


Consultation Paper

NSW Government
consultation in relation to
the civil litigation
recommendations of the
Royal Commission into
Institutional Responses to
Child Sexual Abuse

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1. Introduction

Purpose

- 1.1. The NSW Government is considering the recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse (**Royal Commission**) relating to how to provide justice to victims of future institutional child abuse.¹
- 1.2. In particular, the NSW Government is seeking input through this Consultation Paper from survivors of institutional child abuse, organisations providing services to children, legal professionals, and any other interested members of the public on:
 - (a) Removing legal barriers from the civil litigation system in NSW to make it easier for survivors of institutional child abuse in the future to sue responsible institutions,
 - (b) How achievable and effective the proposed reforms would be, and
 - (c) The potential impact of any changes on survivors of institutional child abuse, government, non-government organisations (**NGOs**) and the public interest.
- 1.3. This Consultation Paper considers three categories of the Royal Commission's recommendations, namely:
 - (a) Expanding the duties of institutions to prevent child abuse (see **Issue A. The liability of institutions** at Section 6),
 - (b) Ensuring that survivors can easily identify a proper defendant to civil claims (see **Issue B. Ensuring there is someone to sue** at Section 0), and
 - (c) Requiring institutions to have insurance cover for child abuse (see **Issue C: Requirement to have insurance** at Section 8).
- 1.4. On 4 November 2016 the Commonwealth Government announced that it will establish a national redress scheme for survivors of past institutional child abuse. Redress will be an important alternative to civil litigation, but only for claims regarding past abuse.

Royal Commission recommendations

- 1.5. The Royal Commission, established by the Commonwealth Government in January 2013, has considered the extent to which survivors of child sexual abuse have achieved justice under the existing civil litigation systems in Australia, and whether reforms are required. The evidence gathered by the Royal Commission, and reported in its 2015 *Redress and Civil Litigation Report*², demonstrates that survivors do not have the same ability to access compensation as other injured persons, and often find the process of civil litigation to be difficult and traumatic.
- 1.6. The Royal Commission made 99 recommendations for the establishment of a redress scheme and civil litigation reform. Recommendations 85 to 99 relate to civil litigation, covering limitation periods (85-88), the civil liability of institutions (89-93), identifying a proper defendant (94), insurance (95) and model litigant approaches (96-99).

¹ For consistency, the term 'child abuse' has been used throughout this Consultation Paper. However, the kinds of injury to which any reforms apply will need to be considered and defined. See section 5 for discussion of this issue.

² Royal Commission into Institutional Responses to Child Sexual Abuse *Redress and Civil Litigation Report* (2015)

- 1.7. In response to these recommendations, the NSW Government is considering possible reforms to make institutions more accountable for child abuse and to address barriers to bringing successful civil claims for compensation.
- 1.8. The NSW Government has addressed two of the Royal Commission's civil litigation recommendations:
 - (a) Reforming limitation periods – The NSW Government introduced the *Limitation Amendment (Child Abuse) Act 2016* to remove limitation periods in civil claims to allow survivors to bring claims regardless of the date of the alleged abuse.
 - (b) Model litigant approaches – The NSW Government has also issued a Premier's Memorandum³ on the Model Litigant Policy for Civil Litigation to assist in maintaining a model approach to civil claims involving the State Government.
- 1.9. This Consultation Paper seeks views on the remaining three areas of the Royal Commission's civil litigation recommendations – the duty of institutions, identifying a proper defendant, and requiring institutions to hold insurance cover for child abuse.
- 1.10. Any changes to civil litigation should be considered in the context of the broader approach to child safety in NSW, including existing systems for child protection.⁴

Consultation: next steps

- 1.11. This Consultation Paper is intended to be a starting point for discussions, to enable the Government to look broadly at reform options and to seek community views about the recommendations and the potential implications.
- 1.12. The discussion questions in this Consultation Paper are presented for consideration by a wide variety of stakeholders, including a range of organisations working with children, survivors of abuse, NGOs, insurers and the legal industry. It is not expected that all stakeholders will be in a position to respond to all discussion questions included in this Consultation Paper.
- 1.13. Due to the complexity of the issues, and the number of stakeholders that will be impacted by any reforms, public input in relation to this Consultation Paper will be critical.
- 1.14. The NSW Government will use this Consultation Paper as a framework to guide face to face discussions with stakeholders about the civil litigation recommendations.
- 1.15. The Department of Justice also welcomes interested individuals and organisations to provide written submissions in response to any of the issues raised in this Consultation Paper.
- 1.16. Submissions should be sent to: Justice, Strategy and Policy, Department of Justice, GPO Box 6, Sydney NSW 2001, or policy@justice.nsw.gov.au by **4 September 2017**. Submissions may be published on the Department's website, unless the Department is specifically asked not to do so.
- 1.17. If you are interested in participating in the consultation but are unable to make a written submission, please contact us at policy@justice.nsw.gov.au.

