Justice, Strategy and Policy
Department of Justice
GPO Box 6,
SYDNEY NSW 2001

By email: policy@justice.nsw.gov.au

Dear Madam/Sir,

RE: NSW Government Consultation in relation to the civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.

We are legal academics in the Law Faculty at the University of Technology Sydney. Dr Silink is also a barrister practising at the bar in New South Wales. We make this submission in our personal capacities and not on behalf of the UTS Faculty of Law.

We have research interests and experience in relation to tort law reform generally and specifically in relation to the proposed civil litigation reforms made by the Royal Commission Into Institutional Responses to Child Sexual Abuse ("the Royal Commission") in its 2015 Redress and Civil Litigation Report ("the Report"). In this context we have published previously in relation to the nature of the proposed statutory reforms and the nature of institutional liability for child sexual abuse. We refer to our previous publications in this area:

We welcome the opportunity to contribute to these discussions as a starting point for the reform of civil liability for institutional child sexual abuse. In this submission we focus upon the proposed statutory reforms and in particular, their proposed form and effect. In this regard, our submission is directed primarily to Issue A of the Consultation Paper.

The Royal Commission has recommended the introduction of two new statutory liabilities, both of which are to have prospective operation only, to provide a cause of action for survivors of child sexual abuse in Australia. One is a statutory non-delegable duty upon certain institutions. The other is a statutory liability upon all institutions for child sexual abuse unless the institution establishes that it took reasonable care to prevent the abuse, the so-called 'reverse onus of proof'. These are examined in more detail below. However, in summary we submit as follows:

Summary of Submission

1. **Re proposed non-delegable duty**: in order to achieve the form of liability proposed, it is unnecessary to draft it in terms of a statutory non-delegable duty. A new statutory liability can be imposed to the same effect in clear terms that do not give rise to questions as to the applicability of common law limitations on the scope of the liability. The negligence-based 'non-delegable duty' at common law does not currently apply to criminal wrongdoing. Existing case law will not assist in the interpretation or application of the proposed statutory liability, and the development of the common law may be affected by the new statutory liability if described by reference to the common law doctrine.

2. **Re proposed reverse onus of proof**: the proposed statutory liability may result in denying vicarious liability of an institution where on the same facts, liability might be found at common law because there is no defence at common law. Is the common law action to be taken to be abrogated by this statutory action, or will the common law be available to a plaintiff if the institution could avoid statutory liability by pointing to steps taken to prevent abuse? This should be considered directly and addressed in the legislation. In another respect, the proposed liability may be broader than vicarious liability at common law if there is no requirement for any particular connection between the abuse and the institution beyond the requirement for the abuser to be an 'associate' of the institution.

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1 Redress and Civil Litigation Report, above n 1, 77, Recommendation No. 89, see also discussion at 489-491.
2 As would be the case at common law in the jurisdictions which have expanded the application of vicarious liability beyond strict application of the Salmond test: Various Claimants v Catholic Child Welfare [2013] 2 AC 1; Bazley v Curry [1999] 174 DLR (4th) 45.
1. **A Non-Delegable Duty**

In its Report, the Royal Commission recommended that:

> [S]tate and territory governments should introduce legislation to impose a non-delegable duty on certain institutions for institutional child sexual abuse despite it being the deliberate criminal act of a person associated with the institution.3

It is proposed that it should apply to certain institutions only.4 These include residential facilities for children, school or day care facilities, disability or health services or religious organisations or other facilities operated for profit having care, supervision or control of children for a period of time. It is not proposed that the duty apply to foster care or kinship care on the basis that the institution that arranges these forms of care does not have the degree of supervision or control over the home environment to justify the imposition of a non-delegable duty.5 Nor is it proposed that the duty would apply to community not-for-profit or volunteer institutions offering cultural, social and sporting activities.6 The Commission noted that these institutions do not provide particularly high-risk services and so excluding these organisations is designed to avoid discouraging valuable cultural, social and sporting association in the community, particularly as the risk of liability or the cost of insurance might force such organisations to cease providing these services.7

