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Dear Sir or Madam,

RESPONSE TO THE NSW CIVIL LITIGATION CONSULTATION PAPER – THE SALVATION ARMY

We act as solicitors for The Salvation Army.

We refer to the NSW Government's consultation paper in respect of the civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse (the **Consultation Paper**).

The Salvation Army is thankful for the opportunity to make submissions in response to the recommendations.

The Salvation Army refers to its previous response to the Royal Commission into Institutional Responses to Child Sexual Abuse (the **Royal Commission**) Issues Paper 5 - Civil Litigation. In summary, that response provided that The Salvation Army believes that, wherever possible, claims made by survivors of child sexual abuse should be resolved without recourse to civil litigation. However, in the event that civil litigation is elected as the course a particular survivor wishes to take, then litigation should be conducted in a just, efficient, timely and cost effective manner. Further, whatever course a survivor elects to take in respect of their claim, The Salvation Army will treat the survivor and their family with the utmost respect and sensitivity.

A. SUMMARY OF THE SALVATION ARMY'S POSITION

Save for the comments made in this section in respect of Issue B – "Ensuring there is someone to sue" and Issue C – "Requirement to have Insurance", these submissions are in substance dedicated to Issue A – "Increasing the legal responsibility of institutions for child abuse".

(i) Issue A: Increasing the legal responsibility of institutions for child abuse

The NSW Government raises two recommended possible changes to the duties of institutions to prevent child abuse in the future:

a) the imposition of a new, strict non-delegable duty of care on *particular* institutions (as listed in the Consultation Paper); and

b) reversing the onus of proof for *all* institutions.

In respect of each, The Salvation Army's position is as follows respectively:

a) The Salvation Army proposes a cautious approach to the adoption of a new, strict non-delegable duty of care in the terms proposed in the Consultation Paper, particularly in light of the remarks of the High Court in *New South Wales v Lepore* [2003] HCA 4; 212 CLR 511; 195 ALR 412; 77 ALJR 558 (6 February 2003) (*Lepore*) in respect of the extension of the non-delegable duty of care, and the further developments in Australia and internationally in the law of vicarious liability.

   Essentially, in *Lepore* the Court's view was that the non-delegable duty of care does not extend to liability for the intentional wrongdoing, and moreover criminal wrongdoing of a delegate. This position was left undisturbed in the decision of the High Court in *Prince Alfred College Incorporated v ADC* [2016] HCA 37.

b) The Salvation Army has identified the following issues in respect of the recommendation to adopt a reverse onus of proof in child sexual abuse cases: (i) any proceedings where the burden is shifted onto the institution will start from a position that the institution in the conduct of the proceedings must first defend the claim. Such an approach may discourage or inhibit early resolution of a claim; (ii) difficulties in proving "reasonable steps" in child abuse cases due to the passage of time; (iii) determination of what constitutes "reasonable steps"; and (iv) determination of who is an "individual associated with a relevant organisation". In light of these issues The Salvation Army also proposes a cautious approach to the adoption of a reverse onus of proof in the terms proposed in the Consultation Paper until there has been further clarification of these issues.

In light of the matters raised in these submissions, The Salvation Army would be grateful for an opportunity to further engage with the NSW Government in respect of the recommended possible changes.

(ii) Issue B: Proper defendant

In Australia, The Salvation Army is incorporated in each state and territory through the various Salvation Army Property Trust Acts. For example, in NSW, The Salvation Army is incorporated as a body corporate known as The Salvation Army (NSW) Property Trust by *The Salvation Army (NSW) Property Trust Act 1929* (NSW), and is pursuant to section 3 of that Act "capable of ...suing and being sued by the aforesaid name and doing and suffering all such other acts and things as bodies corporate may by law do or suffer." In respect of any proceedings against The Salvation Army in connection with its activities in NSW, The Salvation Army has taken a policy position not to run the "Ellis" Defence and as such, the proper defendant would be The Salvation Army (NSW) Property Trust.

