third party (which is only recognised in limited circumstances); that this duty was breached by the institution; and that the abuse would not have occurred if the organisation had taken reasonable care.	Depends on establishing that the perpetrator of the abuse was an employee of the institution rather than a mere contractor, and that they were acting in the course of employment at the time – which only rarely covers intentional criminal conduct.	Depends on establishing a historically recognised institutional context, and only rarely extends to liability for intentional criminal conduct. Existing principles and their application are also complex and unclear.

In response to the various inquiries and reports, states – proudly led by Victoria[11] – have begun implementing a range of legislative reforms seeking to remove or lower these legal barriers. Some legislative measures have targeted the *Ellis* defence, setting out processes for identifying appropriate institutional defendants or unincorporated associations, including those using trusts to manage funds or property.[12] Others have removed statutory time limitations from child abuse cases.[13] The most complex reforms, though, have been those addressing the question of duty or civil liability. In addition, alongside these legislative reforms is the landmark decision of *Prince Alfred College*

10 Of course, plaintiffs may attempt to establish liability under more than one avenue. A table is adopted here as a simple illustrative format. This sets a grounding for understanding the highly technical and complex interaction of these common law avenues both with each other and with relevant legislative reforms, as set out in Parts III and IV below. Full details of relevant legal authorities for each of these grounds are also elaborated below.

11 Mr Pakula stated that '[t]he Victorian government was the first to act in Australia in removing civil limitation periods for victims of child abuse, and it is now the first to act in ensuring that organisations are appropriately subject to a clear, fault-based legal duty to prevent the commission of organisational child abuse by their personnel': *Second Reading Speech* (n 1) 4539. Similarly, Mr Carroll declared that 'Victoria leads the way as the progressive state of the nation, and again it is leading the way in an Australian first to protect children from abuse': Victoria, *Parliamentary Debates*, Legislative Assembly, 7 December 2016, 4873 (Benjamin Carroll).

12 See *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic). The provisions of the *Amending Act* which relate to the identification and nomination of defendant institutions are not discussed in this article, due to them being largely superseded by this newer Act.

13 See *Limitations of Actions Amendment (Child Abuse) Act 2015* (Vic).

Inc v ADC ('*Prince Alfred*')[14] in 2016, where the High Court of Australia set out its preferred approach to deciding vicarious liability in cases involving intentional criminal acts by an employee – in this case, sexual abuse of a child in a boarding school. Notably, while civil liability reforms apply prospectively, historical child abuse is also addressed by the new National Redress Scheme for Institutional Child Sexual Abuse, established in response to the Royal Commission's detailed recommendations.[15]

Scholarly commentary and debate has accompanied these public inquiries and reforms, both in Australia and internationally.[16] Similarly, non-scholarly works have announced or commented on legislative reforms, and the decision in *Prince Alfred*.[17] However, there has not yet emerged any systematic, critical scrutiny of these reforms and the civil law landscape currently faced by victims. Such scrutiny has the potential to inform ongoing developments, as several Australian jurisdictions are still in the process of exploring reform options. As this article will show, these reforms are best evaluated not merely on their face, but with regard to the surrounding common law principles and developments.

This article focuses on Victoria's reforms – specifically, the *Wrongs Amendment (Organisational Child Abuse) Act 2017* (Vic) (the '*Amending Act*')[18] which came into force on 1 July 2017. While the bill introducing the Act (the 'Amending Bill') was

14 (2016) 258 CLR 134 ('*Prince Alfred*').

15 See *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth); *Interim Report* (n 4); Finity Consulting, *National Redress Scheme Participant and Cost Estimates: Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, July 2015).

16 See, eg, Katie Wright, Shurlee Swain and Kathleen McPhillips 'The Australian Royal Commission into Institutional Responses to Child Sexual Abuse' (2017) 74 *Child Abuse and Neglect* 1; Neil Foster, 'Tort Liability for Churches for Clergy Child Abuse after the Royal Commission: Implications of Developments in the Law of Vicarious Liability and Non-delegable Duty' (Conference Paper, Melbourne Law School Obligations Group Torts Conference, 6–7 December 2018) ('Tort Liability for Churches'); Silink and Stewart, 'Tort Law Reform' (n 6); Allison Silink and Pam Stewart, 'Compensation for Survivors of Institutional Child Sexual Abuse in Australia: Tortious Rights and Challenges for Reform' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (LexisNexis Butterworths, 2nd ed, 2017) 337; Gleeson, 'Why the Continuous Failures in Justice for Australian Victims and Survivors of Catholic Clerical Child Sexual Abuse?' (n 6); Judy Cashmore and Rita Shackel 'Responding to Historical Child Sexual Abuse and the Needs of Survivors' (2014) 26(1) *Current Issues in Criminal Justice* 1; Ben Mathews, 'A Taxonomy of Duties to Report Child Sexual Abuse: Legal Developments Offer New Ways to Facilitate Disclosure' (2019) 88 *Child Abuse and Neglect* 337.

17 See, eg, Amanda Ryding and Laura Reisz, 'The High Court Clarifies the Law Regarding Employers' Vicarious Liability for an Employee's Wrongful Acts', *Colin Biggers & Paisley Lawyers: Insights* (Web Page, 5 October 2016) <https://www.cbp.com.au/insights/insights/2016/october/the-high-court-clarifies-the-law-regarding-employe>; Alice Alexander, 'High Court of Australia Declines to Extend Limitation Period in Claim Concerning Vicarious Liability of Educational and Care Institution in Sexual Abuse Case', *Human Rights Law Centre: Human Rights Case Summaries* (Web Page, 5 October 2016) <https://www.hrlc.org.au/human-rights-case-summaries/2017/2/17/high-court-of-australia-declines-to-extend-limitation-period-in-claim-concerning-vicarious-liability-of-educational-and-care-institution-in-sexual-abuse-case>; Australian Associated Press, 'Victoria's New Child Abuse Laws Target Online Offending and Reverse Onus of Proof', *The Guardian* (online, 2 July 2017) <https://www.theguardian.com/australia-news/2017/jul/02/victorias-new-child-abuse-laws-target-online-offending-and-reverse-onus-of-proof>; Annie Kent, 'New Victorian Laws Make It Easier to Sue for Child Sexual Abuse', *Ryan Carlisle Thomas Lawyers* (Web Page, 25 July 2017) <https://rctlaw.com.au/legal-blog/2017/new-victorian-laws-make-it-easier-to-sue-for-child-sexual-abuse>.

18 The *Amending Act* was comprised of a wholesale insertion of a new Part XIII into the *Wrongs Act 1958* (Vic). Nonetheless, we continue to refer to it as the *Amending Act*, rather than simply referring to the new provisions of the *Wrongs Act 1958* (Vic) – either collectively or individually – because the process of the *Amending Act*'s creation is significant to understanding its effects and its shortcomings (as traced in Part II). It is therefore helpful to our argument, to keep in mind the *Amending Act* as the outcome of a specific law reform process, rather than focusing merely on the new provisions created by it.

announced in the second reading speech as 'provid[ing] clarity for both organisations and survivors of abuse',[19] unfortunately it does not achieve this aim. We critically analyse this specific reform, pointing out its shortcomings, and exploring circumstances under which plaintiffs may still struggle to hold institutions liable in cases of organisational child sexual abuse. We show how the *Amending Act* is best understood in its particular historical context, and in the context of complex common law principles. This requires us to delve into the murky depths of High Court reasoning regarding vicarious liability and non-delegable duty in cases of this nature – specifically, in *Prince Alfred* and its predecessor, *New South Wales v Lepore* ('*Lepore*').[20] We argue that while recent legal reforms are welcome and important, a number of significant hurdles remain as a result of the legislative gaps on the one hand, and complex and unclear common law doctrine on the other hand.[21] In light of this ongoing complexity, and the differing approaches now being taken by other jurisdictions, there are still compelling reasons for further Victorian reforms to impose stricter liability on institutions for abuse of children in their care. This may also assist in shaping better reforms in other jurisdictions.

The article is structured as follows. Part II traces the background to the *Amending Act*, showing how it was enacted as a response to a Victorian-level inquiry and therefore ignored concurrent developments in both the High Court and the Royal Commission. Part III then examines and critiques the content of the *Amending Act*, specifically the creation of a statutory duty of care in section 91, and the reversed onus of proof regarding breach by the organisation. Part IV analyses the *Amending Act*'s connection or similarity to non-delegable duty, in the process considering whether non-delegable duty is best understood as imposing strict liability. The remainder of the article lays out the legal principles applicable in cases involving institutional child abuse, where the *Amending Act* cannot be relied upon because the institution was demonstrably not at fault – that is, avenues for imposition of strict liability on the institution. Part V considers the High Court's current preferred (*Prince Alfred*) approach to vicarious liability in cases of organisational child abuse, before outlining the applicable common law regarding non-delegable duty in such cases. Part VI concludes the article, revisiting the overall argument regarding the need for further reform.

II BACKGROUND TO THE *AMENDING ACT*

In order to understand the Victorian *Amending Act* and analyse its shortcomings, it is helpful to place the law in its recent historical context. As we shall see, in this context, the *Amending Act* is significant as the inaugural state-level effort at civil liability reform. However, as a response primarily to a Victorian inquiry and report, the *Amending Act* ignored concurrent developments in the High Court and the Royal Commission. This helps to explain its limitations. A brief narrative account, reflected in the timeline in Figure 1, is offered for this purpose. The story is somewhat complex, but invaluable for understanding the analysis in the remainder of this article.

19 *Second Reading Speech* (n 1) 4539.

20 *New South Wales v Lepore* (2003) 212 CLR 511 ('*Lepore*'). In this case the High Court heard and decided three appeals together, each involving sexual abuse of children in school contexts.

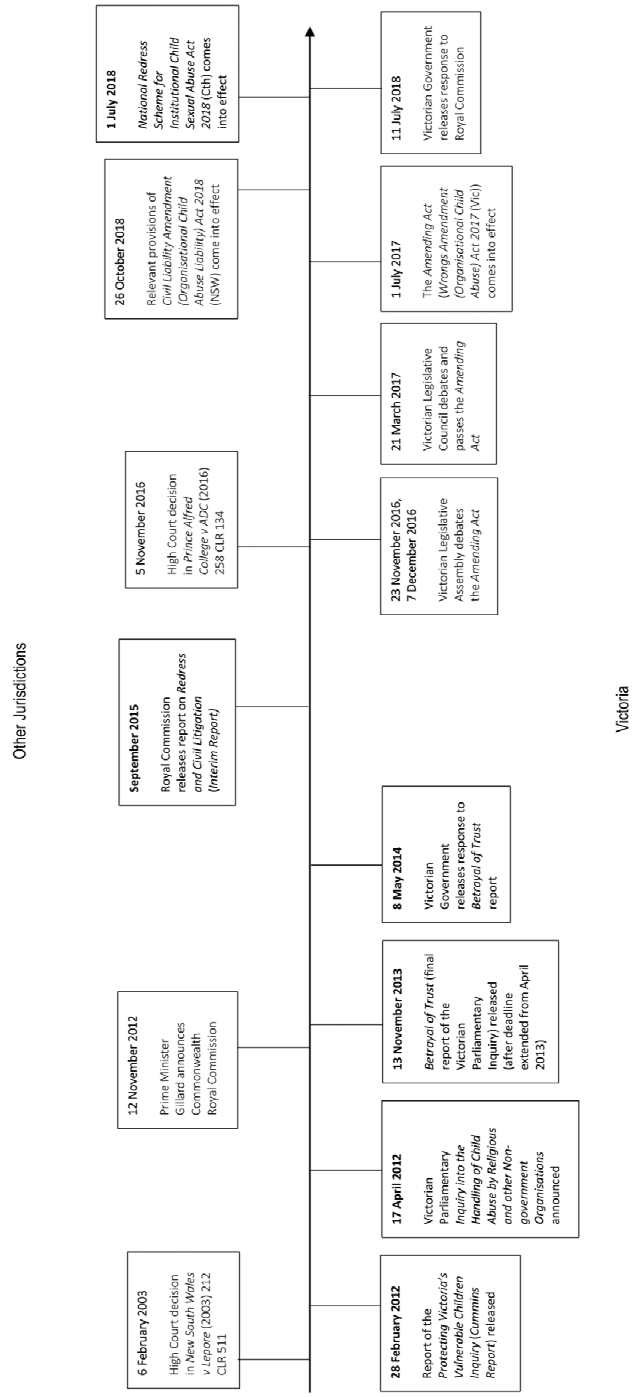
21 In this article we analyse only the legal hurdles for potential plaintiffs with the means, opportunity and courage to approach the courts. There are a multitude of hurdles and challenges before this point: see Ellis and Ellis (n 6).

