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LEGISLATIVE TESTIMONY

TO: Joint Committee on the Judiciary
FROM: Edward F. Saunders, Jr., Esq.
RE: Various bills concerning charitable immunity
DATE: March 14, 2006

Many of the bills being heard today by this Committee would amend the charitable immunity statutes by expanding the degree of civil liability to which a charitable organization potentially would be subject or by removing the existing cap altogether. Some proposals would increase liability globally¹ while other proposals would increase liability in specific categories of cases arising within or under the auspices of the charitable institution.² Under the latter proposals, increased and even unlimited liability would attach either to civil claims involving crimes generally or to those involving criminal or tortious acts of sexual abuse against children specifically. Certain bills would operate retroactively.³

The bills were filed in response to reports in this Commonwealth and around the country of past sexual abuse of children by clergy in the Roman Catholic Church. As Archbishop Seán O'Malley of Boston has stated: "One incident of child abuse is too many, one child hurt too much. We must all do everything that we can to make sure that the scourge of child abuse not only within the Church but in the wider society as well is wiped clean from our midst."⁴ The Catholic Church nationally and locally is "unflinchingly committed to facing this scandal head on and doing all in our power to prevent anything like it from ever happening again."⁵ While its work is not completed, the Church has taken, and continues to take steps to compensate and provide pastoral assistance to survivors of sexual abuse, and to insure that such misconduct will never occur again.

Charitable immunity recognizes the importance of preserving the financial capacity of charities to serve the public good. As noted recently in the Massachusetts Law Review, a publication of the Massachusetts Bar Association, "The primary rationale for charitable immunity is that, without it, the financial strains of liability would reduce the capacity of charitable institutions to provide valuable goods and services to the community. In turn, these 'public goods' would be undersupplied when left to the commercial sector, with government having to make up the shortfall. Thus, by furnishing societal benefits, charitable institutions relieve government of the burden and costs it would otherwise confront if responsibility for public goods were left primarily to for-profit businesses."⁶

Any alteration in the careful balance currently struck by the charitable immunity statutes between the interest of charities in providing services of great public value and the interests of those harmed by sexual abuse should be based on a careful and comprehensive public policy assessment. The bills before this committee fail in this regard for the following reasons.

First, those bills that remove all limits on liability expose charities to the threat of dissolution as a result of the unlimited awarding of damages in specific cases. Second, no precedent exists for singling out specific torts in order to open the damage award floodgates. Third, those bills that operate retroactively would interpose an extremely unfair enlargement of potential liability without affording charities the opportunity to sufficiently insure against actual risk of loss from claims already brought. Fourth, those bills that stipulate that retroactivity should be as extensive as judicially determined, both transgress constitutional guarantees of fairness while at the same time handing over to the courts the legislative task of assessing the competing public policy interests.

Finally, all of the bills focus narrowly on charities and religion as if these were the only arenas of concern. Unfortunately, the sexual abuse of children is a widespread tragedy. Its occurrence in the home, larger community and government institutions, such as public schools, also deserves attention.

For example, in 2004, as required under the “No Child Left Behind” Act, the U.S. Department of Education issued a report on the sexual abuse of children within public schools entitled “Educator Sexual Misconduct: A Synthesis of Existing Literature.”⁷ In a preface, the Department’s Deputy Secretary, Eugene W. Hickock, wrote “we believe that sexual misconduct in whatever form it takes is a serious problem in our nation’s [public] schools and one about which parents and taxpayers have a right to be informed.”⁸

The report surveyed existing studies and demonstrated, among other findings, that a) sexual abuse of children by teachers and other adults is a significant problem in public schools,⁹ b) research to date has “document[ed] the ways in which schools and districts fail to remove abusers from the classroom,”¹⁰ c) even among those perpetrators whose employment may be discontinued and teaching license pulled, few are prosecuted or monitored once they have left the school system,¹¹ and d) school administrations resist media inquiries and other public scrutiny.¹²

In Massachusetts, governmental institutions such as public schools are protected from unlimited liability and from claims brought more than three years from the date the cause of action arose.¹³ None of the bills before this Committee proposes to alter such limits on liability in cases involving public entities, while at the same time such bills would expand the liability of charities.¹⁴

In the face of a tragedy that confronts private and public institutions alike, indeed all of society, this skewed attempt to reach the assets of the Catholic Church by altering the charitable immunity laws, without a comprehensive consideration of the problem in public institutions, lacks a cogent rationale.

Thus, the Massachusetts Catholic Conference urges the Committee to report H.788, H.960, S.874, H.1813/S.1056, S.1067/S.854, and S.951 with an unfavorable recommendation.¹⁵

The Massachusetts Catholic Conference is the public policy office of the Roman Catholic Bishops in the Commonwealth, representing the Archdiocese of Boston and the Dioceses of Fall River, Springfield, and Worcester.

¹ See H.788, H.960, S.874.

² See H.1813 and its identical Senate companion, S.1056; S.1067 and its identical companion filed by Republican senators, S. 854; and S.951. Other bills before the Committee on March 14 would amend criminal statutes not directly concerning charitable institutions and thus are not addressed in this testimony.

³ See H.1813/S.1056, S.854, S.951.

⁴ Statement of Archbishop Sean P. O’Malley, Regarding Clergy Sexual Abuse in the Archdiocese of Boston from 1950-2003 (Feb. 26, 2004), available online at <http://www.rcab.org/News/releases/2004/statement040226.html>.

⁵ Id.

⁶ Kenneth R. Hohlberg, *Modern Reflections on Charitable Immunity*, Mass. L. Rev., Winter 2006, at 163, 164.

⁷ Authored by Prof. Charol Shakeshaft of Hofstra University, the report is available online at <http://www.ed.gov/rschstat/research/pubs/misconductreview/index.html>.

⁸ Id. at 1.

⁹ Id. at 18 (in a national survey commissioned by the American Association of University Women, deemed to be the most extensive and accurate study to date, 9.6 percent experienced unwanted educator sexual misconduct).

¹⁰ Id. at 44

¹¹ Id. at 44-45.

¹² Id. at 10-11, 44-46.

¹³ Mass. G. L. ch. 258, § 4.

¹⁴ All of the proposals before this Committee that would retain a monetary cap nonetheless would exceed the cap of \$100,000 applied to claims against governmental entities.

¹⁵ If the Committee disagrees with our position and feels some change in immunity is necessary, that change should apply to all entities that are entrusted with the care of children including all levels of government.