³ M2016-03-Model Litigant Policy for Civil Litigation and Guiding Principles for Civil Claims for Child Abuse. A Premier's Memorandum is an announcement issued by the Premier to all Ministers to communicate administrative policies and provide guidance and direction to support government sector performance.

⁴ Refer to paragraph 3.3 for further information about child safety in NSW.

- 1.18. If you require a copy of this Consultation Paper in a more accessible format, please contact us by telephone on 1800 990 777 to request. If you are deaf, or have a hearing or speech impairment, please contact us through the National Relay Service on 1800 555 677 and then ask for 1800 990 777.
- 1.19. A substantial volume of written submissions have already been received by the Royal Commission in relation to the issues raised in this Consultation Paper. The NSW Government will take those submissions into account when considering options for reform.
- 1.20. The Department of Justice intends to report to the NSW Government on the results of the consultation. After consultations are completed, the NSW Government will release an Options Paper outlining suggested reforms.

2. Overview of recommendations

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

- 2.1. The Royal Commission has recommended two changes to the duties of institutions to prevent child abuse in the future:
- (a) First, it has recommended the imposition of a new, strict **non-delegable duty of care** on particular institutions (listed at 6.6). The duty would ensure that these institutions are legally responsible (or 'liable') for abuse regardless of whether the institution itself is at fault.
 - (b) Secondly, the Royal Commission recommended **reversing the onus of proof** for all organisations working with children, so that liability would be established in a claim unless the institution can prove that it took reasonable steps to prevent the abuse from occurring.

Issue B: Ensuring there is someone to sue

- 2.2. To ensure that survivors can identify a defendant to sue, the Royal Commission has also recommended that institutions with associated property trusts be required to **nominate a 'proper defendant'** to claims (an entity that can be sued), including claims in respect of past abuse.

Issue C: Requirement to have insurance

- 2.3. The Royal Commission also recommended that all institutions be required to **have insurance cover** for child abuse in order to be eligible for government funding.

Today	
Past abuse	Future abuse
<p style="text-align: center;">Redress (not addressed in this paper)</p> <p>On 4 November 2016 the Commonwealth Government announced that it will establish a national redress scheme. The scheme will apply to <i>past</i> institutional child abuse only.</p>	
	<p style="text-align: center;">Issue A: The liability of institutions</p> <p>Changes to the civil liability of institutions would only apply to <i>future</i> abuse.</p>
<p style="text-align: center;">Issue B: Identifying a proper defendant</p> <p>Institutions with associated property trusts would be required to nominate a proper defendant to all civil claims for abuse, <i>including past abuse</i>.</p>	
	<p style="text-align: center;">Issue C: Requirement to have insurance</p> <p>Institutions would only be required to have insurance cover for child abuse which occurs in the <i>future</i>, not for past abuse.</p>

3. The purpose of the recommendations

- 3.1. Civil liability reform is considered to have two major goals: appropriately **compensating** those who have suffered abuse, and **detering** behaviour which could lead to abuse in the future.

Compensation

(a) Why is compensation important?

- 3.2. The impact of child abuse on survivors and their families can be devastating. Abuse can have a profound impact on the mental health and social functioning of survivors, who may suffer feelings of trauma, isolation and post-traumatic stress for the rest of their lives. Abuse can have a significant financial impact on survivors, as it may lead to loss of earning capacity, medical and counselling expenses and legal costs.
- 3.3. The principle underlying compensation is that those who are liable for the harm suffered should pay for the cost of their actions or omissions. It acknowledges this unjust loss, damage and hardship caused by the perpetrator, and provides survivors with the financial means to access services and support.

(b) Why focus on institutions?

- 3.4. Only a small number of survivors will sue the individual perpetrator of abuse. By the time abuse is brought to light, perpetrators have often died, or lack sufficient assets to pay compensation. An alternative option is to sue the institution responsible for the perpetrator's actions.
- 3.5. The policy basis for the Royal Commission's recommendations is that an institution should be liable for deliberate acts of abuse by people who are entrusted with the care and protection of their victims. The Royal Commission's position is that institutions should be legally responsible if the acts of abuse are closely connected to the tasks the abuser was employed to perform.⁵
- 3.6. The recommendations acknowledge that a survivor should have the same ability to sue an institution which is responsible for abuse as an employee has when suing an employer responsible for his or her personal injury.
- 3.7. The recommendations aim to ensure that the ability of survivors to obtain compensation will not depend on factors such as the legal status of the institution or the employment status of an abuser.

(c) What are the issues that need to be addressed?

- 3.8. Civil claims are not easy for survivors of child abuse. The NSW Government has addressed one of the causes of this difficulty by introducing legislation to remove limitation periods for civil claims for child abuse. However, three significant barriers remain.

⁵ For example, the Canadian case *Bazley v Curry* [1999] 2 SCR 534 concerned the sexual assault of a child in a youth care facility. The abuser was expected to bathe the children in his care, and was left unsupervised with his victims for long periods of time. The court found that the intimate control and parental relationship encouraged by the employer created an environment which enabled the abuse. The employer was therefore held to be liable for the abuse.