(iii) Issue C: Requirement to have insurance

The Salvation Army has no particular submissions in respect of the requirement for institutions to have insurance, but notes the following:

Firstly, the NSW Government wishes to extend the liability of institutions to cover the actions of "all persons associated with the organisation". In respect of religious institutions, The Salvation Army raises in these submissions whether the proposed recommended changes would seek to impose liability in respect of actions by adherents and / or attendees of The Salvation Army (and / or other religious organisations). In respect of insurance coverage one must consider whether the relevant policies of insurance would extend to indemnifying the insured against the actions of this cohort of people; and

Secondly, the insured will ordinary only be covered for the conduct of its employees "but only whilst acting within the scope of their duties in such capacity". This raises two issues (i) in the case of child abuse perpetrated by an employee whether the insurer would accept for the purpose of determining indemnity that an employee was "acting within the scope of their duties in such capacity" and, if yes, (ii) if the recommended possible changes are to be imposed on all services and activities provided by a religious institution (that is, not limited to services directly to or for children) whether the position on indemnity would be different if the abuse was perpetrated

by an employee of a child care services operated by the religious institution or if it was perpetrated by say an employee of an employment service operated by the religious institution (or even say, a minister of religion).

A. THE LIABILITY OF INSTITUTIONS

Issue A: The liability of institutions

As noted earlier, the NSW Government raises two possible recommended changes to the duties of institutions to prevent child abuse in the future:

a) the imposition of a new, strict non-delegable duty of care on particular institutions; and

b) reversing the onus of proof for all institutions.

Each duty is to apply prospectively.

The Salvation Army will address each recommendation in turn. However, before doing so The Salvation Army notes that it is unclear whether both recommendations are proposed to be adopted or whether it is proposed to adopt either one or the other (or if neither, is a possibility). In the case that both recommendations are adopted, The Salvation Army would be grateful for details of the mechanics of the concurrent operations of each proposed law. The Salvation Army notes that if both recommendations are adopted it is difficult to reconcile how the particular institutions listed in the Consultation Paper (the **particular institutions**) will be subject to both laws concurrently, that is, if the new non-delegable duty (arguably the stricter obligation of the two recommendations) is imposed on particular institutions, presumably there would be no utility in also subjecting those institutions to the reverse onus of proof. An alternative which may have been considered by the NSW Government is to impose the new non-delegable duty only on the particular institutions and have the remaining institutions subject to the reverse onus of proof. The Salvation Army notes that if such an approach is adopted it may result in inconsistent outcomes for survivors, as their claim will be dependent on the type of institution which is held to be responsible for the abuse.

a) non-delegable duty of care on particular institutions

Summary of proposed changes

The elements of the proposed new non-delegable duty of care are as follows:

(i) the duty would be owed by particular institutions (that is, residential facilities for children, day and boarding schools, early childhood education and care services, disability services for children, health services for children, other facilities operating for profit providing services for children having the care, supervision or control of children, and any facilities or services operated or provided by a religious organisation). The duty, however, would not be imposed on foster care agencies, kinship care or community-based not for profit or volunteer institutions.

(ii) the duty would be owed to children over which these institutions have "care, supervision or control".

(iii) these particular institutions would be responsible for all persons "associated" with those institutions or every person in the "control" of the institution.

It appears that the terms "associated" and "control" have been used interchangeably in the Consultation Paper and the fact sheet to the Consultation Paper. The Consultation Paper provides at paragraph 6.9 (our emphasis underlined) "[t]he 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). For non-religious organisations, this would include the institution's officers, office holders, employees, agents, volunteers and contractors. For religious organisations, it would include religious leaders, officers and personnel of the religious organisations." On the other hand, the NSW Government's fact sheet provides that these institutions will be responsible for all persons "associated with" the institution. We note that the notion of

"control" has a very particular meaning at law, and cannot be conflated with the phrase "associated with", which may when used in its ordinary sense have a much broader application than the notion of "control". Accordingly, The Salvation Army would be grateful for clarification on this issue.

(iv) These institutions would be personally liable for the breach (that is, for the child abuse committed by a person associated with the institution perpetrated against a child over which the institution had care, supervision or control). There are no available defences for these institutions. The Consultation Paper notes that "[t]he only way to avoid liability would be to prevent child abuse from occurring in the first place".

First, there must be a clear understanding of the non-delegable duty of care and its applicability; that is, an understanding of (i) the nature of that duty; (ii) the content of that duty and (iii) the ambit of that duty and the reservations expressed by members of the High Court in *Lepore* in respect of the extension of that duty.

