



## Charities and Redressing Historic Wrongs – Speaking Notes

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*In a Civil Litigation context this brief paper will high point:*

**CURRENT:**

A. *Civil Liability & Unincorporated Associations – what is happening in practice; and [unintended] consequences of the new Vic legislation ‘Legal Identity of Defendants (Organisational Child Abuse) Act 2018’ (Vic).*

**EMERGING:**

B. *The emergence of competing public policy issues of:*

- a. *compensation to survivors;*
- b. *upholding of specific charitable trust terms (which may result in assets not being available to meet compensation obligations).*

C. *Litigation between Institutions and Insurers in the Canadian context. Comfort for Institutions in this jurisdiction?*

Now to each in turn:

**1. *Civil Liability & Unincorporated Associations – what is happening in practice; and [unintended] consequences of the new Vic legislation ‘Legal Identity of Defendants (Organisational Child Abuse) Act 2018’ (Vic)***

- a. New South Wales Court of Appeal in *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* (2007) 70 NSWLR 565, is authority for the proposition that liability in tort is to be against the management committee at the time of the wrong. The proper defendant was not the Archbishop who was not the Archbishop at the time of the abuse. Mason P paragraphs 49 -51] said:

49 Recognising their inability to sue an unincorporated body ... plaintiffs have proceeded against persons or groups within the body who have assumed some active or managerial role. The persons sued would have acted on behalf of the body as a whole, but this did not confer upon them some species of derivative immunity. If the activity in which they exercised palpable control gave rise to a contractual or tortious claim otherwise recognised by law, **they are held liable as principals** ....

50 By such means, members of a committee of an unincorporated club or society have been found liable in ... tort, eg as occupiers of dangerous premises or for conducting or authorising particular activities (*Ryan v Fildes* [1938] 3 All ER 517; *Smith*).

51 Nevertheless, **care is required to select the members of the committee in office at the relevant time** (*Banfield v Wells-Eicke* [1970] VicRp 64; [1970] VR 481; *Peckham*). **Liability remains personal not representative in nature.**

- b. This is to be distinguished from liability in contract, which is in the hands of the current management committee from time to time. See *Anglican Development Fund Diocese of Bathurst (in its own capacity and in its capacity as trustee of the Anglican Development Fund Diocese of Bathurst (Revivers and Managers Appointed) v Palmer and Others* (2015) 336 ALR 372.
- c. In practice – in civil litigation -
- i. Unincorporated associations are seeking to nominate a corporate defendant to the litigation, but some plaintiff firms are not accepting the nomination of an alternate defendant.
  - ii. Management committee members at the time of the wrong may be deceased or entirely disconnected from the unincorporated association.
- d. The Victorian solution - *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic) passed on 24 May 2018.
- i. *Section 1 – Purpose - The main purpose of this Act is to provide for child abuse plaintiffs to sue an organisational defendant in respect of unincorporated non-government organisations which use trusts to conduct their activities.*
  - ii. *Sections 3 and 5 – NGO - a non-government organisation that is an unincorporated association or body is an NGO.*
  - iii. *Section 4 – Application - This Act applies to any proceeding for a claim founded on or arising from child abuse, ... and the NGO controls one or more associated trusts.*
  - iv. *Section 3 - **associated trust** means a trust which an NGO uses to conduct the NGO's activities and which it controls.*
  - v. *Section 6 – Control - For the purposes of this Act, a trust is an associated trust which an NGO controls if—*
    - (a) *the NGO has, either directly or indirectly, the power to control the application of the income, or the distribution of the property, of the trust; or*
    - (b) *the NGO has the power to obtain the beneficial enjoyment of the property or income of the trust, with or without the consent of any other entity; or*
    - (c) *the NGO has, either directly or indirectly, the power to appoint or*

*remove the trustee or trustees of the trust; or*  
*(d) the NGO has, either directly or indirectly, the power to appoint or remove beneficiaries of the trust; or*  
*(e) the trustee of the trust is accustomed or under an obligation, whether formal or informal, to act according to the directions, instructions or wishes of the NGO; or*  
*(f) the NGO has, either directly or indirectly, the power to determine the outcome of any other decisions about the trust's operations; or*  
*(g) a member of the NGO or a management member of the NGO has, under the trust deed applicable to the trust, a power of a kind referred to in paragraphs (a) to (f).*

- vi. Section 8 - **Associated trust to be proper defendant** - if the NGO fails to nominate a proper defendant
- vii. Section 9 - **Trust property of associated trust available** - Despite any Act, law or other instrument (including any trust deed).

***Possible issues for further consideration in the Victorian legislation (and by the other States / Territories as they consider their own law reform on these issues):***

- e. Is it intended that public policy of compensating survivors, trump the other public policy of protecting and saving specific charitable purpose trusts? In Victoria, perhaps this currently will only turn on the words in the section 3 definition of “associated trust”, a trust which an NGO uses to conduct the NGO's activities and which it controls.
- f. *The duties of trustees purport to be set aside by s9, with the EM driving home the intention:*

*This means that a trustee is able to draw directly on trust assets to discharge any liability incurred on a claim, and that the trustee has a right to be indemnified for doing so, even if the trustee's actions would otherwise be in contravention of the terms of the associated trust, or any Act, law or other instrument.*

- g. Given the express preservation of liability on the hands of the Unincorporated Association, given the Ellis decision, there is perhaps need to clarify that this is the current management committee (ss 7(5) and 8(9) and not the management committee at the time of the alleged abuse. This appears to be the intention from the EM:

*... a proceeding may run against a nominated entity as a proper defendant but obligations in relation to the conduct of the proceeding, such as obligations in relation to the discovery of documents, continue to apply to the NGO itself.*

- h. Not all Unincorporated Associations would necessarily have ‘associated [controlled] trusts’. They may for example have another stand alone corporate entity for asset holding. Who is the proper defendant then?