- 3.9. First, the law significantly limits the **duty of organisations** for child abuse, because:
- Most institutions are only liable for the conduct of employees and agents while acting in the course of their employment
 - Liability does not always extend to intentional, criminal conduct such as sexual abuse
 - Establishing that an organisation had a duty of care to prevent abuse from occurring can be difficult.
- 3.10. Secondly, **identifying a defendant to sue** can also be difficult, because:
- The way an institution is structured may mean that it does not have ‘legal personality’ and therefore cannot be sued (for example, if it is unincorporated)
 - Even if an institution has ‘legal personality’, it may not have legal responsibility for the actions of the perpetrator of the abuse
- 3.11. Thirdly, even if an institution is found to be liable, it may not have sufficient assets, or **insurance cover** which extends to abuse.
- 3.12. For example, if a child was abused by a priest or minister in a church, under the current law, the child may be unable to sue the responsible institution, because:
- Many religious organisations are unincorporated, and by law have no legal personality, so cannot be sued
 - Structures within the religious organisation which could be sued may not be responsible for the abuse
 - The institution may not be liable for the priest’s / minister’s conduct if they were not an employee
 - The institution may not be liable for the priest’s / minister’s intentional, criminal conduct
 - Even if the religious organisation was liable, it may not have available assets or insurance cover for criminal conduct such as abuse.

Deterrence

(a) Child safety in NSW

- 3.13. The second focus of the Royal Commission’s recommendations is on deterring behaviour which could lead to abuse in the future. Any deterrent effect of the recommendations should be considered in the context of the existing NSW child safety framework.
- 3.14. There has been a movement in recent years towards improving ‘child safe’ practices in institutions, by increasing the focus on prevention, designing safe environments and improving the culture and practices of organisations working with children.
- 3.15. There is considerable diversity across organisations working with children and the different child safety standards to which they are all held. Most institutions working with children in NSW are now subject to a number of child safety and protection requirements. Depending on the type of institution, this can include:
- (a) Oversight by the Department of Family and Community Services, which provides services in child safety, parenting support, early intervention and out of home care (including adoption)

- (b) Oversight by the Office of the Children’s Guardian, which is responsible for promoting the interests of children and young people in out-of-home care, accrediting designated agencies and monitoring their responsibilities
- (c) The requirement to report children at ‘risk of significant harm’ to the Department of Family and Community Services⁶
- (d) The requirement (for all government and some non-government agencies providing services to children) to notify the Ombudsman of allegations against employees that constitute ‘reportable conduct’ (sexual offences, misconduct, assault, ill-treatment, neglect and behaviour that causes psychological harm to children)⁷ and to assist the Ombudsman with investigations, audits and review of systems to prevent reportable conduct
- (e) The requirement to conduct pre-employment screening, including Police Checks and Working With Children Checks,⁸ to prevent people who pose a risk to the safety, welfare and well-being of children from being employed or engaged in child-related work.⁹

3.16. Particular sectors are also subject to additional standards, such as the requirement for all organisations in the out-of-home care sector to meet specified ‘Child Safe Standards’.¹⁰

(b) Liability as a means to promote child safety

3.17. Government oversight and reporting requirements can only go so far to protect children. In order to be child safe, an institution must also adopt a child safe approach which is designed to address the particular risks faced by the institution and promote child safety.

3.18. An increase in civil liability increases the costs of ignoring risks, and may encourage institutions to take proactive steps to improve child safety. While it would not be a ‘quick fix’, changing the law may encourage cultural change over time, by moulding public opinion on what is acceptable behaviour and firmly grounding appropriate institutional behaviour in the law.

3.19. However, there is some question as to how effective a deterrent civil liability reform would be. Studies in the United States have shown that civil liability has a negligible impact on individual deterrence.¹¹ Studies in the United Kingdom have also suggested that for deterrence to work, a high number of claims must be enforced.¹²

⁶ The *Children and Young Persons (Care and Protection) Act 1998* (NSW) requires mandatory reporters to report children at ‘risk of significant harm’ to the Family and Community Services Child Protection Helpline.

⁷ Part 3A of the *Ombudsman Act 1974* (NSW)

⁸ *Child Protection (Working with Children) Act 2012* (NSW)

⁹ Research has shown that Working with Children’s Checks and Police Checks are not sufficient to prevent child sexual abuse from occurring in organisations: Royal Commission into Institutional Responses to Child Sexual Abuse, Report into Working with Children Checks, 2015, page 3.

¹⁰ The NSW Child Safe Standards for Permanent Care November 2015 establish the minimum requirements for the accreditation of out-of-home care and adoption service providers.

¹¹ W. J. Cardi, R. D. Penfield and A. H. Yoon, ‘Does Tort Law Deter Individuals? A Behavioural Science Study’, 9 *Journal of Empirical Legal Studies* 301 (2012); Omari Scott Simmons, ‘Muted deterrence: the enhanced attribution of tort liability to US higher education institutions for student safety’, *Torts Law Journal* (2014) 22 TLJ No 1.