The nature of the duty

In essence, the nature of the non-delegable duty of care is that it is a personal duty that a person or institution has responsibility either to perform the duty, or to see it performed, and cannot divest that responsibility by entrusting its performance to another. The underlying premise for the imposition of such a duty is to give protection to a class of individuals who by reason of their immaturity, inexperience, and / or other particular vulnerabilities need that special protection.

The law recognises certain categories of relationships which attract a non-delegable duty of care. The Consultation Paper provides that "[n]on delegable duties currently only apply to a limited number of organisations which work with children, such as schools and hospitals". Given these limited relationships, the NSW Government recommends the extension of this duty so that it will apply to other organisations such as child care centres and other for profit organisations providing services for children having the care, supervision or control of children. The duty would also be imposed on *any* facilities or services operated or provided by religious organisations. In respect of religious organisations, it is unclear whether it would be imposed broadly on religious organisations in respect of all their services and activities (which can be varied and great in number), or limited to the services and activities the religious organisations provide specifically to or for children.

We note the comments of Gleeson CJ in *Lepore*, where his Honour stated "[i]n cases where the care of children, or other vulnerable people, is involved, it is difficult to see what kind of relationship would not give rise to a non-delegable duty of care. It is clearly not limited to the relationship between school authority and pupil." His Honour provided other "obvious examples" of day-care centres and members of directors of a club which provided recreational facilities for children. Arguably, the further examples provided by his Honour, although broader than the relationships noted in the Consultation Paper, still involve services or activities directly involving or provided to children.

We also note the comments of Kirby J in *Lepore*, when his Honour stated "[a] number of difficulties arise in identifying the precise characteristics of relationships said to justify the imposition of the exceptional non-delegable duty of care. This is a reason why, in the past, I have resisted efforts to expand the categories already identified such as employer/employee; hospital/patient; school authority/pupil and possibly occupier/contractual entrant in circumstances of extra-hazardous activities. Thus, I was unwilling to accept the proposition that landlord/tenant had joined this select group. At the heart of my reluctance lies a concern that I feel about the doctrinal foundations of this exceptional principle of tortious liability."

Given the comments of their Honours, we question whether the duty should be extended to capture all manner of services and activities provided by religious organisations. For example, The Salvation Army runs a great variety of services including community services, homelessness services, crisis and supported accommodation, employment services, emergency services, and children and youth services. Would the proposed new non-delegable duty of care seek to capture all these services, which may involve varying degrees of interaction with children and young persons, as importing a non-delegable duty of care?

Content of the duty

In essence, the non-delegable duty of care is a more stringent duty than a duty to take reasonable care; it is a duty to *ensure* reasonable care is taken. In the case of an employer and employee relationship, the non-delegable duty of care imposed on an employer requires them to provide a safe system of work through the provision of competent staff, adequate material, and a proper system of effective supervision: *Wilsons and Clyde Coal Co v English* [1937] UKHL 2; [1938] AC 57 at 84. In the case of the non-delegable duty of care owed by a school to their pupils, as noted by Callinan J in *Lepore*, this would include the engagement of reliable, and carefully screened, properly trained employees, the provision of suitable premises, an adequate system for the monitoring of teachers, and an efficient system for the prevention and detection of abuse (including sexual abuse).

It will always be necessary to ascertain the content of the duty by reference to the particular circumstances of the case and the particular relationship subject to the duty.

Extension of the duty

Although it is a duty to *ensure* reasonable care is taken, members of the High Court in *Lepore* cautioned against the approach of interpreting the duty as an absolute duty to prevent all mischief. Gleeson CJ noted that such an approach would be too broad and demanding on the bearer of that duty. His Honour stated that "[t]he 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." Perhaps, it was even more directly put by Callinan J, when his Honour stated that "[e]ducation authorities do not owe to children for whose education they are responsible (absent relevant contractual provisions to the contrary) a particular or unique non-delegable duty of care, in practical terms, giving rise to absolute liability ... I do agree with the Chief Justice that absent fault on the part of an education authority, it will not be personally liable in situation of the kind with which these cases are concerned."