- i. Interaction with existing personal civil liability protection of volunteer officers. Is the liability under this statute, preserved in the hands of the NGO, and therefore the management committee, personal or 'representative' in nature? If personal, is an amendment required to s37 of the Wrongs Act 1958 (Vic)<sup>1</sup> and liability is limited to the controlled assets or are personal assets of the management committee members exposed?

## 2. *The competing public policy issues of:*

- **compensation to survivors;**
  - **upholding of specific charitable trust terms (which may result in assets not being available to meet compensation obligations).**
- a. The historic charitable immunity doctrine in England in the 19<sup>th</sup> century was short lived.
  - b. The Victorian *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* demonstrates a clear intention to favour compensation for survivors.
  - c. Common Law in Canada (Ontario Court of Appeal) cut through "assets held on a special purpose trust." and likened the question of whether assets of a charity are available to satisfy tort claims to the historic charity immunity doctrine by a different route – "trust fund theory" (donor intention, split ownership, wrongful act of trustee). The facts in this case concerned the availability of assets of schools at different locations albeit ultimately held by a single charity. Would the result have been different if there were express specific trust terms and different trustees? See: *Christian Brothers of Ireland in Canada, Re* [2000] O.J. No. 1117, 132.<sup>2</sup>
  - d. The following passages from the majority judgement in that case are instructive:

50 ... I agree with the statement of Blair J. (p.393) that "the payment of properly established tort claims is as much a part of the conduct of the corporation's charitable calling as are the 'good works' aspect of its mandate."

...

80 However, assuming that a corporate charity with multiple objects will accept gifts on trust for special purposes, the question that confronts this court is whether it would be a breach of trust for the charity, or the liquidator standing in the shoes

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<sup>1</sup> *Wrongs Act 1958* (VIC) s 37 – Protection of Volunteers from liability

- A volunteer is not liable in any civil proceeding for anything done, or not done, in good faith by him/her in providing a service in relation to community work organisation by a community organisation.
- Any liability resulting from an act or omission that would but for subsection (1) attach to the volunteer attaches instead to the community organisation.

<sup>2</sup> I am indebted to the generosity of conversation shared with two Canadian charity lawyers who pointed this decision out to me, namely Susan Metzler and Susan Manwaring.  
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of the charity, to allow such property to be used to satisfy tort claims which did not arise in connection with that property or the purpose for which that property was donated. Or, stated in the context of exigibility, does the fact that such property is held on trust for one charitable purpose of the corporation mean that if the corporation incurs a liability for a wrong done by the corporation but not in connection with that particular charitable object, then that property is not exigible because of the trust?

81 I am satisfied that the answer to both questions is no ...

...

85 A major part of the concern traditionally asserted on behalf of charitable institutions is that donors will be reluctant to give if they believe that the donations will not be used for the good works of the charity but rather to pay tort claims. Whether or not this may be a more legitimate concern in recent years where there have been several instances of large charities held responsible for damage to large numbers of victims, both charities and their donors may see the special charitable purpose trust as a device to enable to them to segregate the assets of the charity and to try in that way to make it difficult for tort claimants to collect judgments from the assets of the charity. This would be contrary to the policy conclusion of *Curry* and the other decisions which rejected charitable immunity on the basis that fairness requires that the victim be compensated out of the assets of the charity.

92 ... If the charity, while still operating, determined that it was in the best interests of the charity to use the assets held on special purpose trust instead of other assets to pay tort claims, that may be a situation where the charity would seek the approval of the court for the scheme, if the consequence would be that the particular purpose would no longer be carried out by the charity.

- e. "In response to this decision British Columbia has enacted legislation [*Charitable Purposes Preservation Act*, SBC 2004] designed to protect donors of 'discrete purpose charitable property'. It empowers the court, in the event that a charity becomes insolvent, to apply the said property in an essentially cy-près fashion rather than it being available to the creditors of the charity." (Dal Pont, *The Law of Charity*, 2<sup>nd</sup> Edition). This does not appear to have been taken up in the other provinces of Canada.

### **3. *Litigation between Institutions and Insurers in the Canadian context. Comfort for Institutions in this jurisdiction?***

- a. I draw attention to recent litigation in Canada between an institution and an insurer where the insurer sought to deny liability on the basis that at the time of relevant insurance renewals the institution did not disclose to the insurer the alleged material facts, being the knowledge of the alleged abuse which, on the submission of the insurer, would have had a bearing of whether it underwrote the risk or the premium it charged.

- b. The decision is *L'Eveque Catholique Romane de Bathurst v. Aviva Insurance Company of Canada* 2016 NBQB 174,<sup>3</sup> which is authority for the following:
- i. At the time of the alleged abuse the law in Canada had not recognised that a charity was vicariously liable for sexual abuse committed by an employee, and therefore the charity should not have been expected to disclose the circumstances as material to the underwriting decision.
  - ii. The judgement also considered the extent of response of the policy of insurance and the meaning of “liability imposed by law” in the context of voluntary conciliation compensation scheme payments, as not being payments to which the policy of insurance would respond.
- c. Institutions intending to opt in to the National Redress Scheme should of course seek to take their insurers on this journey.
- d. Institutions intending to establish their own voluntary conciliation scheme should again seek to take their insurers on this journey (and carefully consider this Canadian decision).

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**Important note: These speaking notes are intended for educational purposes only and is not intended to be legal advice or relied upon as such.**

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<sup>3</sup> Again, I am indebted to the generosity of conversation shared with two Canadian charity lawyers who pointed this decision out to me, namely Susan Metzler and Susan Manwaring.  
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