It is clear from the discussion in the Report8 that the proposed duty is modelled upon the minority view in *Lepore* and is intended to be a statutory form of the common law non-delegable duty. A statutory form of institutional liability for child sexual abuse would undoubtedly provide a clear pathway for future abuse survivors to establish liability and entitlement to damages. However, we make three observations with respect to the form and scope of the proposed statutory liability expressed as a *non-delegable duty*:

(i) there could be potential consequences for the development of the common law from enacting a liability expressed in the form of the negligence-based, common law, 'non-delegable duty', applying to criminal wrongdoing in a manner which is quite different to the scope of the duty at common law;

(ii) the scope of the proposed duty may be broader than the scope of institutional liability imposed in other common law jurisdictions by means of vicarious liability;

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3 Ibid, 77 and 495, Recommendation No. 89, see also discussion at 489-491.
4 Redress and Civil Litigation Report, above n 1, 490.
5 Ibid, 493.
6 Ibid.
7 Ibid, 491.
8 Ibid, 488-493.
(iii) it is unnecessary to achieve the liability proposed to cast it in terms of a statutory non-delegable duty. The liability can be imposed as a new statutory duty in clear terms that do not give rise to questions as to the applicability of common law limitations on the scope of the liability.

These issues are considered below.

The common law non-delegable duty is a 'sub-species' of negligence: the proposed statutory liability would be an unprecedented application of non-delegable duties to criminal intentional wrongdoing

The non-delegable duty has been previously described as a 'sub-species of negligence law.' At common law, it functions to by-pass the restrictions on vicarious liability insofar as it only applies to employees, and renders an employer liable for negligence of an independent contractor in particular circumstances where the law has come to accept that an employer cannot avoid liability in negligence by 'contracting out' its duties to independent contractors. Accordingly the liability in negligence of hospitals to patients, and schools to pupils etc, is regarded as a personal duty to ensure that reasonable care is taken by whoever discharges its duties; employee or contractor. A liability in negligence for unintentional harm to a plaintiff is avoided where the defendant can show that it did not breach its duty to take reasonable care, and took all reasonable steps required of it in the circumstances to avoid harm. In other words, at common law, the non-delegable duty visits directly upon the primary employer or institution this responsibility to ensure that all reasonable steps were taken by the employee or contractor to avoid unintentional harm.

Whether the tort of negligence can extend to intentional wrongdoing per se, is not settled at common law. However, regardless of the debate in this regard, the application of a negligence-based duty – the non-delegable duty - to criminal intentional wrongdoing is particularly contentious and was rejected categorically by the majority in the High Court in Lepore. As already noted, in Lepore Gleeson J12 (with whom Callinan J agreed13) expressed concern that criminally intentional conduct introduced a 'factor of legal relevance' which took it outside the scope of the duty of care in negligence and the non-delegable duty. It would be a profound shift in the scope of the insurance risk.

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10 See Peter Handford, 'Intentional Negligence: A Contradiction in Terms?' (2010) 32 Sydney Law Review 29; R Stevens, Torts and Rights (Oxford University Press, 2007) 122-123. See also Neil Foster, 'Vicarious Liability and Non-Delegable Duty in common law actions based on institutional child abuse' http://works.bepress.com/neil_foster/92. On the other hand, in the context of civil liability reform following the Ipp Panel recommendations, intentional torts were not considered to be within the scope of negligence: Review of the Law of Negligence Final Report, Commonwealth of Australia, Canberra, 2002 at [1.14]. See also the apparent rejection of it in Williams v Miloim (1957) 97 CLR 465, 470 per Dixon CJ, McTiernan, Williams, Webb and Kitti JJ. In Various Claimants v Catholic Child Welfare Society (2013) 2 AC 1, Lord Phillips also noted at 21 that 'sexual abuse can never be a negligent way of performing a requirement of employment.'
13 Ibid 624.
common law doctrine to render institutions liable for criminally intentional conduct regardless of any steps taken to avoid such harm. In effect, pursuant to the proposed statutory liability, institutions will be made liable as insurers of this form of harm to a child irrespective of actions taken to avoid it, and well beyond the existing bounds of the common law. Liability for abuse of a child in the care of an institution to which the liability applies will follow regardless of any steps taken by the institution.