¹² D Harris, ‘Evaluating the Goals of Personal Injury Law: Some Empirical Evidence’ in P Cane and J Stapleton (Eds), *Essays for Patrick Atiyah*, Clarendon Press; Oxford University Press, Oxford; New York, 1991, p 289: discussing the

- 3.20. The studies show that there are various reasons for this:
- (a) The nature of civil litigation, which provides 'after the fact' compensation, may not encourage proactive changes to promote safety
 - (b) Evidence shows that people are often ignorant of the law
 - (c) Individuals discount the prospect of liability where the risk of detection is low
 - (d) The existence of liability insurance seriously undermines the deterrent effect of liability, by reducing the financial consequences (though insurance premiums provide a price signal)
 - (e) Organisations may view civil claims to be extreme, unusual cases which do not require improvements to safety.

(c) Other impacts on organisational behaviour

- 3.21. The proposed changes to liability should be considered carefully in light of the potential impacts on services. If the proposed changes increase the risk of providing child-related services, organisations may seek to reduce that risk by reducing services to limit their potential liability. This could potentially lead to a reduction in services to children, including those who are particularly 'at risk'. In his submissions to the Royal Commission, Professor Parkinson suggested that the changes could 'drive voluntary organisations out of providing the facilities for children which are so important to the community'.¹³
- 3.22. A risk management approach also has the potential to influence organisational behaviour in other ways, for example, leading to discrimination against men in employment decisions.
- 3.23. In any event, it is important to acknowledge that civil liability reform is not solely focused on deterrence. The primary aim of the proposed reform is to improve access to justice for those survivors who, despite the existence of child safety measures, have suffered harm. It does not take the place of child protection.

empirical evidence for deterrence in light of surveys conducted by the Centre for Socio-Legal Studies in Oxford, the Pearson Commission, RAND Institute for Civil Justice and the Harvard Medical Study.

¹³ Prof. Patrick Parkinson AM, University of Sydney, submission in response to Royal Commission into Institutional Responses to Child Sexual Abuse Consultation Paper, 'Redress and civil litigation', 2 March 2015, p12-14.

4. A roadmap to this Consultation Paper

Royal Commission Recommendation		Impact of the Recommendation	Refer to paragraph	Discussion questions
A preliminary issue: The definition of child abuse				
–	–	A preliminary issue is what type of child abuse should be included in the scope of any reform.	5.1 to 5.9	Q1 - Q2
Issue A: Increasing the legal responsibility of institutions for child abuse				
Recs 89, 90, 92, 93	Non-delegable duty	a) Particular institutions (see 5.6) would be subject to a new non-delegable duty of care to children over which they have <i>care, supervision or control, to prevent institutional child abuse</i>	6.6 to 6.15	Q3 - Q6
	To introduce a new non-delegable duty of care to prevent institutional child abuse for particular institutions which provide services for children	b) Institutions could be liable for intentional, criminal abuse c) Those institutions would be personally liable for the actions of <i>all persons associated with the organisation</i> , regardless of whether the institution itself is at fault	6.28 to 6.35	Q13 - Q16
Recs 91-93	Reverse onus	a) <i>All</i> institutions would be responsible for the actions of <i>all persons associated with the organisation</i> – not just employees	6.16 to 6.27	Q7 - Q12
	To reverse the onus of proof for child abuse claims, by requiring an institution to prove that it took 'reasonable steps' to prevent the abuse in order to avoid liability	b) Institutions could be liable for intentional, criminal abuse c) In order to avoid liability, institutions would be required to prove that they had taken <i>reasonable steps</i> to prevent abuse from occurring	6.28 to 6.35	Q13 - Q16
Issue B: Ensuring there is someone to sue for civil claims for child abuse				
Rec 94	Proper defendants to claims	a) Institutions with associated property trusts which cannot be sued (for example, unincorporated associations) will be <i>required to nominate a defendant</i> which is able to be sued for child abuse	7.1 to 7.27	Q17 - Q28
	To require institutions with associated property trusts to nominate a proper defendant to child abuse claims, with sufficient assets to meet any liability arising from proceedings	b) The nominated defendant must have <i>sufficient assets</i> to meet a claim c) If the institution failed to nominate a defendant, <i>any property trust associated with the institution</i> would be deemed to be a defendant		
Issue C: Requirement to have insurance				
Rec 95	Insurance	Government funding would be withheld from all institutions responsible for the care of children <i>unless insurance is obtained to cover future abuse claims</i>	8.1 to 8.11	Q29 - Q41
	To require all institutions responsible for the care of children to have insurance, including cover for institutional child abuse claims, in order to be eligible for funding			
Overall impact of the recommendations				
–	–	The overall impact of the proposed reforms is discussed in this section	9.1 to 9.2	Q42 - Q44