Early in 2011, the Victorian Government announced the *Protecting Victoria's Vulnerable Children Inquiry*, tasked with investigating and developing recommendations to reduce the incidence and negative impact of child neglect and abuse in Victoria.[22] Just over one year later, the resulting report was released.[23] This rapidly led to a Victorian parliamentary *Inquiry into the Handling of Child Abuse by Religious and other Non-government Organisations*, announced on 17 April 2012.[24] The Commonwealth was soon to follow suit, with Prime Minister Gillard announcing a Royal Commission into Institutional Responses to Child Abuse in November the same year.

22 Victorian Government, 'Terms of Reference', *Protecting Victoria's Vulnerable Children Inquiry* (Web Page, 7 March 2012) <http://childprotectioninquiry.vic.gov.au/terms-of-reference.html>. This inquiry closely followed the completion of the Victorian Law Reform Commission's inquiry and report on child protection, focusing specifically on the laws and procedures of the Children's Court: see 'Child Protection', *Victorian Law Reform Commission* (Web Page, 20 January 2020) <https://www.lawreform.vic.gov.au/all-projects/child-protection>.

23 Victorian Government, 'Report of the *Protecting Victoria's Vulnerable Children Inquiry*', *Protecting Victoria's Vulnerable Children Inquiry* (Web Page, 7 March 2012) <http://childprotectioninquiry.vic.gov.au/report-pvvc-inquiry.html> (commonly referred to as the '*Cummins Report*' after the *Inquiry*'s Chair, the Honourable Philip Cummins).

24 Victoria, *Victoria Government Gazette*, No S 235, 17 April 2012.


Other Jurisdictions
Victoria
6 February 2003
High Court decision in New South Wales v Lepore (2003) 212 CLR 511
12 November 2012
Prime Minister Gillard announces Commonwealth Royal Commission
September 2015
Royal Commission releases report on Redress and Civil Litigation (Interim Report)
5 November 2016
High Court decision in Prince Alfred College v ADC (2016) 258 CLR 134
1 July 2018
National Redress Scheme for Institutional Child Sexual Abuse Act 2018 (Cth) comes into effect
28 February 2012
Report of the Protecting Victoria's Vulnerable Children Inquiry (Cummins Report) released
17 April 2012
Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and other Non-government Organisations announced
13 November 2013
Betrayal of Trust (final report of the Victorian Parliamentary Inquiry) released (after deadline extended from April 2013)
8 May 2014
Victorian Government releases response to Betrayal of Trust report
23 November 2016, 7 December 2016
Victorian Legislative Assembly debates the Amending Act
21 March 2017
Victorian Legislative Council debates and passes the Amending Act
1 July 2017
The Amending Act (Wrongs Amendment (Organisational Child Abuse) Act 2017 (Vic)) comes into effect
26 October 2018
Relevant provisions of Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018 (NSW) come into effect
11 July 2018
Victorian Government releases response to Royal Commission

The final report of the Victorian parliamentary inquiry, entitled Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-government Organisations ('Betrayal of Trust'), was released in November 2013 (after an extension was approved).[25] Comprising two volumes and over 700 pages, this report looked comprehensively at many aspects and issues relating to institutional child abuse, from victims' experiences, to specific organisational processes (such as the Melbourne Response within the Catholic Church),[26] to measures to create child-safe organisations. Part H focused on Civil Justice Reform, with Chapter 26 specifically attending to the 'Legal Barriers to Claims Against Non-government Organisations', where the following barriers were identified:

- difficulty finding an entity to sue, because of the legal structures of some non-government organisations [noted above as '*Ellis* defence']
- application of the statute of limitations to [civil] child abuse cases …
- inability to establish that organisations have a legal duty to take reasonable care to prevent child abuse by their members
- difficulty identifying a legal relationship between the perpetrator and the entity
- the courts' exclusion of criminal acts from the notion of vicarious liability.[27]

The first two of these barriers were addressed through dedicated legislative amendments, namely the *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic) which came into effect on 21 April 2015, and the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic), which came into effect on 1 May 2019.

The remaining three barriers refer to specific principles within common law, where courts have been reluctant to hold organisations liable – as reflected in Table 1, above. In negligence, a duty of care to protect a plaintiff from harm by criminal conduct of another person is often difficult to establish, except where either the plaintiff or the wrongdoer is under the defendant's care and control.[28] Liability also depends on proving that the defendant breached the duty by failing to take reasonable care,[29] and that the breach caused harm that was not too remote.[30] In tort law more generally, vicarious liability will only be imposed upon an institution where both a) the tortfeasor was an employee of the organisation,[31] and b) the tort was committed in the course of their

25 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* (Parliamentary Paper No 275, November 2013) ('*Betrayal of Trust*').

26 The Melbourne Response, a process internal to the Catholic Church, was launched by then Archbishop of Melbourne George Pell in 1996 to deal with reports of child sexual abuse. It has been subject to controversy and criticism of being overly legalistic and capping compensation for victims at very low levels. It was also the subject of a Case Study by the Royal Commission, provided in a dedicated 346-page report: see *Royal Commission into Institutional Responses to Child Sexual Abuse: Religious Institutions* (Final Report, 2017) vol 16 bk 2.

27 *Betrayal of Trust* (n 25) vol 2, 528. Note that in the report a bullet point was missing between the third and fourth items of this list. This was presumably a typographical error given that the list was introduced as 'five layers of defence' and the third and fourth items are grammatically separate.

28 See below nn 56 and 57.

29 *Wrongs Act 1958* (Vic) s 48.

30 Ibid s 51.

31 *Hollis v Vabu Pty Ltd (t/as Crisis Couriers)* (2001) 207 CLR 21.

employment.[32] *Betrayal of Trust* also briefly discussed non-delegable duty of care, particularly in light of *Lepore*,[33] where a majority of the High Court held that the non-delegable duty owed by a school to its pupils cannot extend to intentional criminal conduct against a pupil by a teacher.[34] *Betrayal of Trust* also accurately observed that '[t]he case [of *Lepore*] failed to provide clear guidance on the question of when vicarious liability could be established in these circumstances.'[35]

In exploring potential avenues for reform by considering '[e]xisting legislative models for vicarious liability',[36] *Betrayal of Trust* then took a curious turn. It drew a model[37] from discrimination legislation – including both the *Equal Opportunity Act 2010* (Vic)[38] and the *Sex Discrimination Act 1984* (Cth)[39] – where employers or principals are said to have contravened the relevant Acts when their employees or agents do so while acting in the course of employment or while acting as agents. Both of these Acts also provide an exception – the organisation will not be held vicariously liable if it can prove, on the balance of probabilities, that it took reasonable steps or precautions to prevent such conduct. These provisions from discrimination law were titled 'vicarious liability' provisions.

Based on this discussion *Betrayal of Trust* then identified two options for reform:

- legislating [a] non-delegable duty of care in the *Wrongs Act*. For example, that organisations have a non-delegable duty of care to take reasonable care to prevent intentional injury to children in their care
- a provision regarding vicarious liability in the *Wrongs Act* based on the examples in the Victorian and Commonwealth discrimination legislation.[40]

After setting out these options, *Betrayal of Trust* specified Recommendation 26.4: 'That the Victorian Government undertake a review of the *Wrongs Act 1958* (Vic) and identify whether legislative amendment could be made to ensure organisations are held accountable and have a legal duty to take reasonable care to prevent criminal child abuse'.[41] As we shall see below, the subsequent *Amending Act* followed somewhat of a hybrid approach, in an attempt to address the latter three barriers identified above.

In its May 2014 response to *Betrayal of Trust*, the Victorian Government expressed support in principle for Recommendation 26.4, stating that it was 'currently considering options to achieve the objectives of this recommendation'.[42] By late 2016, the Amending Bill was introduced to the Victorian Legislative Assembly. In parliamentary debates, and Attorney-General Pakula's second reading speech, the Amending Bill was explicitly framed as a response to *Betrayal of Trust* (specifically Recommendation 26.4) and by extension to 'the common law [which the report found] has not developed

32 *Deatons Pty Ltd v Flew* (1949) 79 CLR 370; *Bugge v Brown* (1919) 26 CLR 110.
33 *Betrayal of Trust* (n 25) 545–6.
34 This decision is discussed in detail in Part V(B) below.
35 *Betrayal of Trust* (n 25) 546.
36 Ibid 550.
37 Ibid 550–1.
38 *Equal Opportunity Act 2010* (Vic) ss 109–10.
39 *Sex Discrimination Act 1984* (Cth) s 106.
40 *Betrayal of Trust* (n 25) 552.
41 Ibid.
42 Victorian Government, 'Victorian Government Response to the Report of the Family and Community Development Committee Inquiry into the Handling of Child Abuse by Religious and Other Non-government Organisations "*Betrayal of Trust*"' (8 May 2014) 9.

sufficiently in Australia to recognise the liability of organisations for child abuse perpetrated by organisational representatives'.[43]

In fact, in the two months preceding this second reading speech, two important developments had emerged. The first was the High Court's decision in *Prince Alfred*, handed down on 5 November 2016. In this decision, the Court acknowledged the confusion generated by its past decision in *Lepore*, while clearly and unanimously outlining a new approach to determining vicarious liability in cases of organisational child abuse. As we discuss in Part VI below, this decision still left some areas of uncertainty, particularly regarding non-delegable duty. It is significant that the decision did address some of the barriers or difficulties identified in *Betrayal of Trust*, and yet was effectively ignored while the Amending Bill was being debated.[44]

The second development was the release by the Royal Commission of its interim *Redress and Civil Litigation Report*.[45] Part IV of this *Interim Report* focused on civil litigation, covering the same general issues as *Betrayal of Trust* had, as well as model litigant approaches. Section 15 focused on the 'duty of institutions', and considered approaches taken in other jurisdictions, such as the United Kingdom and Canada.[46] A key difference between this report and *Betrayal of Trust* was the explicit discussion of strict liability – both with regards to vicarious liability, and non-delegable duty. It even articulated and rebutted arguments against the imposition of strict liability in this area,[47] and considered circumstances where courts had been willing to recognise vicarious liability for intentional criminal conduct, comparing these with the case of organisational child abuse.[48]

The *Interim Report* also considered the discrimination law models proposed in *Betrayal of Trust*. Ultimately it recommended two kinds of law reform at state level:

- First, legislation should impose a non-delegable duty on certain institutions for institutional child sexual abuse, with a list of recommended institutions that provide care, supervision or control of children (Recommendations 89 and 90);
- Second, (and regardless of whether the first option is undertaken) legislation should impose liability on *all* organisations for institutional child sexual abuse, with the possibility for an organisation to escape liability by proving that it took reasonable precautions – that is, with a 'reverse onus' (Recommendation 91). This echoes what had been recommended in *Betrayal of Trust*, with its model based on discrimination legislation.[49]

43 *Second Reading Speech* (n 1) 4537.