In *Lepore*, their Honours Gummow and Hayne JJ, examined this issue further, and made the following remarks in respect of the consequences of extending such a duty to include responsibility for intentional defaults or the criminal wrongdoing of delegates:

> 266. First, 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. No longer would the duty of the employer, the hospital, the school authority, be in any sense a duty to take reasonable care for the safety of the employee, the patient, the pupil. It would be a duty to bring about a result that no person (employee or independent contractor) who was engaged to take steps connected with the care of the plaintiff did anything to harm the plaintiff. This would introduce a new and wider form of strict liability to prevent harm, a step sharply at odds with the trend of decisions in this Court rejecting the expansion of strict liabilities. It would sever the duty from its roots in the law of negligence. It would make the employer (the hospital, the school authority) an insurer of the employee (the patient, the pupil) against any harm done by any person engaged by the former to care for the latter.
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> 267. Secondly, it would remove any need to consider whether the party concerned could or should have done something to avoid the harm. In the present cases, there is no allegation that the State failed to act with reasonable care in selecting and supervising teachers. Yet much of the argument in support of extending a non-delegable duty or imposing vicarious liability failed to give due weight to this fact. The unstated premise for the argument appeared, at times, to be that the State should be held responsible because it could and should have averted the injuries that were done to these appellants. Yet it is not suggested that the State was itself negligent in its choice or supervision of teachers. That being so, any deterrent or prophylactic effect that might be said to follow from extending the non-delegable duty of care of a school authority to include liability for intentional trespasses committed by teachers would, at best, be indirect.
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> ...

> 269. Thirdly, and no less importantly, extending a non-delegable duty of care, in the way for which the appellants contend, would give no room for any operation of orthodox doctrines of vicarious liability. It would be irrelevant to consider whether the party under the duty could or should be held vicariously liable for the defaults of the persons whose conduct caused the injury of which the plaintiff complains. Despite the difficulties that attend the content and application of principles of vicarious liability, it would distort the proper development of that aspect of the law to extend non-delegable duties in this way. It would do this by shifting the focus of attention away from an explicit consideration of whether vicarious liability should be imposed for certain kinds of intentional wrongdoing, to a discussion of the applicability of unusual principles intended to be a particular extension of ordinary negligence principles in certain limited circumstances.

Their Honours' view was that the issue was more appropriately dealt with through the application of the legal principles of vicarious liability. This was echoed by Kirby J in the same case, when his Honour stated that "[s]pecial rules, such as non-delegable duty of care, developed over time to deal with specific circumstances, should not be applied when the broader basis of vicarious liability applies to the circumstances as it does here".

The NSW Government is questioning whether or not to extend the non-delegable duty of care so that the particular institutions listed in the Consultation Paper would be liable for the intentional criminal wrongdoings of its delegates. This is the very approach that was cautioned against by the High Court in *Lepore*. If the proposed new, strict non-delegable duty of care is adopted, it would result in a fundamental unfairness to these particular institutions. Take the situation where an institution has implemented every conceivable measure to prevent injury to those whom it has this special protective responsibility over, but in spite of these measures "fails" to prevent the criminal actions of their delegate, this institution will nevertheless be held personally and absolutely responsible for the criminal actions of their delegate. If one of the primary aims of the imposition of the new duty is ultimate deterrence of such behaviour it is difficult to see how the imposition of this civil obligation on an institution, which is not the direct perpetrator of the offence, would succeed where the criminal law has failed to prevent such actions through the imposition or threat of an imposition of a criminal penalty directly on the perpetrator of these crimes. This was clearly articulated by Gleeson CJ in *Lepore* when his Honour stated "[f]urthermore, if deterrence of criminal behaviour is regarded as a reason for imposing tortious liability upon innocent parties, three things need to be remembered. First, the problem only arises where there has been no fault, and therefore no failure to exercise reasonable care to prevent foreseeable criminal behaviour on the part of the employee. Secondly, it is primarily the function of the criminal law, and the criminal justice system, to deal with matters of crime and punishment. (Most Australian jurisdictions also have statutory schemes for compensating victims of crime.) Thirdly, by hypothesis, the sanctions provided by the criminal law have failed to deter the employee who has committed the crime."

The other aim of the introduction of the new, strict non-delegable duty of care, is to encourage institutions to take proactive steps to improve child safety. It is difficult to see where the encouragement lies, when in spite of any measures taken by the institution, it will still be held liable for the criminal actions of their delegates.

It is The Salvation Army's view that the better approach to deal with the liability of institutions in respect of the intentional wrongdoing of their delegates is through the application of the legal principles of vicarious liability, as developed over time by the common law.