5.A preliminary issue: a consistent definition of child abuse

- 5.1. A preliminary issue for consideration is how far any civil litigation reform should extend. The Royal Commission is limited, by its terms of reference, to recommendations relating to child sexual abuse. However, it will be important to consider whether the impact of non-sexual (physical and psychological) abuse is such that it should also be included within the scope of any legislative reform.
- 5.2. This is a complex issue which has previously been the subject of consultation by the NSW Government in relation to the reform of limitation periods.
- 5.3. Evidence shows that physical and psychological abuse can be equally as traumatic for children as sexual abuse, and can result in the same severity of harm. It is also common for child sexual abuse to occur in combination with psychological and physical abuse.¹⁴
- 5.4. The definition is also important from a deterrence perspective, as it sets the values base for cultural change. The scope of the definition will define the approaches organisations will take to address child abuse.
- 5.5. To exclude non-sexual abuse from the proposed reforms could result in confusion in the law, particularly if different duties of care were applied to institutions in respect of different kinds of abuse.
- 5.6. For example, if a child is psychologically manipulated to be ‘groomed’ for sexual activity, and physically beaten in order to prevent disclosure, it would be difficult to distinguish the harm suffered by the child as a result of each type of abuse. If a new non-delegable duty to prevent child sexual abuse was adopted, different claims would have to be made in respect of the sexual and non-sexual abuse. This distinction could complicate and prolong civil litigation.
- 5.7. One option could be to adopt the definition used in the *Limitation Amendment (Child Abuse) Act 2016* (NSW). The Act defined ‘child abuse’ as including any of the following, perpetrated against a person when the person is under 18 years of age:
 - (a) sexual abuse
 - (b) serious physical abuse
 - (c) any other abuse (connected abuse) perpetrated in connection with the sexual abuse or serious physical abuse of the person (whether or not the connected abuse was perpetrated by the person who perpetrated the sexual abuse or serious physical abuse).
- 5.8. While this definition requires that there must have been either sexual abuse or serious physical abuse to make a claim, once that is established, other connected forms of abuse can be considered in determining the claim.
- 5.9. Although it may seem ideal to adopt a consistent definition of ‘child abuse’ for all of the civil litigation reforms, this may not be possible or preferable, depending on the scope of reform. It will be important to consider the impact of the scope of the definition on each recommendation during the consultation process.

¹⁴ An example is the Parramatta Training School for Girls and the Institution for Girls in Hay, where children were isolated, psychologically and physically abused, humiliated and sexually assaulted on a regular basis: Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No. 7, Child sexual abuse at the Parramatta Training School for Girls and the Institution for Girls in Hay*, October 2014.

Discussion questions

1. What kind of abuse should be covered by civil litigation reforms?
2. Should the definition used in the *Limitation Amendment (Child Abuse) Act 2016* (NSW) be adopted, or should a different definition be used?

6. Issue A: The liability of institutions

- 6.1. There are currently three ways that an institution can be found liable:
- (a) In **negligence**, where an institution is responsible for a child and does something, or fails to do something, that leads to the child being harmed.
 - (b) By being found to be **vicariously liable** for the actions of employees and agents.
 - (c) By breaching a personal, **non-delegable duty** to take care, and to ensure that care is taken of persons over which an institution has a special protective relationship. Non-delegable duties currently only apply to a limited number of organisations which work with children, such as schools and hospitals.
- 6.2. Until recently, it has not been clear whether an institution can be vicariously liable for intentional, criminal acts, such as child abuse. In the High Court decision *New South Wales v Lepore*,¹⁵ the High Court expressed different views about whether an employer could be vicariously liable for the sexual abuse of a child by an employee. Although the Court did not express a conclusive test, the majority concluded that there would be some circumstances in which sexual abuse could be sufficiently connected to the duties of an employee to lead to the employer being liable.
- 6.3. The High Court has now reconsidered the judgment in *Lepore* and confirmed that an institution *can* be vicariously liable for criminal offences committed by employees, provided that the employer provided the *occasion for the commission of the wrongful act*.¹⁶ The employee's authority, power, trust and control over the victim, and his or her ability to achieve intimacy with the victim, are all relevant to whether the employer created the opportunity for the criminal offence to be perpetrated. A similar approach has also been taken in courts in the United Kingdom and Canada.¹⁷
- 6.4. However, the Australian approach to vicarious liability is still more restricted than the approach in other jurisdictions, because employers can only be liable for the actions of *employees and agents*.¹⁸ This requirement can be a barrier to claims against priests, volunteers and contractors who are not employees. The 'course of employment' requirement can also be difficult to establish in sexual assault cases if abuse occurred away from the workplace or outside normal working hours.
- 6.5. In the United Kingdom and Canada, liability extends beyond employees to people who have relationships which are 'sufficiently analogous' or 'akin' to employment.¹⁹ In Canada, the test is whether the relationship is 'sufficiently close as to make a claim for vicarious liability appropriate'.²⁰

¹⁵ *New South Wales v Lepore* (2003) 212 CLR 511

¹⁶ *Prince Alfred College Incorporated v ADC* [2016] HCA 37 at [81]

¹⁷ In the United Kingdom, an institution will be liable for sexual abuse if the action is 'so closely connected' with the perpetrator's employment that it is 'fair and just' to hold the institution liable: *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at [28]. In Canada, there must be a 'significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires': *Bazley v Curry* [1999] 2 SCR 534. However, a more stringent test is applied in cases against NGOs (there must be a 'material increase in the risk of harm occurring in the sense that the employment significantly contributed to the occurrence of the harm.'): *Jacobi v Griffiths* [1999] 2 SCR 570 (emphasis added).