44 The only mention was a passing reference in Attorney-General Pakula's second reading speech, where he confirmed the ongoing relevance of the *Betrayal of Trust* report's understanding of the common law in this area: 'Indeed, despite recent developments in the High Court, the law of vicarious liability and non-delegable duties in relation to organisational child abuse is still an area of great uncertainty and confusion in Australia': ibid.

45 Note that the report explains the urgency of its reform agenda as the reason it was released as an Interim Report rather than being incorporated into the Royal Commission's Final Report: 'By reporting as early as possible on these issues, we are seeking to give survivors and institutions more certainty on these issues and enable governments and institutions to implement our recommendations to improve civil justice for survivors as soon as possible': *Interim Report* (n 4) 3. The release of such reports and policy positions in such a large inquiry is unusual: see Wright, Swain and McPhillips (n 16) 5.

46 *Interim Report* (n 4) 470–3.

47 Ibid 491–2.

48 Ibid 464–8.

49 *Interim Report* (n 4) 495. As Silink and Stewart observe, 'The interrelationship between the two proposed liabilities is not entirely clear': Silink and Stewart, 'Tort Law Reform' (n 6) 572.

The *Interim Report* also recommended (in Recommendation 92) that for both options 1 and 2

> the persons associated with the institution should include the institution's officers, office holders, employees, agents, volunteers and contractors. For religious organisations, persons associated with the institution also include religious leaders, officers and personnel of the religious organisation.[50]

By contrast with the later *Interim Report*, *Betrayal of Trust* had not paid attention to the significance of imposing strict liability in circumstances of institutional child abuse. Amazingly, the phrase 'strict liability' was not used once in the entire two-volume report. Its cursory discussion of non-delegable duty referred to a 'non-delegable duty of care' and stated that the imposition of such a duty had been precluded by courts in *Lepore*.[51] Likewise, in the *Betrayal of Trust* options for reform (as quoted above), the language of 'non-delegable duty' became muddled with language of 'duty to take reasonable care',[52] suggesting that the *Betrayal of Trust* committee did not appreciate or consider the significance of non-delegable duty as potentially imposing strict liability. In considering models of 'vicarious liability' from discrimination legislation, which include exceptions where reasonable care is taken by an employer or principal, *Betrayal of Trust* also strayed from an understanding of vicarious liability as one involving strict liability. The strict liability nature of both vicarious liability and non-delegable duty therefore became lost in *Betrayal of Trust*.

Yet it was *Betrayal of Trust* that formed the basis for Victorian law reform. In debating the Amending Bill in late 2016 and early 2017, parliamentarians ignored the recent *Interim Report* with its clearer view of strict liability and its recommendation for the imposition of a (strict liability) non-delegable duty on institutions. They also ignored the freshly decided case of *Prince Alfred*, where the High Court had signalled a new potential avenue for the imposition of vicarious liability in cases of institutional child sexual abuse. The Victorian Government even claimed, in its 2018 response to the Royal Commission, that it had 'already implemented' the *Interim Report's* recommendations on this matter, by introducing 'legislation to impose a non-delegable duty on certain institutions for institutional child sexual abuse'.[53] The Victorian Government thus appears to retain its confusion about non-delegable duty, vicarious liability and strict or fault-based liability in this area.

With this background in mind, we can better appreciate the irony of an *Amending Act* specifically aimed at addressing uncertainties created by common law, which is based on a government report (*Betrayal of Trust*) which displayed confusion regarding liability in this area:

> [T]he government agrees with the Family and Community Development Committee [in *Betrayal of Trust*] that only a legislative response can resolve the current issues and uncertainties in the current law, and in doing so, provide clarity for plaintiffs and defendants by clearly specifying the circumstances in which an organisation will be liable for abuse perpetrated by people associated with that organisation. The bill provides the legislative response that is required.[54]

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50 *Interim Report* (n 4) 495.

51 *Betrayal of Trust* (n 25) vol 2, 545–6.

52 Ibid 545.

53 Victorian Government, *Victorian Government Response to the Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, July 2018) 14.

54 *Second Reading Speech* (n 1) 4537.

Of course, this irony is only problematic if the *Amending Act* itself does not resolve the confusion. As the Fact Sheet on the *Amending Act* confidently declares, '[t]his duty provides clarity for both organisations and survivors of abuse'.[55] Unfortunately, clarity remains elusive. As the rest of this article will demonstrate, the *Amending Act* appears to address several of the legal barriers identified in *Betrayal of Trust* and the *Interim Report*. However, particularly when the *Amending Act* is viewed in the context of common law principles of non-delegable duty and vicarious liability, we find that Victorian plaintiffs and organisations still face confusion about when an organisation may be held liable for institutional child abuse.

III CREATION OF A STATUTORY DUTY, AND PRESUMPTION OF BREACH

The *Amending Act* inserts a new Part XIII into the *Wrongs Act 1958* (Vic). In this section we examine the key provisions inserted by the *Amending Act*, with regard to establishment of a statutory duty and the 'reverse onus' on organisations regarding breach. We then critique these by examining to what degree they work to establish liability where none would otherwise be arguable by a plaintiff.

Section 91, the heart of the new provisions, creates a direct statutory duty owed by the relevant organisation to the victim:[56]

> (1) This section imposes a duty of care that forms part of a cause of action in negligence.
> (2) A relevant organisation owes a duty to take the care that in all the circumstances of the case is reasonable to prevent the abuse of a child by an individual associated with the relevant organisation while the child is under the care, supervision or authority of the relevant organisation.
> (3) In a proceeding on a claim against a relevant organisation for damages in respect of the abuse of a child under its care, supervision or authority, on proof that abuse has occurred and that the abuse was committed by an individual associated with the relevant organisation, the relevant organisation is presumed to have breached the duty of care referred to in subsection (2) unless the relevant organisation proves on the balance of probabilities that it took reasonable precautions to prevent the abuse in question.

A Note accompanying section 91(3) also provides:[57]

> Reasonable precautions will vary depending on factors including but not limited to–
> a) The nature of the relevant organisation; and
> b) The resources that are reasonably available to the relevant organisation; and
> c) The relationship between the relevant organisation and the child; and
> d) Whether the relevant organisation has delegated the care, supervision or authority over the child to another organisation; and
> e) The role in the organisation of the perpetrator of the abuse.

Section 91(6) also reiterates that the statutory duty in section 91(2) 'does not apply to abuse of a child committed by an individual associated with a relevant organisation

55 'Betrayal of Trust Fact Sheet: The New Organisational Duty of Care to Prevent Child Abuse', *Victorian Government Department of Justice and Community Safety* (Web Page, May 2017) <https://www.justice.vic.gov.au/safer-communities/protecting-children-and-families/betrayal-of-trust-fact-sheet-the-new>.

56 *Wrongs Act 1958* (Vic) s 91, as inserted by *Amending Act* s 3.

57 Ibid s 91(3).

in circumstances wholly unrelated to that individual's association with the relevant organisation'.[58]

The establishment of a duty of care in section 91 appears to provide progress and certainty for plaintiffs. In particular, it appears to address difficulties faced by plaintiffs under the first of the three avenues of liability (A) displayed in Table 1. A duty of care in negligence can certainly be difficult to establish where the duty involves protection from intentional criminal harm by others. Such a duty has been successfully established in circumstances where the defendant was in a relationship where they exercised 'care and control' – either over the third party who committed the criminal conduct,[59] or over the plaintiff.[60] A key factor in judicial decision-making in this area is the factor of control: specifically, the degree of control exercised by the defendant over the wrongdoer.[61] This emphasis on control is consistent with recent High Court reasoning in determining duty of care in novel circumstances more generally.[62]

Absent such a relationship, mere foresight that others may cause harm is not enough to establish a duty.[63] In addition, where the potential class of plaintiffs is effectively indeterminate, a duty will not be recognised.[64] Notably, none of the cases where liability has successfully been established involved child sexual abuse, although several have involved other kinds of criminal assault upon children. The *Amending Act* captures such instances of physical assault in its broad definition of 'abuse' as 'physical abuse or sexual abuse'.[65]

In these cases, courts have grappled with questions of the extent, nature or scope of the duty of care. For example, a school's duty of care to protect its pupils from criminal harm by others may only extend so far from the school grounds (ie geographically) or from school hours (temporally).[66] As courts have acknowledged when discussing questions of extent, nature or scope of a duty of care in other contexts,[67] such language

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58 Ibid s 91(2).

59 For example, parents over children: *Smith v Leurs* (1945) 70 CLR 256; schools over pupils: *Richards v Victoria* [1969] VR 136, see also *Geyer v Downs* (1977) 138 CLR 91; gaolers over juvenile detainees: *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004; a nightclub over its patrons: *Club Italia (Geelong) Inc v Ritchie* (2001) 3 VR 447.

60 For example, the school's duty to protect from harm by pupils from other schools: *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman* (1996) Aust Torts Reports 81-399; gaoler's duty to protect prisoner from criminal harm by others: *New South Wales v Bujdoso* (2007) 69 NSWLR 302; duty of employer to employee to protect from criminal harm by others: see, eg, *Chomentowski v Red Garter Restaurant Pty Ltd* (1970) 92 WN (NSW) 1070. See also *Ogden v Bells Hotel Pty Ltd* [2009] VSC 219, even extending to relationships 'akin to employment': *English v Rogers* [2005] NSWCA 327.

61 See *Club Italia (Geelong) Inc v Ritchie* (2001) 3 VR 447, 460 (Brooking, Charles and Chernov JJA).

62 See, eg, *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; *Amaca v New South Wales* [2004] NSWCA 124; *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215.

63 *Smith v Littlewoods Organisation Ltd* [1987] AC 241, 251 (Lord Griffiths). See also *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2005) 205 CLR 254, 268 [34] (Gleeson CJ).

64 See, eg, *New South Wales v Godfrey* (2004) Aust Torts Reports 81-741, 65, 665 (Spigelman J). While none of the cases in which a duty to protect from criminal harm by others was recognised involved child sexual abuse, this is likely due to the limited existing case law in this area relying on other, stronger, lines of reasoning – particularly vicarious liability.

65 *Wrongs Act 1958* (Vic) s 88, as inserted by *Amending Act* s 3.

66 But see *Uniting Church in Australia Property Trust (NSW) v Miller* (2015) 91 NSWLR 752, where a duty was owed to a pupil who was injured outside school hours and off school grounds.

67 See, eg, *Roads and Traffic Authority of New South Wales v Dederer* (2007) 234 CLR 330, 337 [17] (Gummow J); *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361, 370 [19]–[20] (French CJ and Gummow J); *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469, 487 [56]–[57] (Gummow and Hayne JJ).

effectively blends the reasoning or questions of duty, with those of breach. Likewise, we can view the various (duty and breach) subsections of section 91 as a whole, when assessing how far the *Amending Act* provides opportunities for establishing liability beyond those already existing under common law principles. Put simply, how much of a difference does the *Amending Act* make in this area?