There is now at least some certainty at law that an institution can be vicariously liable for the criminal offences committed by employees: *Prince Alfred College Incorporated v ADC* [2016] HCA 37. In respect of vicariously liability, their Honours French CJ, Kiefel, Bell, Keane and Nettle JJ, stated the relevant approach as:

> 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.

The Consultation Paper raises limitations to the Australian approach to vicarious liability in that it "...is still more restricted in other jurisdictions because employers can only be liable for the actions of employees and agents". We note that internationally there is a movement to recognise the liability absent of an employment relationship (or recognising the liability in respect of a relationship *akin* to employment). For example, the Supreme Court of Canada's decision in *Doe v Bennett & Ors* [2004] ISCR 436. There may be a similar evolution of the law in Australia, where the test will be whether the institution created the occasion for the wrongful act (that is, by of the reason of perpetrator's authority, power, trust, control and the ability to achieve intimacy with the victim), without reference to the particular relationship created by the institution between perpetrator and victim.

The Salvation Army proposes consideration of the introduction of legislation that clarifies when an employer (or in a relationship akin to employment) is vicariously liable. In particular, legislation that either:

(i) creates a non-delegable duty of care. For example, that organisations have a non-delegable duty to take reasonable care to prevent intentional injury to children in their care, however, allow for an available defence for organisations where they have put in all reasonable steps / reasonable precautions to prevent the impugned conduct; or

(ii) hold employers vicariously liable for criminal acts by employees in the course of their employment, unless the organisation took reasonable steps / reasonable precautions to prevent the behaviour.

b) reversing the onus of proof for all institutions

Summary of proposed changes

The elements of the proposed new reverse onus of proof are as follows:

(i) owed by all institutions (including foster care agencies or kinship care and community-based not for profit or volunteer institutions);

(ii) all institutions would be responsible for "all persons associated with the institutions" and

(iii) subject to a "reasonable steps" defence.

As noted in the Consultation Paper, the Victorian Government has recently reversed the onus of proof in negligence claims against institutions.

Presumably, any adoption of the reversal onus of proof in NSW will largely reflect the duty as incorporated in the *Wrongs Act 1958* (Vic).

Subsection 91(2) of the *Wrongs Act 1958* (Vic) provides that (our emphasis underlined) "[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." Subsection 91(3) of that Act provides: "...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."

Section 90 of the *Wrongs Act 1958* (Vic) provides that an individual associated with the relevant organisation includes (but is not limited to) an officer, an office holder, an employee, an owner, a volunteer or contractor, and in the case of a religious organisation: includes (but is not limited to) a minister of religion, a religious leader, and officer or a member of the personnel of the religious organisation.

Section 88 of the *Wrongs Act 1958* (Vic) provides that a "relevant organisation" means 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...".

"Reasonable precautions" are not defined in the *Wrongs Act 1958* (Vic), however, it is noted that they will depend on a number of factors including (a) the nature of the relevant organisation; (b) resources available to the relevant organisation; (c) relationship between the relevant organisation and the child; (d) whether the care was delegated to another organisation; and (e) the role in the organisation of the perpetrator of the abuse.

In Victoria, the reverse onus of proof came into operation on 1 July 2017, and given its recent commencement date, understandably there has not yet been any judicial consideration of the shifted burden.

As noted, The Salvation Army proposes a cautious approach to the adoption of a reverse onus of proof, in light of the following issues:

a) possibility of a more adversarial approach to litigation:

If the burden is shifted then legal proceedings will start from the position that the institution is first required to defend the claim, that is, prove that "reasonable steps" were taken to prevent the abuse. This may perhaps encourage a more adversarial approach to litigation and discourage early resolution of the proceedings.

b) difficulties in proving 'reasonable steps' in child sexual abuse cases due to the passage of time

In support of the reverse onus of proof, the Consultation Paper refers to similar shifted burdens being used in the Federal anti-discrimination equal opportunity legislation as well as work health and safety law. We note that in respect of claims brought under these laws, there is some ordinary immediacy between the proceedings being commenced and when the impugned conduct is said to have occurred. Hence, in these types of proceedings institutions will have more readily available to them current policies and procedures (which reflect current standards of acceptable behaviour) and access to / evidence of the accused and / or witnesses. Access to such information and documents will assist the institution to demonstrate that the reasonable steps were undertaken to prevent the impugned conduct. In their response to the Royal Commission Issues Paper 5 – Civil Litigation, the Australian Lawyers Alliance referred to a 2009 survey by the Anglican Church that found that the average time between the abuse and the first complaint was 23 years. Accordingly, in respect of a child sexual abuse claim commenced many years after the alleged conduct, whether an institution took "reasonable steps" to prevent the alleged conduct, must inevitably be seen through the lens of time, that is, a determination of what would have been considered as "reasonable steps" at the time of the alleged conduct (which may be infinitely different to what may be considered as "reasonable steps" at the time of the actual proceedings). Further the passage of time may result in, through no fault of the institutions, a lack of documents and records and the unavailability of witnesses and / or the accused. These matters must be considered in light of the right of institutions to defend the claim.