We stress that this particular submission is not seeking to address the merits of this proposed liability – rather it focuses upon the significant difference in its scope over the common law doctrine bearing the same name, and the implications of using the common law form for the statutory liability.

Expressed as a statutory non-delegable duty applying to such criminally intentional conduct, there is the potential for it to influence the development of the common law doctrine through the process of analogical reasoning by which courts have regard to statutory context in the development of common law.14 As noted by Leeming JA writing extra-judicially:

In short, statutes are an under-appreciated component in the academic literature on the Australian legal system. Their role lies not merely in stating norms of the law, but in influencing judge-made law and as a critical driver of change and restraint in the Australian legal system.15

The extension of civil liability for negligence at common law arising from criminally intentional conduct would be a profound shift in tort law. This is not to suggest that such change to the common law would necessarily occur, but there is the potential for influence upon the common law from such statutory development.

In short, framed as a statutory ‘non-delegable duty,’ the proposed liability would lack coherence with the non-delegable duty in other common law jurisdictions and there are no apparent advantages to using this form to achieve the desired aim of imposing strict liability upon certain institutions for child sexual abuse (with or without limitation upon the circumstances of such abuse).

The proposed non-delegable duty is broader in application than at common law

As noted, the proposed statutory non-delegable duty has no comparable statutory provision or common law counterpart in other common law jurisdictions, as no jurisdiction imposes institutional liability for child sexual abuse by means of a non-

15 Leeming, above n 97, 1002-1003.
delegable duty. Institutional liability has developed in other common law jurisdictions by means of vicarious liability. Accordingly, the scope of the proposed liability can only be compared with the scope of vicarious liability in other jurisdictions. In making that comparison, the proposed statutory non-delegable duty may be broader in scope in two respects.

First, the proposed duty is intended to apply to a greater range of workers than historically within the scope of vicarious liability. The Royal Commission has proposed that the institutions subject to the proposed duty may be liable for the acts of 'members or employees' defined broadly to cover almost any working relationship:

an institution's 'members or employees' should be defined broadly to include persons associated with the institution, including officers, office holders, employees, agents and volunteers. It should include persons contracted by the institution. It should also include priests and religious [sic] associated with the institution.¹⁶

There is much to commend the application of any proposed statutory duty to a broader range of workers who may be engaged or utilised by an institution in the care of children than the limited scope of vicarious liability at common law given the increasing diversity of working relationships.¹⁷ At common law, vicarious liability remains limited to liability for acts of employees. The proposed statutory extension of the range of persons for whom an institution may be liable effectively by-passes these historical limitations to the relationships to which vicarious liability applies. Of course, the non-delegable duty of care at common law is not subject to this limitation and already applies to independent contractors, and this may be a significant motivation behind basing the proposed statutory liability upon the non-delegable duty. However, as discussed, this can be adopted, and achieved, without reference to the common law doctrine.

Secondly, the proposed duty may be considerably broader in scope than vicarious liability as developed in Canada and England. This can be illustrated by example. If an institution employs a worker in an area with no or very limited responsibility for the care of children, such as a cleaner, gardener or office worker, and that person sexually abuses a child in the care of the institution, will the institution be liable?

This question has been considered directly in other jurisdictions. For example, under Canadian law, it has been held that public policy considerations require a 'strong connection' between what the employer was asking the employee to do (the risk created by the employer's enterprise) and the wrongful act,¹⁸ in the sense that the employer significantly increased the risk of the harm by putting the employee in his or her

¹⁶ Redress and Civil Litigation Report, above n 1, 493.
position and requiring him to perform the assigned tasks.' In *Bazley*, McLachlin J observed that:

Where vicarious liability is not closely and materially related to a risk introduced or enhanced by the employer, it serves no deterrent purpose, and relegates the employer to the status of an involuntary insurer.

The court noted that otherwise, liability would be unlikely to have a significant deterrent effect as 'short of closing the premises or discharging all employees, little can be done to avoid the random wrong.' In *EB v Order of the Oblates of Mary Immaculate of the Province of British Columbia*, the Supreme Court of Canada refused a claim to make the school vicariously liable for the sexual abuse of a child by a baker who was employed by the school. The school had given the baker no responsibility for or authorisation to have contact with children. It was held that 'mere opportunity' to abuse a child was not sufficient to impose liability. The same policy question arises under English law and similarly requires a close connection between the abuse and the employee's responsibilities to give rise to liability.