The *Amending Act* defines a 'relevant organisation' as 'an entity (other than the State) organised for some end, purpose or work that exercises care, supervision or authority over children, whether as part of its primary functions or activities or otherwise'.[68] Affiliation with the organisation is also defined broadly in the *Amending Act*, in section 90(1):[69]

> (1) An individual associated with a relevant organisation–
>
> (a) includes but is not limited to an individual who is an officer, office holder, employee, owner, volunteer or contractor of the relevant organisation; and
>
> (b) if the relevant organisation is a religious organisation, includes but is not limited to a minister of religion, a religious leader, an officer or a member of the personnel of the religious organisation …

In circumstances contemplated by the *Amending Act* – where the organisation exercises some level of care, authority or supervision over a child, and where an abuser had some affiliation with the defendant organisation – a duty of care to the child to protect them from harm by a person in the abuser's position may already be arguable. If so, then the legislation makes a duty of care in negligence action easier to establish, rather than creating a duty of care where victims would otherwise be unable to establish one on the basis of existing common law principles. Somewhat confusingly, the Victorian Government has stated that

> A stand-alone statutory duty of care has been created to allow an organisation to be held liable in negligence for certain contexts of organisational child abuse. This does not alter other duties under the law of negligence, vicarious liability, or non-delegable duties.[70]

This suggests that the *Amending Act* is best understood not as intervening in avenue A of liability from Table 1 (a common law action in negligence) but instead as creating an entirely separate avenue of liability.

In a common law action in negligence, questions of the extent or content of a duty of care to protect from harm by a third party would already have required a court to consider the circumstances of the criminal conduct in question, and the level of care or control that the organisation was able to exercise over either the perpetrator, and/or the plaintiff. These aspects are now found in the list of factors to be considered by a court in considering whether the duty was breached by the organisation. Likewise, the exclusion in section 91(6) confirms the reasoning that would already be applied under common law principles: if an individual abused a child in circumstances wholly unrelated to their association with an organisation, then the scope of the organisation's duty would not likely be held to extend to such conduct. As summarised by Attorney-General Pakula in the second reading speech for the *Amending Act*:

> The nature of the care, supervision or authority exercised by an organisation will also inform a court's determination of the 'reasonable precautions' an organisation is required to take. The more distant an alleged perpetrator's association with an organisation and with that organisation's care, supervision or authority over children, the lower the burden

68 *Wrongs Act 1958* (Vic) s 88, as inserted by *Amending Act* s 3.

69 Ibid s 90(1).

70 Department of Justice and Community Safety (n 55).

> may be for the organisation to prove reasonable precautions were taken if the child abuse occurs.[71]

This seems to confirm the reasoning that would be applied by courts under existing negligence principles – either in relation to the scope or nature of a duty of care, or the assessment of breach according to the ordinary 'calculus of negligence' principles under section 48 of the *Wrongs Act 1958* (Vic).

In contrast, the new section 91(3) inserted by the *Amending Act* definitely makes a significant shift away from the existing common law principles of negligence, by creating a presumption of breach by the organisation. Ordinarily, breach of duty would need to be proven by a plaintiff, on the balance of probabilities, and according to the general principles set out in section 48 of the *Wrongs Act 1958* (Vic). This provision of the *Amending Act* conforms to the model of so-called 'vicarious liability' in discrimination law as set out in *Betrayal of Trust*[72] and referred to as a 'reverse onus' in the Royal Commission's *Interim Report*.[73] An organisation is therefore able to avoid liability if it can prove on the balance of probabilities that it took 'reasonable precautions' to prevent the abuse.[74]

In his second reading speech for the Amending Bill, Attorney-General Pakula stated that:

> 'Reasonable precautions' has intentionally been left undefined to allow courts to flexibly respond to the circumstances of each case. As the liability that can be imposed by the bill is one in negligence, it is expected that courts will draw on the vast wealth of case law concerning negligence to determine what is and is not 'reasonable'.[75]

As he noted, courts would also likely be guided by 'the government's recently released Child Safe Standards, which are compulsory minimum standards that apply to organisations that provide services for children, and were also released in response to *Betrayal of Trust*.'[76]

As the *Amending Act* applies prospectively – that is, it applies only to abuse that occurs after the new provisions came into force[77] – judicial determination of 'reasonable precautions' is indeed likely to be heavily informed by the kinds of measures required of institutions under the suite of 'child safe institutions' reforms arising from *Betrayal of Trust* and the Royal Commission.[78] The *Amending Act* therefore effectively functions in a regulatory sense as a kind of enforcement mechanism for the new mandated precautions expected of organisations to prevent abuse of children under their care or

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71 *Second Reading Speech* (n 1) 4539. The Victorian factsheet confirms that 'complying with the [Child Safe] Standards will help organisations demonstrate they have taken appropriate actions to identify and reduce or remove risks of child abuse': Department of Justice and Community Safety (n 55).

72 *Betrayal of Trust* (n 25) vol 2, 550–2.

73 *Interim Report* (n 4) 495.

74 *Wrongs Act 1958* (Vic) s 91(3), as inserted by *Amending Act* s 3.

75 *Second Reading Speech* (n 1) 4538.

76 Ibid.

77 *Wrongs Act 1958* (Vic) s 93, as inserted by *Amending Act* s 3. This date is 1 July 2017.

78 See Victorian Government, Department of Health and Human Services, 'Child Safe Standards', *Department of Health and Human Services* (Web Page, 20 December 2018) <https://dhhs.vic.gov.au/publications/child-safe-standards>, arising from *Betrayal of Trust*; *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, 2017) vols 6–8. As confirmed by Ms Williams,

> [r]easonable precautions may include compliance with relevant standards, including the government's recently released child safe standards, which are a compulsory minimum standard that apply [sic] to organisations that provide services for children and also formed a part of this government's response to the *Betrayal of Trust* report …

Victoria, *Parliamentary Debates*, Legislative Assembly, 7 December 2016, 4881–2 (Gabrielle Williams).

supervision. However, the burden remains on individual victims, who have been abused following institutional failures to take reasonable precautions, to bring their claims to court to have these failures and their harmful consequences recognised.[79]

It is undoubtedly a benefit to plaintiffs to have the onus of proof regarding breach reversed. In the recent cases involving institutional child abuse, and within arguments relying on negligence (that is, in avenue A from Table 1), breach has indeed been a sticking point. For example, in the first instance (District Court) judgment of *New South Wales v Lepore*, Judge Downs QC found that breach by the school had not been made out.[80] There was no challenge to this finding in the subsequent appeals (which focused on non-delegable duty and vicarious liability instead).[81] Similarly, in the first instance decision of *A, DC v Prince Alfred College*, Vanstone J found that there was no breach by the school.[82] On appeal to the South Australian Full Court in *A, DC v Prince Alfred College*, two out of three judges again found that there had been no breach by the defendant school.[83] The question was not then raised on appeal to the High Court.[84] In the case of *Erlich v Leifer*, which involved sexual abuse of a pupil by a school principal, breach was also not made out.[85]

However, even with a reversed onus, many plaintiffs are still likely to experience problems when relying on a negligence action. In terms of logistics and evidentiary burdens, the defendant organisation will almost always be better equipped than the plaintiff in terms of having the resources and other means to gather the requisite evidence relating to precautions taken. Also, of course, the civil standard of care remains unchanged (the balance of probabilities). The remaining element – causation – may also prove problematic. To establish liability, plaintiffs are still required to prove both a) that the organisation's failure to take reasonable precautions was a necessary precondition of the abuse; and b) that it would be appropriate for the scope of the organisation's

79 A similar critique of regulatory function has been made in the area of discrimination law (from which *Betrayal of Trust* drew its model): 'Complainants under anti-discrimination legislation are, by the very nature of the legislation, members of traditional disempowered groups. Expecting them alone to identify breaches, press claims, and enforce outcomes without any public assistance represents a fundamental regulatory weakness': Belinda Smith, 'A Regulatory Analysis of the *Sex Discrimination Act 1984* (Cth): Can It Effect Equality or Only Redress Harm?' in Christopher Arup et al (eds) *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Federation Press, 2006) 105, 112. We are grateful to Liam Elphick for bringing this parallel critique to our attention. Of course, civil liability is not the only form of enforcement involved in this area, as individuals in various roles of authority may also be subject to different obligations to report claims of abuse. For an account of civil law duties (specifically to report known or suspected child abuse) alongside similar duties in other areas of law, see Mathews, 'A Taxonomy of Duties to Report Child Sexual Abuse: Legal Developments Offer New Ways to Facilitate Disclosure' (n 16). For a discussion of Victoria's Child Safe Standards in a regulatory context, and arguments for direct regulation by an appropriate body, see Mathews, 'Optimising Implementation of Reforms to Better Prevent and Respond to Child Sexual Abuse in Institutions: Insights from Public Health, Regulatory Theory, and Australia's Royal Commission' (n 6) 94–5.

80 As summarised by the New South Wales Court of Appeal in *Lepore v New South Wales* (2001) 52 NSWLR 420, 424–5 [23]–[24] (Mason P).

81 Ibid; *Lepore* (2003) 212 CLR 511. The first instance decision in *Rich v Queensland* (2001) Aust Torts Reports 81-626 did not involve any allegations of fault on the part of the defendant institution, and the case was argued on the basis of non-delegable duty instead.

82 [2015] SASC 12, [166].

83 [2015] SASCFC 161, [33] (Kourakis CJ, Peek J agreeing at [263]). In contrast, Gray J found that there had been three breaches: failing to make inquiries when employing the abuser as a teacher (at [92]); inadequate supervision over the teacher (at [100]); and inadequate response to the abuse (at [106]).

84 *Prince Alfred* (2016) 258 CLR 134.

85 [2015] VSC 499, [152] (Rush J) ('*Erlich*').

liability to extend to that abuse.[86] In some cases where courts have been willing to recognise a duty to protect from harm by others, causation has nevertheless been difficult to prove, because the plaintiff could not prove, on the balance of probabilities, that further precautions would have prevented the intentional criminal conduct that took place.[87]

Of course, as intended by the *Amending Act*, if an organisation can show that it did take reasonable precautions, then no liability arises. This is why alternative avenues of liability (avenues B and C in Table 1) have been significant to plaintiffs in cases involving institutional child abuse – and why they are likely to remain so. The remainder of this article therefore traces the remaining legal landscape faced by potential plaintiffs in cases of institutional child abuse in Victoria. As we will demonstrate, if an organisation can demonstrate that it took reasonable precautions, this does not simply mean that there is no way it can be held liable for physical or sexual abuse of a child under its care. For this reason, the *Amending Act* – whose purpose is 'to clarify when an organisation can be held liable for child abuse perpetrated by its personnel'[88] – fails to achieve this aim.

IV THE *AMENDING ACT*'S RELATIONSHIP TO NON-DELEGABLE DUTY

Before charting the legal landscape of avenues B and C from Table 1, it is necessary to address a point of contention or confusion around non-delegable duty. This is partly because the *Amending Act* has been interpreted by some as creating or imposing a non-delegable duty, and partly because – as traced in Part II above – the *Betrayal of Trust* report which led to the *Amending Act* displayed some confusion regarding non-delegable duties. Specifically, it is necessary to clarify whether non-delegable duties can, and should, be understood as imposing strict liability.

In its 2018 formal response to the Royal Commission, the Victorian Government claimed to have 'already implemented in Victoria' several recommendations from the *Interim Report*, including 'the introduction of legislation to impose a non-delegable duty on certain institutions for institutional child sexual abuse'.[89] Yet, as we saw in Part II above, the Royal Commission in fact had two separate recommendations – first, for the creation of a non-delegable duty imposing strict liability on certain institutions but exempting others, and second, for the Victorian-style 'reverse onus' imposition of liability where reasonable precautions were not taken by the organisation. How then could the Victorian Government mistakenly claim that it had in fact followed the Royal Commission's first option, and created a non-delegable duty?[90]

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86 *Wrongs Act 1958* (Vic) s 51. Section 52 confirms that the onus for this element lies with the plaintiff.