¹⁸ No other jurisdiction has yet imposed a non-delegable duty to prevent child abuse.

¹⁹ *Woodland v Essex County Council* [2013] UKSC 66 (23 October 2013)

²⁰ *KLB v British Columbia* [2003] SCC 51 (2 October 2003)

New non-delegable duty

(a) What did the Royal Commission recommend?

- 6.6. The Royal Commission has recommended the introduction of a new, strict non-delegable duty of care (Recommendation 89), to be imposed on the following organisations (Recommendation 90):
- Residential facilities for children, including residential out-of-home care facilities and juvenile detention centres but not including foster care or kinship care
 - Day and boarding schools and early childhood education and care services, including long day care, family day care, outside school hours services and preschool programs
 - Disability services for children
 - Health services for children
 - Any other facility operated for profit which provides services for children that involve the facility having the care, supervision or control of children for a period of time but not including foster care or kinship care
 - Any facilities or services operated or provided by religious organisations, including activities or services provided by religious leaders, officers or personnel of religious organisations but not including foster care or kinship care.
- 6.7. The duty would not extend to community-based not for profit or volunteer institutions that offer opportunities for children to engage in cultural, social and sporting activities. The Royal Commission considered that imposing liability on other not-for-profit institutions would potentially increase the cost of insurance, which may force organisations to cease to provide services and activities for children.²¹
- 6.8. The new duty would require institutions to exercise reasonable care, and to ensure that reasonable care is taken to prevent the abuse of all children who are in the care, supervision or control of the institution. Failure to do so would mean that an institution would be *personally* (rather than vicariously) liable for the abuse, regardless of whether the institution itself was at fault.
- 6.9. 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). 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 organisation.
- 6.10. The Royal Commission has recommended that the changes should apply prospectively (Recommendation 93).

(b) What is the purpose of the recommendation?

- 6.11. It is reasonable for children, as vulnerable members of society, to expect that all institutions with responsibility for their care should owe them a legal duty of care. Organisations should

²¹ Royal Commission into Institutional Responses to Child Sexual Abuse *Redress and Civil Litigation Report* (2015), p491

have a clear, personal legal duty to take appropriate measures to prevent harm to children in their care.

- 6.12. The Royal Commission's recommendations would significantly simplify litigation for plaintiffs, as 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.
- 6.13. An advantage of the proposed recommendation is that it may have a deterrent effect. Unlike the proposal to reverse the onus of proof, discussed below, even if an organisation can show that it has taken 'reasonable steps' to prevent the abuse from occurring, it would not be entitled to a defence. Superficial steps to improve child safety would not be enough to reduce an institution's potential liability, and the institution would need to take genuine action to prevent abuse occurring in the first place.

Example

Currently: *If a child is sexually abused by a volunteer carer at a day care centre, the centre would not be liable for breach of a non-delegable duty to the child, because:*

- (a) Day care centres are currently not subject to non-delegable duties*
- (b) Even if the centre had a non-delegable duty, it would not be liable for an intentional, criminal act such as sexual abuse.*

If the Royal Commission's recommendations were adopted: *The centre would be liable, because:*

- (a) Services provided by a day care centre would be subject to a statutory, non-delegable duty*
- (b) The duty would require the day care centre to ensure that care is taken by all persons associated with the centre to prevent abuse*
- (c) The centre would be personally liable to the child regardless of whether the institution itself was at fault*
- (d) It would not be necessary for the plaintiff to show that the carer was an employee of the day care centre.*

(c) Which organisations should any reform apply to?

- 6.14. It will be important to consider whether a new non-delegable duty of care should be imposed on all of the organisations listed by the Royal Commission (see 6.6). General non-delegable duties already apply to a number of institutions in the Royal Commission's list, such as schools and hospitals. However, the existing duties of care do not extend to intentional, criminal conduct such as child abuse.
- 6.15. It will also be necessary to consider whether the recommendations should apply to organisations which work with children as well as adults. For example, would a GP practice be considered to be a 'health service for children' if some of the practice's patients were children?

Discussion questions

3. Should the Royal Commission's recommendations for a new non-delegable duty be adopted?
4. If the recommendation is adopted, which organisations should be subject to a new non-delegable duty of care? For example, should a new duty:
 - (a) Only be imposed on institutions which operate for profit, and have the care, supervision or control of children for a period of time?
 - (b) Only apply to large organisations?
 - (c) Extend to organisations which provide services to children as well as adults?
5. Should legislation list the organisations on which the non-delegable duty would be imposed, or would a more general definition be appropriate?
6. If your organisation provides services to children, how would the imposition of a non-delegable duty impact on your organisation? Would it affect your organisation's ability to provide services to children?