Under Australian law, the High Court has recently clarified the scope of vicarious liability with respect to institutional liability for child sexual abuse. In *Prince Alfred College v ADC* the plurality (French CJ, Kiefel, Bell, Keane and Nettle J) focussed upon the importance of the examining the precise nature of the employee's responsibilities, so that for example, it can be seen that the employee used or took advantage of the position in which the employment placed the employee vis-a-vis the victim. In this respect their Honours emphasised the importance of considering any 'special role' assigned to the employee and noted that particular features may be taken into account, including, 'authority, power, trust, control and the ability to achieve intimacy with the victim.' Accordingly, the 'relevant approach' identified by the High Court focuses upon 'any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-a-vis the victim' so that '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.' In other words, in Australia also, institutional liability is closely connected to an inquiry into the nature of the employee's duties and finding particular

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19 Ibid.
20 Ibid, 556.
21 Ibid.
22 [2005] 3 SCR 45.
23 (2005) 258 DLR (4th) 385, [40] approved in *EB v Order of the Oblates of Mary Immaculate of the Province of British Columbia* [2005] 3 SCR 45, 52 [3].
24 *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1, 26 [86]-[87].
26 Ibid, 1099 [81].
27 *Prince Alfred College Inc v ADC* (2016) 90 ALJR 1085 [81]
28 Ibid.
features in their responsibilities with respect to children. The 'mere opportunity' afforded by employment is insufficient. This requirement prevents liability being imposed as if the institution were an insurer for any harm of a specified type (such as sexual abuse) occurring.

It is not clear whether liability under the proposed non-delegable duty would extend to child sexual abuse by any person associated with the institution, regardless of their level of responsibility for, or authority over children in the care of the institution, or whether it is intended that liability should be limited to acts of persons with specific responsibilities in relation to a child such that it could be said that 'the employer significantly increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks.' Recommendation 89 itself contains no limitation, and the Consultation Paper does not suggest that any limitation is proposed. At 6.9 of the Consultation Paper it noted that:

'the institution would be personally liable for the actions of every person to which it delegates the duty of care - that is, every person in the control of the institution (Recommendation 92).

We note that the discussion in the Royal Commission Report, in places, might be read as suggesting some limitation. The Report states:

A non-delegable duty is a personal duty borne by the institution. It cannot be delegated. Where this duty is recognised, the institution must ensure that reasonable care is taken by those to whom it entrusts the performance of its duty of care. Sexual abuse of a child is the deliberate act of the perpetrator. It is the antithesis of the taking of reasonable care. 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. (emphasis added).

If the reference to 'those to whom it entrusts the performance of its duty of care' means those particular associates to whom responsibilities for the care and supervision of children is given, it may end up with a similar scope to the Bazley test under vicarious liability. If so, liability would probably not arise in the hypothetical scenario above. However, if the proposed liability is drafted without limitation, this may render the relevant institutions the insurers of all harm arising from the 'mere opportunity' that any association with the institution presents. The public policy justifications of this significantly broader scope to liability than is available in other common law jurisdictions ought to be clarified if this is intended, particularly in light of the detailed policy discussions that have occurred in other jurisdictions with respect to the

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29 Ibid.
30 Redress and Civil Litigation Report, above n 1, 490.
31 Ibid.
appropriateness (or not) of rendering institutions insurers for all harm of this nature to children in the care of the institution.

As noted at para 6.12 in the Consultation Paper, the proposed liability would significantly simplify litigation for plaintiffs. 'A plaintiff would only need to prove (a) that the abuse occurred and (b) that the institution was one of the specified institutions on which the statute imposed a non-delegable duty of care.' It is true that this is a significantly simplified form of liability, however it is fundamentally not a non-delegable duty of care as that concept is understood at common law. In our view, these issues give rise to the fundamental question – why cast this proposed statutory liability in terms of a non-delegable duty at all? Whilst there are strong reasons for considering the enactment of a statutory liability upon certain institutions as proposed, we submit that there is no need to describe it as a non-delegable duty, and in fact, there are risks to coherence in the common law from doing so. It would be equally effective, and carry less confusion with a common law doctrine with which it bears little similarity, if enacted simply as a new statutory liability without being described by reference to the common law doctrine.