87 See, eg, *Adeels Palace v Moubarak* (2009) 239 CLR 420, 440–2 [45]–[50] (the Court); *Jovanovski v Billbergia* [2011] NSWCA 135, [15]–[24] (Giles JA). See also *Oyston v St Patrick's College (No 2)* [2013] NSWCA 310 [71] (Tobias AJA).

88 Victoria, *Parliamentary Debates* (n 78) 4882 (Gabrielle Williams).

89 Victorian Government, *Victorian Government Response to the Royal Commission into Institutional Responses to Child Sexual Abuse* (n 53) 14.

90 The *Amending Act* was also said by some in the legal profession to 'impose a duty of care which is non-delegable': Mary Sheargold, 'Righting Wrongs: Victoria Takes Lead on Organisational Child Abuse Legislation', *Prolegis Lawyers* (Web Page, August 2017) <http://www.prolegis.com.au/insights_detail.php?Righting-Wrongs-Victoria-takes-lead-on-organisational-child-abuse-legislation-13>.

The *Amending Act* provides a very broad test for determining an individual's association with a relevant organisation:[91]

> **90 When is an individual associated with a relevant organisation?**
>
> (1) An individual associated with a relevant organisation–
>
> (a) includes but is not limited to an individual who is an officer, office holder, employee, owner, volunteer or contractor of the relevant organisation; and
>
> (b) if the relevant organisation is a religious organisation, includes but is not limited to a minister of religion, a religious leader, an officer or a member of the personnel of the religious organisation; and
>
> (c) if the relevant organisation has delegated, by means of contract or otherwise, the care, supervision or authority over the child to whom the claim relates to any organisation, includes but is not limited to an individual who is referred to in paragraph (a) or (b) in relation to the delegator organisation or the delegate organisation; and
>
> (d) if the relevant organisation has delegated, by means of contract or otherwise, the care, supervision or authority over the child to whom the claim relates to a specified carer and a permanent care order in respect of the child has not been made, includes but is not limited to–
>
> (i) an individual who is referred to in paragraph (a) or (b) in relation to the relevant organisation; and
>
> (ii) the specified carer.
>
> (2) An individual is not associated with a relevant organisation solely because the relevant organisation wholly or partly funds or regulates another organisation.

There are thus several reasons why the *Amending Act* could have been interpreted as imposing a non-delegable duty. First, section 90 expressly addresses situations where the care of a child has been delegated, and confirms that the statutory duty applies to *all* relevant organisations, and a broad range of individuals within those organisations. Second, the express inclusion of contractors alongside employees in section 90(1)(a) is also reminiscent of non-delegable duty. This is because non-delegable duty is typically raised (and thus considered judicially) as an extension of vicarious liability – more specifically as an exception to the 'first limb' of vicarious liability, namely the requirement in vicarious liability that the tortfeasor was an employee of the institution rather than a mere contractor. Third, one of the most well-known and common relationships where a non-delegable duty has traditionally been recognised is a school's non-delegable duty to its pupils. Indeed, courts have confirmed that non-delegable duty is the appropriate duty to be argued – as opposed to a general duty of care in negligence – in circumstances involving schools and pupils.[92] Of course, schools are one of the most common organisational contexts within which child abuse occurs.[93]

It is understandable, then, that the *Amending Act* could be interpreted as imposing a non-delegable duty, or extending non-delegable duty beyond a traditionally recognised category (school to pupils) to a much broader category of children in institutional contexts. Nevertheless, this would be a misinterpretation, and one based on a misunderstanding of the law of non-delegable duty.

Non-delegable duty is an especially complex and unclear area of tort law. Nonetheless, attempts have been made, by judges and scholars alike, to provide some

91 *Wrongs Act 1958* (Vic) s 90, as inserted by *Amending Act* s 3.

92 As discussed in Part V below.

93 31.8% of survivors who participated in private sessions in the Royal Commission had been abused in a school: *Royal Commission Preface and Executive Summary* (n 2) 11.

clarity in this area. In this regard, it is worth quoting at length the discussion provided in the 2002 *Review of the Law of Negligence* (commonly known as the '*Ipp Report*'):

> Although the precise nature of a non-delegable duty is a matter of controversy and uncertainty, one thing is clear: a non-delegable duty is not a duty to take reasonable care. …
>
> A second thing that is clear about non-delegable duties is that although they are a technique for imposing vicarious liability – that is, strict liability for the negligence of another – they are typically not thought of as a form of strict liability. It is often said, for instance, that although a non-delegable duty is not a duty of care, it is a duty 'to see that care is taken'. The implication of this statement is that there are steps (typically not specified) that can be taken to discharge a non-delegable duty. By contrast, there is nothing that an employer can do to prevent being subject to vicarious liability for the negligence of its employees. This is because it is a form of liability that attaches automatically to the relationship of employer and employee, and not to anything done by the employer in the course of that relationship. The only way of avoiding vicarious liability is not to be an employer.
>
> The problem that this situation creates is that courts often give the impression, when they impose a non-delegable duty, that they are not imposing a form of strict liability but rather a form of liability for breach of a duty committed by the employer in the course of being an employer. In other words, although it is clear that a non-delegable duty is not a duty of care, courts often seem to think that a non-delegable duty can only be breached by conduct on the part of the employer that is *in some sense faulty*. As a result, courts do not think that they need to justify the imposition of a non-delegable duty in terms of the justifications for the imposition of strict vicarious liability. Rather, they appear to think that justification is to be found in arguments for imposing liability for 'fault' (in some sense).
>
> Thirdly, it is important to understand that a non-delegable duty is a duty imposed on the employer alone. The worker is not, and cannot be, under the duty. The worker's duty is an ordinary duty to take reasonable care. And even though liability for breach of a non-delegable duty is functionally equivalent to vicarious liability, it is (unlike vicarious liability) liability for breach of a duty resting on the employer. In other words, whereas vicarious liability is secondary or derivative liability (in the sense that it is based on the liability of the negligent worker), liability for breach of a non-delegable duty is, in theory at least, a primary, non-derivative liability of the employer.[94]

It was precisely in response to this confusion, and in order to remedy it, that the *Ipp Report* recommended a legislative enactment clarifying that liability for non-delegable duty should be imposed strictly and equivalently to vicarious liability. As a result, Victoria enacted exactly such a provision in section 61 of the *Wrongs Act 1958* (Vic), which also confirmed that liability for non-delegable duty could extend beyond circumstances where negligence is the tortious conduct involved:

> **61. Liability based on non-delegable duty**
>
> (1) The extent of liability in tort of a person (the **defendant**) for breach of non-delegable duty to ensure that reasonable care is taken by a person in the carrying out of any work or task delegated or otherwise entrusted to the person by the defendant is to be determined as if the defendant were vicariously liable for the negligence of the person in connection with the performance of the work or task.
>
> (2) This section applies to a claim for damages in tort whether or not it is a claim for damages resulting from negligence …

Despite these clarifications, and ongoing scholarship confirming that non-delegable duty is best understood as imposing strict liability,[95] *Betrayal of Trust* referred explicitly

94 *Review of the Law of Negligence* (Final Report, September 2002) 167–8.

95 See, eg, Neil Foster, 'Vicarious Liability and Non-delegable Duty in Common Law Actions Based on Institutional Child Abuse' (Speech, Kelso Lawyers, 20 March 2015) ('Vicarious Liability and Non-delegable

to 'non-delegable duty of care', and listed 'the duty of care owed by an education authority to its students' as a recognised category of non-delegable duty.[96] Such language reveals a poor understanding of the law of non-delegable duty, and in the process muddles avenues A (duty of care in negligence) and C (non-delegable duty) for liability. The Royal Commission, in its *Interim Report*, did not repeat these slippages in its brief discussion of non-delegable duty.[97] It also explicitly reproduced judicial statements that non-delegable duty imposes strict liability upon the defendant.[98]

Hence the non-delegable duty proposed by the *Interim Report* was intended as an option for imposing *strict liability* upon institutions for abuse of children under their care. It was for this reason that the Royal Commission recommended that such a new statutory non-delegable duty would extend only to certain kinds of institutions and not others:

> Where a person associated with an institution fails to take reasonable care of a child in the care and control of that institution, by that person committing a criminal act against the child a strict liability regime will impose liability on the institution for that failure.
>
> To our minds it would be reasonable to impose liability on any residential facility for children, any school or day care facility, any religious organisation or any other facility that is operated for profit that provides services for children and that involves the facility having the care, supervision or control of children for a period of time. We do not believe that liability should be extended to not-for-profit or volunteer institutions generally – that is, beyond the specific categories of institutions identified.[99]

In contrast, in the *Amending Act* the Victorian Government created a statutory duty whereby an institution can avoid liability by proving that it took reasonable precautions. That is *not* the imposition of strict liability, and should not be characterised as a non-delegable duty.

With this confusion cleared, our remaining task in this article is to map the avenues of liability remaining for potential plaintiffs in this area. That is, if institutional liability is not possible under avenue A (a common law action in negligence) or under the new statutory duty, because the institution can prove that it took reasonable precautions and was not at fault, can the institution still be liable?

V AVENUES FOR STRICT LIABILITY

A victim of institutional child abuse, seeking to hold the institution liable, has two legal avenues when seeking an imposition of strict liability – vicarious liability, and non-delegable duty (corresponding to avenues B and C in Table 1). As we show in this section, while important developments have been made in these areas, unfortunately for both plaintiffs and institutions, many uncertainties and areas of confusion remain.

Duty'); Foster, 'Tort Liability for Churches' (n 16); Christian Witting, 'Breach of the Non-delegable Duty: Defending Limited Strict Liability in Tort' (2006) 29(3) *University of New South Wales Law Journal* 33; Silink and Stewart, 'Tort Law Reform' (n 6); Prue Vines, '*New South Wales v Lepore*; *Samin v Queensland*; *Rich v Queensland* – Schools' Responsibility for Teachers' Sexual Assault: Non-delegable Duty and Vicarious Liability' (2003) 27(2) *Melbourne University Law Review* 612.

96 *Betrayal of Trust* (n 25) 545.

97 *Interim Report* (n 4) 468–9.

98 '[T]he characterisation of a duty as non-delegable involves, in effect, the imposition of strict liability upon the defendant who owes that duty': ibid 469, quoting *Scott v Davis* (2000) 204 CLR 333, 417 (Gummow J).

99 Ibid 490.

A Vicarious Liability

As mentioned earlier, for a defendant to be held vicariously liable for the tortious conduct of another person, two conditions (known as 'limbs') must usually be satisfied: first, the tortfeasor must have been an employee/agent of the defendant employer/principal,[100] and second, the tortfeasor must have committed the tortious conduct in the 'course of employment' rather than during a 'frolic of their own'.[101] In particular because of this second limb, courts in Australia and other common law jurisdictions have traditionally been reluctant to recognise vicarious liability for intentional criminal conduct.[102] As we shall see from the relevant case law, this includes child abuse.

As mentioned above, while the Victorian Amending Bill was being debated in Parliament in late 2016, the High Court had just delivered a landmark judgment: *Prince Alfred*. This case involved child abuse by a housemaster employed at a boarding school. The case was ultimately decided on a different legal question – namely whether an extension of time under the relevant statute of limitations should be allowed – which the court answered in the negative, for reasons beyond the scope of our discussion here. However, the High Court took this opportunity to outline the suitable approach for determining vicarious liability in cases of institutional child abuse. In doing so, the Court was not only seeking to clarify an area of law which had previously been left in a messy and uncertain state – namely, in the *Lepore* decision of 2003[103] – but was also attempting to bring Australia more in step with developments in other common law jurisdictions.