Reverse onus of proof

(a) What did the Royal Commission recommend?

- 6.16. The Royal Commission has also recommended 'reversing the onus of proof' for child abuse claims. This would mean that liability would be imposed on *all* institutions for child abuse perpetrated by *any person associated with the institution*, unless the institution can prove that it took *reasonable steps* to prevent the abuse from occurring (Recommendations 91 and 92).
- 6.17. A complete defence would be available to any institution that can show that it took reasonable steps to prevent abuse, regardless of whether the steps were actually effective in preventing abuse. The Royal Commission has not proposed a definition of what would constitute 'reasonable steps'.
- 6.18. The Royal Commission has recommended that the changes should apply prospectively (Recommendation 93).
- 6.19. It is not clear whether the Royal Commission's recommendation to reverse the onus of proof applies to the law of negligence or vicarious liability. It appears that the recommendation could apply to either. Whatever the recommendations' relationship is to the underlying common law, it appears the intent is to impose broader duties on institutions in respect of a wider group of 'associated' people, subject to a 'reasonable steps' defence.

Example

Currently: *If a child commenced a civil claim against a foster care agency for abuse perpetrated by a foster parent, it would be the responsibility of the child to prove,*

1) *for a claim for vicarious liability:*

(a) *That the abuse occurred*

(b) *That the foster parent was an employee of the agency (in this case the agency would be protected from liability in respect of the actions of all non-employees)*

(c) *That the abuse was committed in the 'course of employment' because the employer created the opportunity for the abuse to occur, or*

2) *for a negligence claim:*

(a) *That the foster care agency owed the child a duty of care to prevent the abuse*

(b) *That the agency's act, or failure to act, amounted to a breach of that duty*

(c) *That the breach resulted in the child suffering loss and damage.*

If the Royal Commission's recommendations were adopted: *The child would only need to prove:*

(a) *That the abuse occurred*

(b) *That the foster parent was 'associated' with the agency.*

The onus would then be on the agency to prove that it had taken 'reasonable steps' to prevent the abuse from occurring. If it could, it would not be liable in any way for the abuse perpetrated by the foster parent. The only option available to the child would be to sue the foster parent directly.

- 6.20. The Victorian Government has recently reversed the onus of proof in negligence claims against liable institutions. The *Wrongs Amendment (Organisational Child Abuse) Act 2016* (Vic) imposes a duty of care in negligence on organisations that exercise care, supervision or authority over children to prevent the physical or sexual abuse of those children. If a child is abused, the duty is presumed to have been breached unless the organisation can prove that it took reasonable precautions to prevent the abuse from occurring. The term 'reasonable precautions' is not defined, but will depend on the circumstances of each case.

(b) What are 'reasonable steps'?

- 6.21. The Royal Commission has not proposed a definition of what would constitute 'reasonable steps' to prevent child abuse. This is a key term, because proof that 'reasonable steps' have been taken will wholly defeat a claim, even if those steps failed to prevent the abuse from occurring.

- 6.22. Relevantly, similar terms have been adopted for use in Federal anti-discrimination equal opportunity legislation as well as work health and safety law. The legislation imposes an ‘onus of proof’ on employers, by requiring them to show that they took reasonable steps to prevent discrimination and harassment in the workplace in order to avoid liability. Employers must show that they:
- ‘took all reasonable steps’ to prevent conduct under the *Racial Discrimination Act 1975* (Cth)²² and *Sex Discrimination Act 1984* (Cth)²³
 - ‘took reasonable precautions and exercised due diligence to avoid the conduct’ under the *Disability Discrimination Act 1992* (Cth)²⁴ and *Age Discrimination Act 2004* (Cth).²⁵
- 6.23. The terms ‘reasonable steps’ and ‘reasonable precautions’ are not defined in this legislation, so that what is ‘reasonable’ will vary depending on various factors, including the size and nature of the organisation, the level of supervision of employees, the workplace culture, and so on.
- 6.24. The Australian Work Health and Safety (**WHS**) Acts also use the term ‘reasonably practicable’ to define what must be done by persons conducting a business or undertaking to ensure health and safety.
- 6.25. Under the WHS Acts, what is reasonably practicable depends on the circumstances, but requires an assessment of the risk and what can reasonably be done about the risk. This is done by weighing up relevant matters including the likelihood of the risk occurring, the degree of harm that might result, what was known about the risk, and the availability of ways to eliminate or minimise the risk.²⁶ Those that hold the duty are expected to have knowledge about the risk and to be proactive in managing it, by, for example, undertaking risk assessments, learning from previous incidents and consulting with others in the industry.
- 6.26. A similar approach could be adopted in respect of the Royal Commission’s recommendations, as it may not be appropriate or practical to adopt a standard for all institutions, given the substantial variation in the size, structure and duties of organisations responsible for the care of children.
- 6.27. It may, however, be necessary to provide guidance about the scope of what would be ‘reasonable’ by developing legally binding standards. This could clarify what is expected of service providers and reduce the risk of lengthy disputes. For example, under the *Federal Disability Discrimination Act*,²⁷ the Attorney-General can develop binding standards to provide certainty and guidance on obligations under the legislation. Safe Work Australia has also published an interpretative guideline on what is ‘reasonably practicable’ under the WHS Act.