c) what are "reasonable steps"?

The Salvation Army agrees with the views expressed in the Consultation Paper that it will be necessary to provide guidance about the scope of what would be "reasonable steps". This may be done, as suggested, through the development of legally binding standards. Guidance on what would be considered "reasonable steps" may also address some of the difficulties discussed above in respect of proceedings commenced many years after the alleged conduct.

d) Who is an individual associated with a relevant organisation?

This issue applies to both proposed recommendations.

The Salvation Army echoes its submissions to the Victorian government in respect of recommendation 26.4 from the 2012 Betrayal of Trust Inquiry in respect of the issue of who is "an individual associated with a relevant institution". Those submissions sought further clarification in respect of the meaning of "personnel" of religious organisations as used in the *Wrongs Act 1958* (Vic). The proposed changes in NSW, in respect of both recommendations, seeks to impose liability

on institutions in respect of the actions of an individual associated with the relevant institution. This raises the following questions:

i. would the NSW Government consider "personnel" of religious institutions to include adherents of the faith and / or attendees at worship services?

ii. would the answer be dependent on the regularity of the attendee's attendance at Church?

iii. would a religious institution be considered as associated and / or in control of an attendee that attends service say once or twice a year?

Further, in respect of "reasonable steps" what steps should be taken in respect of attendees? Would it be reasonable to request from each attendee a working with children check, or require them to undertaken some other form of risk assessment?

The Consultation Paper provides two examples where it may be difficult for an institution to take steps to prevent abuse. Firstly, where the abuse is perpetrated by an electrician who is on the premises for a short period of time to do repair work (a contractor), or a parent who volunteers to help at the school's cafeteria once a year (a volunteer). These are appropriate examples which give rise to the question as to what reasonable steps can an institution take to prevent abuse. On one hand, it may be reasonable for the institution to require a working with children check from the volunteer, but would it be reasonable for the institution to require a working with children check from the contractor conducting one off repairs on the premises of the institution? What other reasonable steps would the institution be required to take in respect of the contractor – for example, would reasonable steps include ensuring children are not present while the repairs take place or ensuring constant direct supervision of the contractor?

In terms of the contractor's association with the institution, what if the initial meeting with a future victim occurs at the institution's premises, but the abuse occurs many years after this meeting and in a non-institutional setting (perhaps at the perpetrator's home) - is the contractor still deemed to be associated with the institution?

It is not difficult to see how the application of the proposed recommendation may lead to confusing and inconsistent (and even unfair) applications of liability on institutions.

Ultimately, to ensure that there is some logical and rational application of law to determine the liability of institutions, The Salvation Army suggests that rather than to categorically define what constitutes "all persons associated with the institutions", a more appropriate approach is for each case to be determined on a case by case basis, perhaps by reference to the guidance provided by the Honours French CJ, Kiefel, Bell, Keane and Nettle JJ in *Prince Alfred College Incorporated v ADC* [2016] HCA 37. That is, to inquire, as to the following in respect of determining an institution's potential liability:

a) what role did the institution assign to the perpetrator and the position the perpetrator was placed in respect of the victim?

b) what authority, power, trust, control and ability to achieve intimacy with the victim was afforded to the perpetrator by the institution?

c) did the abuse occur in circumstances substantially unrelated to the perpetrator's association with the institution?

The Salvation Army raises these issues as important issues to be addressed before any proposed recommendations are implemented by the NSW government and it welcomes ongoing discussions on these important issues in a consultative manner.

If you have any questions or require further information please do not hesitate to contact Ms Nameeta Chandra on 02 8202 1549 or by email at nameeta.chandra@salvoslegal.com.au

Yours faithfully

LUKE GEARY
PARTNER