In *Prince Alfred*, then, the High Court – specifically a majority consisting of French CJ, Kiefel, Bell, Keane and Nettle JJ – confirmed that in cases of institutional child abuse, the fact that the tortious act is intentional criminal conduct does not preclude it from attracting vicarious liability. Looking at case law in Australia as well as Canada and the United Kingdom, the Court contrasted circumstances where the criminal conduct was carried out in ostensible performance of the tortfeasor's employment (where vicarious liability may apply, as in *Lloyd v Grace, Smith & Co*), and circumstances where the employment merely provided an opportunity for the criminal conduct which was otherwise unconnected to it (where vicarious liability may not apply, as in *Deatons Pty Ltd v Flew*).[104] Between these two extremes, there may be cases where

> the role given to the employee and the nature of the employee's responsibilities may justify the conclusion that the employment not only provided an opportunity but was also the occasion for the commission of the wrongful act. By way of example, it may be sufficient to hold an employer vicariously liable for a criminal act committed by an

100 *Hollis v Vabu Pty Ltd (t/as Crisis Couriers)* (2001) 207 CLR 21.

101 *Deatons Pty Ltd v Flew* (1949) 79 CLR 370; *Bugge v Brown* (1919) 26 CLR 110.

102 See, eg, *Deatons Pty Ltd v Flew* (1949) 79 CLR 370; cf *Lloyd v Grace, Smith & Co* [1912] AC 716.

103 Each judge in *Lepore* (2003) 212 CLR 511 had a divergent interpretation of the law, making it impossible to extract a coherent ratio. Furthermore, three judges found it was possible for an educational authority to be vicariously liable for the intentional criminal wrong of their employee against a pupil: Gleeson CJ at 546 [74], Gaudron J at 561 [131], and Kirby J at 620–1 [326]; three found it was not: Callinan J at 625 [342], Gummow and Hayne JJ at 594 [243]; and one declined to address the conversation: McHugh J at 562 [136]. To be fair, we must also mention here that the Victorian Supreme Court decision in *Erlich* [2015] VSC 499 considered *Lepore* (2003) 212 CLR 511 and recognised vicarious liability as a possible avenue for imposition of liability in a case involving organisational child abuse. However, this case was not considered by the High Court in *Prince Alfred* (2016) 258 CLR 134 and has since been superseded by the latter.

104 *Prince Alfred* (2016) 258 CLR 134, 159 [80] (French CJ, Kiefel, Bell, Keane and Nettle JJ).

> employee where, in the commission of that act, the employee used or took advantage of the position in which the employment placed the employee vis-à-vis the victim.
>
> Consequently, in cases of this kind, the relevant approach is to consider any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim. In determining whether the apparent performance of such a role may be said to give the 'occasion' for the wrongful act, particular features may be taken into account. They include authority, power, trust, control and the ability to achieve intimacy with the victim. The latter feature may be especially important. Where, in such circumstances, the employee takes advantage of his or her position with respect to the victim, that may suffice to determine that the wrongful act should be regarded as committed in the course or scope of employment and as such render the employer vicariously liable.[105]

The two dissenting judges, Gageler and Gordon JJ, also explicitly conceded: 'We accept that the approach described in the other reasons as the "relevant approach" will now be applied in Australia',[106] suggesting that despite technically being obiter dictum, the passage above does represent a new consensus for the courts. This clear articulation of the applicable legal principles has been welcomed.[107] It has also brought Australian courts more in line with concurrent developments abroad.[108]

However, there still remains the question of the first limb of vicarious liability – the requirement that the tortfeasor was an employee of the institution. This limb was not discussed anywhere in *Prince Alfred*, nor in *Lepore*: it was not a live legal issue, as both cases involved employees of the respective institutions. The language used in the passage from *Prince Alfred* quoted above reflects the assumption that the 'relevant approach' applies in circumstances where the first limb has already been met, as the formulation refers to an 'employee' and 'employer'.

And yet, given that the new *Prince Alfred* test involves interrogating the particular circumstances of control, authority, etc, it is arguable that contractors would often (and justifiably) fail this test anyway, and vicarious liability would not be imposed. This new approach could therefore be applied as a wholesale approach to vicarious liability in cases of institutional child abuse, doing away with the need for any first limb to be satisfied as a separate requirement. But the High Court did not address, or even appear to contemplate, such a possibility in this case.

As a result, there still remains a degree of uncertainty within the area of vicarious liability – specifically, whether it is necessary for a plaintiff to prove that their abuser

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105 Ibid 159–60 [80]–[81] (French CJ, Kiefel, Bell, Keane and Nettle JJ).

106 Ibid 172 [130].

107 See, eg, David Seeman, 'The Law on Vicarious Liability: Recent Developments' (2017) 143 (November/December) *Precedent* 38. For commentary placing the decision of *Prince Alfred* (2016) 258 CLR 134 in the context of other common law jurisdictions, see Anthony Gray, 'Liability of Educational Providers to Victims of Abuse: A Comparison and Critique' (2017) 39(2) *Sydney Law Review* 167. Giliker even draws comparisons across common law, civil law, and Chinese legal contexts: Paula Giliker, 'Comparative Law and Legal Culture: Placing Vicarious Liability in Comparative Perspective' (2018) 6(2) *Chinese Journal of Comparative Law* 265.

108 For discussions of approaches to vicarious liability for institutional child abuse in other jurisdictions, such as the United Kingdom, Canada and New Zealand, see Foster, 'Vicarious Liability and Non-delegable Duty' (n 95); Paula Giliker, 'Analysing Institutional Liability for Child Sexual Abuse in England and Wales and Australia: Vicarious Liability, Non-delegable Duties and Statutory Intervention' (2018) 77(3) *Cambridge Law Journal* 506; Silink and Stewart, 'Tort Law Reform' (n 6); Gleeson, 'Why the Continuous Failures in Justice for Australian Victims and Survivors of Catholic Clerical Child Sexual Abuse?' (n 6); Ben Mathews, *New International Frontiers in Child Sexual Abuse: Theory, Problems and Progress* (Springer Nature Switzerland AG, 2019) ch 4; Kate Gleeson, 'Responsibility and Redress: Theorising Gender Justice in the Context of Catholic Clerical Child Sexual Abuse in Ireland and Australia' (2016) 39(2) *University of New South Wales Law Journal* 779.

was an employee of the institution rather than a mere contractor, when seeking to hold the institution vicariously liable for their abuse. In circumstances where a contractor was placed in a position involving 'authority, power, trust, control and the ability to achieve intimacy with the victim',[109] could the institution be held vicariously liable? This is an incredibly important question for victims of clerical child abuse given that ministers of religion occupy an ambiguous status in law, as possible employees of religious institutions. No Australian case involving clerical child abuse has yet tested this point.[110]

As this section has shown, the new test laid down by the High Court in *Prince Alfred* provides a useful guide for deciding vicarious liability in cases of organisational child abuse. But an important area of uncertainty remains – specifically, whether the first limb remains a separate test to be satisfied, in order for an institution to be held vicariously liable. If it does, then victims abused by contractors rather than employees face further difficulties. However, they still have one possible fall-back line of argument: non-delegable duty (avenue C in Table 1).

B Non-delegable Duty

As we saw in Part IV above, non-delegable duty has often functioned as an exception to the first limb of vicarious liability, albeit one confined to specific recognised relationships such as school and pupil, employer and employee, or hospital and patient. As we also saw, this area of law is complex and often causes confusion, including for judges. When we focus on the law of non-delegable duty in cases involving intentional criminal conduct – including cases involving institutional child abuse – this confusion continues.

Although *Prince Alfred* superseded *Lepore* as the leading authority on vicarious liability in cases of sexual abuse of children in educational institutions, it did not address non-delegable duty in any detail. At first instance, Vanstone J 'held, by reference to *New South Wales v Lepore*, that the non-delegable duty of care which the [defendant] owed to the [plaintiff] did not extend to a duty to protect him against the intentional criminal conduct of Bain, in the absence of fault of its own'.[111] The appeal was then apparently mis-argued on this issue:

> So far as concerns the [defendant's] non-delegable duty of care owed to the respondent, the respondent contends that *New South Wales v Lepore* was wrongly decided. However, submissions for the respondent do not address the matters required to invoke the authority of this Court to reconsider a previous decision. They are addressed to arguments which were rejected by the majority in *Lepore*.[112]

109 *Prince Alfred* (2016) 258 CLR 134, 160 [81] (French CJ, Kiefel, Bell, Keane and Nettle JJ).

110 The NSW Court of Appeal explicitly side-stepped this question in *Ellis* (2007) 70 NSWLR 565, 573 [32] (Mason P):

> Like the primary judge, I do not find it necessary to grapple with this issue at the interlocutory stage. Nor is it necessary to decide whether a priest in the Roman Catholic Church who is appointed to a parish is an employee in the eye of the law or otherwise in a relationship apt to generate vicarious liability in his superior …

111 *Prince Alfred* (2016) 258 CLR 134, 145 [25] (French CJ, Kiefel, Bell, Keane and Nettle JJ).

112 Ibid 147 [36]. Recalling the discussion in Part IV above, we can note the High Court's use of misguided language of 'non-delegable duty of care' in this brief treatment of the issue.

This means that the leading authority on the issue of non-delegable duty in cases of institutional child abuse is still *Lepore*.[113]

As already mentioned, *Lepore* involved pupils bringing actions against schools. The case therefore fell squarely within a recognised category or relationship of non-delegable duty. That category was explained by the High Court in *Commonwealth v Introvigne* ('*Introvigne*') as follows:

> The liability of a school authority in negligence for injury suffered by a pupil attending the school is not a purely vicarious liability. A school authority owes to its pupil a duty to ensure that reasonable care is taken of them whilst they are on the school premises during hours when the school is open for attendance.[114]

However, *Introvigne* had involved negligence causing personal injury – specifically, negligence which resulted in an unsafe school environment, leading to a student being accidentally injured. Thus, despite the quite broad wording of the non-delegable duty as expressed in *Introvigne*, the Court in *Lepore* questioned the applicability and extent of such a non-delegable duty in circumstances of intentional criminal conduct:

> It is not and, at no stage of these proceedings, has it been in issue that the duties owed by education authorities to their pupils are non-delegable. As already indicated, so much was established by the decision of this Court in *Introvigne*. What is in issue is the *nature* of a duty of that kind.[115]

This is broadly consistent with reasoning applied by courts in avenue A (negligence). As we have already seen above, the High Court has followed a similar trend in cases based on an action in negligence: where harm was caused by intentional criminal conduct by a third party, the scope, nature or extent of the defendant's duty of care may be in question. *Lepore* then extended this reasoning to avenue C (non-delegable duty). The desire to set limits on this non-delegable duty (as well as a slippage between a non-delegable duty and duty of care) can be observed in the concerns of Gleeson CJ:

> The proposition that, because a school authority's duty of care to a pupil is non-delegable, the authority is liable for any injury, accidental or intentional, inflicted at school upon a pupil by a teacher, is too broad, and the responsibility with which it fixes school authorities is too demanding.[116]

Using similarly problematic wording, Gaudron J also acknowledged the same need for a limit, even while acknowledging that a non-delegable duty imposes strict liability: 'To say that, where there is a non-delegable duty of care, there is, in effect, a strict liability is not to say that liability is established simply by proof of injury'.[117]

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113 The question of non-delegable duty was also side-stepped in *Erlich* [2015] VSC 499, in favour of an approach based on vicarious liability (even '[d]espite the admission that the School owed the plaintiff a non-delegable duty of care': at [119] (Rush J)).

114 *Commonwealth v Introvigne* (1982) 150 CLR 258, 269 (Mason J) ('*Introvigne*').