2 Statutory Liability with a Reverse Onus of Proof

The Royal Commission has recommended that irrespective of whether a non-delegable duty of care is imposed on certain types of institution by statute, legislation should be introduced to make all institutions liable for child sexual abuse by a broad range of persons associated with the institution, unless the institution proves it took reasonable steps to prevent the abuse. Recommendation 91 of the Report states:

Irrespective of whether state and territory parliaments legislate to impose a non-delegable duty upon institutions, state and territory governments should introduce legislation to make institutions liable for institutional child sexual abuse by persons associated with the institution unless the institution proves it took reasonable steps to prevent the abuse. The 'reverse onus' should be imposed on all institutions, including those institutions in respect of which we do not recommend a non-delegable duty be imposed.

We understand this proposal to be for the introduction of a new statutory liability modelled on vicarious liability but which incorporates a defence not available under the proposed non-delegable duty.

32 Redress and Civil Litigation Report, above n 1, Recommendations 91 and 92, 475. The recommendation is that all institutions should be liable for child sexual abuse by a broad range of persons including, office holders, employees, agents, volunteers and contractors. For religious organisations, persons included would be religious leaders, officers and personnel of the religious organisation. See also Redress and Civil Litigation Report, above n 1, 219.

33 Redress and Civil Litigation Report, above n 1, 493.
Significantly, this proposed statutory liability would apply to all institutions including community, 'not-for-profit' and volunteer organisations as well as organisations administering foster care or kinship care. Some of these types of organisations have traditionally not fallen within the scope of vicarious liability at common law (for example foster care) and so statutory inclusion would assist in providing causes of action which are not presently available at common law. It would also apply to those organisations to which the Commission's proposed non-delegable duty of care would apply.

Recommendation 91 is in essence proposing a statutory form of vicarious liability that is not strict. This is something unknown to the common law, though not unknown in statute law. There are two important features of this proposed duty.

Firstly, there is no apparent requirement for any particular connection between the abuse and the institution beyond the requirement for the abuser to be an 'associate' of the institution. If so, the recommended provision has a much broader scope than vicarious liability at common law. For example, under this proposed liability, a sporting club may be liable for abuse by a cleaner or person such as the baker in *EB v Order of the Oblates of Mary Immaculate of the Province of British Columbia* (unless the defence of having taken reasonable steps to prevent abuse can be raised.) This would be of considerable advantage to survivors, but it has significant public policy implications.

As discussed in relation to the scope of the non-delegable duty, under Canadian and English vicarious liability, public policy has required balancing the interests of survivors in having a defendant to sue on the one hand, against 'foisting undue burdens on business enterprises' rendering them 'involuntary insurers' for all sexual abuse on the other. Courts in Canada and England considering the public policy questions have found that liability for child sexual abuse is not justified and so liability is limited to circumstances where the institution has, 'significantly increased the risk of harm by putting the employee in his or her position and requiring him to perform the assigned tasks.' This is not to say that the same public policy issues could not be debated and resolved differently in Australia. For example, it may be determined that the existence of the proposed defence, discussed below, renders it fair to expand the scope of this second liability. However, these issues will need to be fully addressed by legislators.

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35 As would be the case at common law in the jurisdictions which have expanded the application of vicarious liability beyond strict application of the *Salmond test*; *Various Claimants v Catholic Child Welfare* [2013] 2 AC 1; *Bazley v Curry* [1999] 174 DLR (4th) 45.


38 Ibid 556.

39 Ibid 534, [42].
considering the implementation of reforms as where the defence cannot be raised, the scope of the liability is significantly broader.