115 *Lepore* (2003) 212 CLR 511, 551 [99] (Gaudron J) (emphasis added). Similarly, McHugh J stated that '[a]ll parties to the present appeals accepted that the duty owed to the respective plaintiffs was non-delegable. The vital issue in all cases of non-delegable duties is to determine with precision what the duty is': at 570 [157]–[158]. Gummow and Hayne JJ also expressed 'the need for considerable caution in developing any new species of this genus of liability': at 596 [247].

116 *Lepore* (2003) 212 CLR 511, 533 [34] (Gleeson CJ). For a discussion of UK cases involving consideration of the 'scope' or 'limits' of non-delegable duty, see Paula Giliker, 'Vicarious Liability, Non-delegable Duties and Teachers: Can You Outsource Liability for Lessons' (2015) 31(4) *Tottel's Journal of Professional Negligence* 259.

117 *Lepore* (2003) 212 CLR 511, 552 [101] (Gaudron J).

The judicial reasoning in *Lepore* is significant for the purposes of our analysis. To begin, we can observe that despite following slightly different pathways or reasoning, four out of seven judges in *Lepore* stated that a school's non-delegable duty to its pupils does not extend to a duty of protection from intentional criminal conduct.[118] In this sense *Lepore* symbolises a 'dead end' of sorts: despite non-delegable duty typically functioning as an exception to the first limb of vicarious liability, for victims of intentional criminal harm – even those falling within a recognised non-delegable duty relationship like school to pupil – this exception is of no help.

However, there are factors which complicate this view. The first is that the reasoning followed by some judges in *Lepore* on the issue of non-delegable duty and its limits may be revisited in future. There are occasional inconsistencies in some of the reasoning followed (such as the slippage between non-delegable duty and duty of care), or tensions between the judgments.[119] There are also tensions between the limited view of non-delegable duty in some judgments from *Lepore*, and other cases in this area. For instance in his dissenting judgement McHugh J observed that a school's non-delegable duty 'extends to protecting the pupil from the conduct of other pupils or strangers and from the pupil's own conduct.'[120] This is consistent with the cases mentioned in Part III regarding the scope of a duty of care in negligence (avenue A of liability).[121] But read alongside the view that a school's non-delegable duty includes a duty to ensure that care is taken, including by teachers, we reach an absurd outcome: that a school owes a non-delegable duty to pupils, to ensure that teachers exercise reasonable care and do not cause harm to them through negligent conduct (through avenue C), and a school's duty of care in negligence extends to protecting pupils from intentional criminal harm by other pupils (avenue A) but not by teachers.[122]

The second complicating factor is the limited interpretation of non-delegable duty by some judges in *Lepore*, that liability based on such a duty can only arise out of a failure to take reasonable care – that is, out of negligent conduct by someone, whether the school or its employees or contractors:

> [T]o describe the duty of a school authority as non-delegable is not to identify a duty that extends beyond taking reasonable care to avoid a foreseeable risk of injury. It is simply to say that, if reasonable care is not taken to avoid a foreseeable risk of injury, the school

118 Ibid 533 [34] (Gleeson CJ), 603 [270] (Gummow and Hayne JJ), 624 [340] (Callinan J).

119 The majority, consisting of Gleeson CJ, Gummow, Hayne and Callinan JJ held that a school authority's non-delegable duty does not extend to intentional criminal conduct against a pupil by a teacher employed by the authority. Callinan J did not even recognise that a school authority owes any non-delegable duty to its pupils, which would attract strict liability on the part of the school: at 624 [30]. Kirby J sidestepped the issue in favour of imposing vicarious liability: at 609 [293]. McHugh dissented and held that a duty was owed, even in the context of intentional criminal conduct: at 572 [164]. Gaudron J described the nature of a non-delegable duty, but neglected to apply it to the facts of the case at hand, and seemed to assert that a non-delegable duty did not impose strict liability: at 552 [103]. For commentary on the court's reasoning on non-delegable duty in *Lepore*, see Vines (n 95); Foster, 'Tort Liability for Churches' (n 16); Jane Wangmann, 'Liability for Institutional Child Sexual Assault: Where Does *Lepore* Leave Australia?' (2004) 28(1) *Melbourne University Law Review* 169.

120 *Lepore* (2003) 212 CLR 511, 565 [143] (McHugh J).

121 For a discussion of cases involving the limits or extend of a duty owed by a school to its pupils, particularly in the context of injuries caused by carelessness rather than intentional criminal conduct, see Foster, 'Vicarious Liability and Non-delegable Duty' (n 95).

122 Silink and Stewart similarly surmise from *Lepore* (2003) 212 CLR 511 the nonsensical result that an institution could be held liable under a non-delegable duty for negligent conduct by an independent contractor which results in a child being sexually abused by someone else, but not liable for sexual abuse by the contractor themselves: Silink and Stewart, 'Compensation for Survivors' (n 16) 355.

> authority is liable notwithstanding that it engaged a 'qualified and ostensibly competent' person to carry out some or all of its functions and duties.[123]

This view of non-delegable duty effectively reduces it to a narrow exception to the first limb of vicarious liability, and only where vicarious liability arises from carelessness (negligence by, say, a contractor).[124] But of course since *Prince Alfred*, we now know that vicarious liability *can* arise even for intentional criminal conduct, depending on the circumstances of the case. What might this mean for possible re-interpretations of non-delegable duty in the future? We are yet to see.[125]

To understand the final problem with *Lepore*'s reduction of non-delegable duty to applying only in circumstances of carelessness (negligence by someone, whether an employee or a contractor) we must revisit the *Ipp Report's* recommendation (in Part IV above) regarding non-delegable duty, and the resulting legislative provision in Victoria. Specifically, recall section 61(2) of the *Wrongs Act 1958* (Vic) which provides that section 61 ('Liability based on non-delegable duty') 'applies to a claim for damages in tort whether or not it is a claim for damages resulting from negligence'. Thus, Victoria has legislation specifically contemplating that liability in non-delegable duty may arise in circumstances other than negligent conduct.[126] No such provision exists in the *Civil Liability Act 2003* (Qld) in Queensland, where *Prince Alfred* arose, and the equivalent provision in New South Wales legislation[127] did not exist when the case of *Lepore* arose.

Thus, despite it still being true that no victim of institutional child abuse has successfully relied on an argument of non-delegable duty (avenue C), a question mark effectively still remains over whether such plaintiffs – and Victorian ones in particular – may in future have a chance of encouraging courts to revisit the non-delegable duty 'dead end' of *Lepore*. Of course, even in the most optimistic of scenarios, this avenue is still only open to those victims who were abused in institutional contexts where a

123 *Lepore* (2003) 212 CLR 511, 553 [105] (Gaudron J). A similar summary is provided by Gummow and Hayne JJ at 599 [257]:

> A duty to ensure that reasonable care is taken is a strict liability. There is a breach of the duty if reasonable care is not taken, regardless of whether the party that owes the duty has itself acted carefully. Not only is the liability strict, it can be seen to be a species of vicarious responsibility. Employers, hospitals, school authorities, all of whom owe a non-delegable duty, will be held liable for the negligence of others who are engaged to perform the task of care for a third party – no matter whether the person engaged to provide the care is a servant or an independent contractor …

124 This view also arguably misunderstands the historical development of non-delegable duty as not merely an exception to the first limb of vicarious liability. Witting, in his detailed analysis of vicarious liability and non-delegable duty, observes that '[d]espite the all too frequent failures to distinguish between … vicarious liability and [non-delegable duty], doctrinal analysis and evidence of court practice support the view that they are distinguishable': Witting (n 95) 46.

125 Our aim in this article is not necessarily to set out all the grounds for such a hypothetical argument – which would undoubtedly encompass questions of policy, the similarities of underlying rationales and significant factors (like vulnerability, control, etc) as relevant to these various duties or avenues of liability. Our purpose here is merely to canvass whether such avenues may exist at all.

126 This divorcing of non-delegable duty from negligence was one of the concerns expressed by Gummow and Hayne JJ in *Lepore* (2003) 212 CLR 511: 'to hold that a non-delegable duty of care requires the party concerned to ensure that there is no default of any kind committed by those to whom care of the plaintiff is entrusted would remove the duty altogether from any connection with the law of negligence': at 601 [266]. For an in-depth analysis of the connection between non-delegable duty and negligence generally, see Witting (n 95). Witting ultimately concludes that 'there is no necessary connection between the [breach of non-delegable duty] and the tort of negligence. … [Non-delegable duty] appears to be distinguishable from both negligence *and* nuisance': at 42.

127 *Civil Liability Act 2002* (NSW) s 5Q.

non-delegable duty relationship is already recognised – such as a hospital to its patients, an employer to its employee, or a school to its pupils.

VI CONCLUSION

This article has proceeded as follows. Part II narrated the recent historical context of Victoria's *Wrongs Amendment (Organisational Child Abuse) Act 2017* – referred to throughout the article as the *Amending Act*. We saw how this reform was enacted as a direct response to *Betrayal of Trust*, and that during its debating and enactment, the Victorian parliament effectively ignored concurrent developments in both the High Court and the Royal Commission, specifically the latter's *Interim Report*. In order to demonstrate what was mistaken or problematic about the *Amending Act*, we have analysed it in the context of the various potential avenues of establishing liability for institutional child abuse – as set out in Table 1 in our Introduction. Part III examined in detail the *Amending Act*'s creation of a statutory duty of care, and the presumption (with its 'reverse onus' of proof) of breach by the organisation. In Part IV we compared the new statutory duty with the general law of non-delegable duty, demonstrating why references to the *Amending Act* as creating or extending a non-delegable duty were understandable but misguided, due to their misunderstanding or ignoring the strict nature of liability under common law non-delegable duty. Part V of the article then traced remaining avenues, based on an imposition of strict liability. This included first, the current position regarding imposition of vicarious liability, based on the new 'relevant approach' set out by the High Court in *Prince Alfred*; and second, the complex situation regarding non-delegable duty and intentional criminal conduct, based on the diverse judgments from *Lepore* and questions about their applicability in present day Victoria.

Mapping the common law context of the *Amending Act* has thus enabled us to outline the various potential avenues of liability for survivors of organisational child abuse seeking to hold those institutions liable for their abuse. These avenues, and the main hurdles of each, can now be summarised thus (with a new avenue labelled 'S' for statutory duty of care):

S. Negligence action based on statutory duty of care as set out in the newly inserted Part XIII of the *Wrongs Act 1958* (Vic). This avenue applies to abuse by a broad range of individuals affiliated with the organisation, and presumes a breach by the organisation. The organisation can avoid liability if it can prove (under the 'reverse onus') that it took 'reasonable precautions' to prevent the abuse.

A. Common law action in negligence, which would rely on arguing that the institution's duty of care, in its nature/scope/extent, covered protection from intentional criminal conduct by others. Parallel precedents may exist, depending on the specific facts, but none have yet involved organisational child abuse. The plaintiff must also prove that the organisation breached the duty of care by failing to take reasonable care, and that this breach caused harm that was not too remote.

B. Vicarious liability (for battery), applying the new test from *Prince Alfred*. The plaintiff needs to establish that the employee abuser was placed in such a position vis-à-vis them that the employment provided the occasion for the abuse, and was taken advantage of by the abuser. (This depends on factors like

authority, power, trust, control and the ability to achieve intimacy with the victim, so will depend on all the circumstances of the case.) It is not clear from *Prince Alfred*, but this test may only apply to employees. So, the first limb requirement for employee status may still need to be satisfied, with the result that victims abused by a contractor may be excluded.

C. Non-delegable duty, the least accessible avenue of all. This avenue was not addressed in *Prince Alfred*, so the leading authority is *Lepore*, where a majority of the court indicated that the non-delegable duty owed by a school to its pupils should not extend to protection from intentional criminal harm by a teacher. The reasoning in this case may merit revisiting, particularly in light of *Prince Alfred*, and its applicability to Victoria is somewhat uncertain. Non-delegable duty typically functions as an exception to the first limb of vicarious liability, as a way to attribute liability to an institution, for acts of contractors. Nonetheless, if this avenue could be argued, it would still only be open to those plaintiffs abused in circumstances of a recognised category of non-delegable duty, for instance as a pupil in a school or a patient in a hospital.[128]

Overall, then, we can see that some plaintiffs will still potentially fall between the cracks of the various avenues of liability. The classic example of this would be clerical child abuse where the religious institution can prove that it took reasonable precautions: if the plaintiff cannot establish that their clergy abuser was an employee[129] (or convince the court that the *Prince Alfred* test disposed of the necessity to pass the 'first limb'), then they will not be able to rely on the fall-back argument of non-delegable duty as for instance a pupil in a school may attempt to do. Why this inequality between victims, especially if both situations involved similar degrees of authority, control, and intimacy in the abuser's position?[130] Statistics from the Royal Commission demonstrate an alarming incidence of clerical child abuse or other kinds of child abuse that occurred outside school settings.[131]

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128 It may also be argued that a fifth avenue exists, in rare circumstances where an organisation can be held directly liable for the actions of an abuser on principles similar to agency. This was the case in *Erlich* [2015] VSC 499, where the court held that the actions of a school principal who exercised a great degree of power and discretion 'should be attributed to the School': at [91] (Rush J). This was justified on the basis that

> [t]he power, control and authority of [the abuser] within the School was unrestrained and unrestricted. … she was acting 'within her appropriate sphere', which was the day to day administration and operations of the School. In that sense, her misconduct was the misconduct of the School and thus the School is directly liable …

at [118] (Rush J). Such reasoning was taken from cases where courts had considered whether an individual represented the 'mind and will' of an organisation, though none of these cases involved organisational child abuse. Notably, the decision in *Erlich* [2015] VSC 499 was handed down after the first instance decision of *A, DC v Prince Alfred College* [2015] SASC 12, and before the High Court's appeal decision in *Prince Alfred* (2016) 258 CLR 134, so its continued relevance may be in question. See, however, one recent discussion advocating the use of agency principles in the reconceptualisation of liability for organisational child abuse: Gray (n 107).

129 On the question of whether clergy may be considered employees for the purpose of vicarious liability, see Foster, 'Vicarious Liability and Non-delegable Duty' (n 95); Foster, 'Tort Liability for Churches' (n 16).

130 For a discussion of how and why common law non-delegable duty might be extended to cover religious institutions, see Foster, 'Vicarious Liability and Non-delegable Duty' (n 95); Foster also examines cases involving clergy, from before *Prince Alfred* (2016) 258 CLR 134, and comments that 'most would seem to have features which would … create vicarious liability in Australia today': 'Tort Liability for Churches' (n 16) 30.

131 31.8% of survivors who participated in private sessions in the Royal Commission had been abused in a school (as noted above), while 14.5% had been abused in religious institutions. Further, '[o]f those survivors who told [the Royal Commission] about the types of institution where they were abused, 58.6 per cent said they were

We know that the Child Safe Standards, important as they are, will not successfully prevent institutional child abuse in absolutely all cases (that is, even where institutions have taken reasonable precautions against such abuse). It is problematic to say the least, that survivors in such circumstances – that is, stepping outside the fault-based avenues of liability (S and A) should face uncertain, and possibly different, legal hurdles and complexities based on distinctions like employee/contractor or whether the abuse took place within a school context.

Likewise, the newly established National Redress Scheme for Institutional Child Sexual Abuse provides a valuable mechanism for survivors of historical child abuse to access compensation. But certain categories of victim are excluded, while those with 'serious criminal convictions' face 'special assessment' hurdles in attempting to claim redress.[132] In addition, since the National Redress Scheme applies only to victims of historical child abuse (where the abuse occurred before 1 July 2018),[133] and the *Amending Act* applies prospectively from 1 July 2017, any such victim of historical child abuse cannot pursue litigation under avenue S above. Potential plaintiffs who effectively 'fall through the cracks' of the National Redress Scheme and the *Amending Act*, face the ongoing complexity of the remaining avenues of liability (avenues A, B and C).

We have already seen that the Victorian Government (in its factsheet)[134] and the Attorney-General (in his second reading speech)[135] have claimed that the Amending Bill provides clarity to both plaintiffs and organisations. In particular, the parliamentary discussions made much of the 'appropriate balance' struck by the 'reverse onus' – accompanied by statements that if an organisation can show it took reasonable precautions, it will not be held liable.[136] But this is not true, because actions based on

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sexually abused in an institution managed by a religious organisation': *Royal Commission Preface and Executive Summary* (n 2) 11.

132 *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) s 63. See also Kate Seear and Suzanne Fraser, 'When it Comes to Redress for Child Sexual Abuse, All Victims Should be Equal', *The Conversation* (online, 1 November 2017) <https://theconversation.com/when-it-comes-to-redress-for-child-sexual-abuse-all-victims-should-be-equal-86456>. This is despite the Royal Commission's recommendation that particular communication strategies be adopted to raise awareness of the scheme among victims 'who might be more difficult to reach, including: … people in correctional or detention centres': *Interim Report* (n 4) 39, and notwithstanding the fact that 10.4% of survivors who participated in private sessions with the Royal Commission did so while in prison: Ibid 9. Of course, this is only one of many points of difference between the Royal Commission's recommendations and the National Redress Scheme as it stands: see Kathleen Daly and Juliet Davis, 'National Redress Scheme for Child Sexual Abuse Protects Institutions at the Expense of Justice for Survivors', *The Conversation* (online, 7 March 2019) <https://theconversation.com/national-redress-scheme-for-child-sexual-abuse-protects-institutions-at-the-expense-of-justice-for-survivors-112954>.

133 The National Redress Scheme also only applies to historical abuse that occurred before the Scheme's start date, namely 1 July 2018: *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) s 14(1)(c). For those who suffered historical abuse, before the *Amending Act* came into effect, they may have access to the Redress Scheme, but they cannot rely on avenue S for establishing liability. But our discussion of the other avenues of liability still holds for these survivors.

134 Department of Justice and Community Safety (n 55).

135 *Second Reading Speech* (n 1).

136 The language of 'appropriate balance' was used by Mr McGuire in Victoria, *Parliamentary Debates*, Legislative Assembly, 7 December 2016, 4878 (Frank McGuire) and by Mr Eideh in Victoria, *Parliamentary Debates*, Legislative Council, 21 March 2017, 1499 (Khalil Eideh). Ms Williams observed that 'the government has been careful to ensure the bill is fair to both victims and organisations': Victoria, *Parliamentary Debates* (n 78) 4882 (Gabrielle Williams). As Mr Pakula summarised in the *Second Reading Speech,* 'The bill therefore balances the interests of plaintiffs and defendants. … For defendants … if an organisation proves it took "reasonable precautions" to prevent the abuse, that organisation will not incur liability': (n 1) 4537. Likewise, Mr Melhem stated that '[i]f [organisations] have done everything within their scope and within their power to prevent these

the statutory duty, or on negligence, are not the only possible avenues for liability to attach to the organisation. By casually importing a model of 'vicarious liability' with its 'reasonable precautions' exception from discrimination law, *Betrayal of Trust* ignored the complexities and rationales of tort law with its avenues of fault-based or strict liability. In following the model proposed in *Betrayal of Trust*, the *Amending Act* appeared to be addressing the difficulties in this area of law – such as liability for contractors as well as employees, or the difficulties of proving breach – but it did so without considering how each hurdle arises within its particular common law setting. As a result, the *Amending Act* failed to provide the clarity claimed by government officials.

Of course, Victoria's approach was subsequently picked up by the Royal Commission and listed in the *Interim Report* as a recommendation to states, explicitly encouraged regardless of whether states also adopted the separate recommendation to enact a statutory (strict liability) non-delegable duty owed by a range of institutions responsible for the care or supervision of children. (As we saw, Victoria then reported that it had already acted upon the *Interim Report*'s recommendations by enacting a non-delegable duty, misunderstanding the strict liability nature of non-delegable duty both at common law and in the *Interim Report*.) In its eagerness to lead legislative reform in this area, then, has Victoria's error indirectly led other jurisdictions astray?

New South Wales offers an interesting contrast here. Its *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018* (NSW) (most of the provisions of which came into force on 26 October 2018) provides two main mechanisms for survivors of institutional child abuse seeking to hold the institution liable: first, a statutory duty of care and presumption of breach, similar to Victoria's model though with an expanded list of factors to be considered in determining whether the organisation took reasonable precautions;[137] and second, a new approach to vicarious liability, which replicates the test from *Prince Alfred* but explicitly extends this both to employees *and* those 'akin to' employees. Section 6G specifies: 'An individual is akin to an employee of an organisation if the individual carries out activities as an integral part of the activities carried on by the organisation and does so for the benefit of the organisation'.[138] The New South Wales legislation therefore clarifies avenues of both fault-based liability (with a reverse onus, to the benefit of plaintiffs) and strict liability (extending *Prince Alfred* to circumstances where a departure from the first limb is justified based on the abuser's role within the institution). Of course, this is only one possible way forward – other approaches are possible, whether based on the Royal Commission's recommended strict liability non-delegable duty, or approaches based on other jurisdictions.[139]

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things from happening and have taken all of the necessary actions, then they have nothing to fear': Victoria, *Parliamentary Debates*, Legislative Council, 21 March 2017, 1491 (Cesar Melhem).

137 *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018* (NSW) s 6F(4).

138 This approach is consistent with the more recent approaches taken by courts in other common law jurisdictions: see above n 104.

139 Wright suggests that recommendations from inquiries like the Royal Commission often become more likely to be implemented over time: Katie Wright, 'Remaking Collective Knowledge: An Analysis of the Complex and Multiple Effects of Inquiries into Historical Institutional Child Abuse' (2017) 74 *Child Abuse and Neglect* 10, 18. Thus it may be that the Royal Commission's recommended statutory strict liability non-delegable duty for organisations caring for children gains popularity over time, rather than being forgotten in light of the alternative approaches already implemented in Victoria and New South Wales. At the time of publication, amendments in other jurisdictions have unfolded as follows: *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* (WA); *Civil Law (Wrongs) (Child Abuse Claims Against Unincorporated Bodies) Amendment*

While offering a detailed argument of the need for further reforms in light of the *Amending Act* and its place alongside common law principles, we have not advocated any specific articulation that such reform might take. There are examples from other common law jurisdictions, which Australian courts or legislatures might proceed to follow, and there is a wide range of policy factors or other rationales which could guide such decisions. Our task has simply been to demonstrate how Victoria's *Amending Act* is less helpful than it first appears. The fact remains that Victorian survivors of institutional child abuse and institutions alike are still awaiting clarity in this area.

Act 2018 (ACT); the Queensland Government has been receiving submissions on its Civil Liability (Institutional Child Abuse) Amendment Bill 2018 (Qld); the Tasmanian Government has been receiving public submissions on its Justice Legislation (Organisational Liability for Child Abuse Amendment Bill 2019 (Tas); and the Northern Territory Government has released an Options Paper: Department of Attorney-General and Justice (NT), *Options for the Implementation in the Northern Territory of the Civil Litigation Reforms Recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse* (Options Paper, September 2018). The relevant Victorian law remains as analysed in this article.