Secondly, this new statutory liability may be avoided upon proof by the institution that it took reasonable care to prevent abuse, effectively creating a defence to vicarious liability that is unknown to the common law. These reforms appear\textsuperscript{40} to be based upon provisions in the Victorian and Commonwealth discrimination legislation\textsuperscript{41} which provide that where an employee or agent acting in the course of their employment contravenes the act, then the employer or principal will be vicariously liable unless it can establish that it took reasonable precautions to prevent the contravention.\textsuperscript{42} The difference is that liability under these provisions is limited, as is common law vicarious liability, by the twin requirements for an employment relationship and a sufficient connection with the employment.

The proposed defence, or so-called \textit{reverse onus of proof}, is a significant advantage to institutions which does not exist at common law. The implication of the proposed defence appears to be that if the institution does \textit{not} take reasonable precautions to prevent sexual abuse, then it is fair that it is made liable for any abuse. Conversely, if an institution does take reasonable steps (whatever they might be) to prevent abuse it will escape liability, \textit{even if} the nature of the responsibilities given to the perpetrator would be accepted in other jurisdictions as having significantly increased the risk of sexual abuse occurring, and therefore warranting the imposition of vicarious liability.

The important point we wish to emphasise is that the statutory liability may result in denying vicarious liability where on the same facts, a different result would be likely at common law because there is no defence at common law. Is the common law action to be taken to be abrogated by this statutory action, or will the common law be available to a plaintiff if the institution could avoid statutory liability by pointing to steps taken to prevent abuse? This should be considered directly and addressed in the legislation.

The Royal Commission recognised that what are reasonable steps for an institution to take to avoid child sexual abuse will vary depending upon the type of institution and the position and responsibility of the abuser within the institution. More active steps toward precaution might be expected of a for-profit institution than a community-volunteer institution. These questions will depend on many individual circumstances but will no doubt involve complex factual issues such as reasonable foreseeability of risk, and the kinds of matters typically relevant to a finding of negligence.\textsuperscript{43} The Royal Commission recognised that institutions are in a much superior position to plaintiffs to

\textsuperscript{40} The Royal Commission referred to the Parliament of Victoria Family and Community Development Committee report, \textit{Betrayal of trust: inquiry into the handling of child abuse by religious and other non-government institutions}, November 2013, 552, Recommendation 26.4 which recommended that the Victorian Government consider, as an option for reform, reforms to the \textit{Wrongs Act 1958} (Vic) based upon vicarious liability in Victorian and Commonwealth discrimination legislation.

\textsuperscript{41} \textit{Equal Opportunity Act 2010} (Vic) and to the \textit{Sex Discrimination Act 1984} (Cth)

\textsuperscript{42} \textit{Equal Opportunity Act 2010} (Vic), s. 109 and 110; \textit{Sex Discrimination Act 1984} (Cth), s106.

\textsuperscript{43} Often referred to as the 'Shirt Calculus' referring to \textit{Wyong Shire Council v Shirt} (1980) 146 CLR 40.
be able to prove the precautions taken to prevent abuse, having relatively easy access to records and witnesses. Yet, inevitably the survivor plaintiff would bear an evidentiary onus which may be difficult to discharge.

The Commission recognised that its recommendation, if adopted, may lead to increased insurance premiums for institutions but that it would also potentially engender higher standards of care, governance and risk mitigation within institutions. The social benefit from encouraging all institutions to do more to reduce the risk of child sexual abuse goes without saying. However, the uncertainty as to what would constitute reasonable steps to prevent abuse may be of concern, especially to small community groups.

The inter-relationship between the two proposed liabilities is not entirely clear. Presumably, institutions to which both the non-delegable duty and the statutory liability apply may be liable under the former even in circumstances in which the defence can be raised to the latter. However, when would those institutions be liable under the second statutory duty and not liable under the non-delegable duty? One answer might be that if the non-delegable duty is limited in scope to acts of abuse by persons with responsibility for childcare. If abuse by a non-childcare worker, such as a cleaner, does not fall within the scope of the non-delegable duty, it might still fall within the scope of the statutory liability. In such circumstances, an institution to which the non-delegable duty applies could be liable under the second statutory liability if it cannot make out the defence that it took reasonable steps to prevent abuse.

We would be happy to discuss any of these matters further.

Yours sincerely,

Allison Silink and Pam Stewart

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44 Redress and Civil Litigation Report, above n 1, Recommendation 93, 494.