²² Sections 18A(2) and 18E(2)

²³ Section 106(2)

²⁴ Sections 123(2) and (4)

²⁵ Sections 57(2) and (4)

²⁶ *Work Health and Safety Act 2011* (NSW), sections 18 to 26

²⁷ *Disability Discrimination Act 1994* (Cth)

Discussion questions

7. Should the Royal Commission's recommendation to reverse the onus of proof in child abuse claims be adopted?
8. What would be the benefit and/or implications of defining the term 'reasonable steps' in legislation?
9. If the recommendation is adopted, would it be useful to develop guidelines or industry standards about what is considered to be 'reasonable'?
10. Would it be appropriate for a definition of reasonable steps to be graduated according to the type of service provided? If so, on what basis?
11. How could it be ensured that 'reasonable steps' were actually effective to improve the safety of children?
12. Would the recommendation to reverse the onus of proof affect an organisation's ability to provide services to children?

Persons associated with an institution

(a) *The Royal Commission's recommendation*

- 6.28. Regardless of which of the two civil liability recommendations are adopted, the Royal Commission has recommended that institutional liability should be extended to the actions of '*all persons associated with the institution*' (Recommendation 92).
- 6.29. The Royal Commission recommended that 'persons associated with' an institution should include:
 - (a) For non-religious institutions: the institution's officers, office holders, employees, agents, volunteers and contractors
 - (b) For religious organisations: religious leaders, officers and personnel.
- 6.30. The recommendation raises two issues for consideration.
 - (a) First, how close should the connection be between the *perpetrator* and the institution in order to establish liability?
 - (b) Secondly, how close should the connection be between the *abuse* and the institution, in terms of when and where the abuse occurs?

(b) *Association between the perpetrator and the institution*

- 6.31. The first issue is whether it is necessary to specify the type of people who would be considered to be 'associated with' an institution, and if so, whether the list proposed by the Royal Commission should be narrowed or expanded.
- 6.32. It will be important to consider whether this would impose liability on institutions for persons over which they could not reasonably be expected to have control. For example, it may be difficult for an institution to take steps to prevent abuse being perpetrated by an electrician who is on the premises for a short time to do repair work (a contractor), or by a parent who volunteers to help at the school cafeteria once a year (a volunteer). It will also be necessary to consider whether liability should extend to child abuse perpetrated by other children.

6.33. The impact of the change would be different depending on which of the two recommendations to expand the duties of institutions were adopted:

- (a) If only the 'reverse onus' recommendation were adopted, the institution would only be liable if it failed to take reasonable steps to prevent abuse from occurring. In the case of the electrician and the parent, it would be expected that the steps that might be considered 'reasonable' would be less than steps required for more permanent staff.
- (b) However, if the institution were subject to a non-delegable duty of care, it would be strictly liable for the actions of the electrician and volunteer.

(c) Association between the abuse and the institution

6.34. The second issue is the connection between the abuse and the institution – for example, whether abuse would need to have occurred on the institution's premises, or during hours of operation, for an institution to be liable.

6.35. There is uncertainty as to how long an individual will be considered to be 'associated' with an institution after the relationship between the individual and the institution comes to an end. For example, if a person meets and befriends a family when briefly volunteering for a local charity, and then subsequently abuses a child at a private gathering of the family a year later, would there be a sufficient connection between the abuse and the charity? Should the charity be responsible when the primary connection between the abuser and the victim at the time of the abuse was directly through the family?

6.36. Potential options to address this uncertainty include:

- Adopting a test to determine whether the child would reasonably have assumed that the person was part of, or associated with, the institution at the time of the abuse
- Limiting liability to the actions of persons which are *under the control or authority* of the institution
- Adopting a similar test to the one adopted by United Kingdom and Canadian courts – that is, whether the relationship is *sufficiently analogous* or *akin* to employment.

Discussion questions

13. Should the Royal Commission's recommendation to extend institutional liability to 'all persons associated with an institution' be adopted?

14. If the recommendation is adopted, should the term 'associated with' be defined in legislation, or decided on a case by case basis?

15. Should the range of persons 'associated with' an institution capture all of those referred to in the Royal Commission's recommendation? That is:

- (a) for non-religious institutions: the institution's officers, office holders, employees, agents, volunteers and contractors
- (b) for religious organisations: religious leaders, officers and personnel.

Discussion questions

16. How closely associated should an institution and a perpetrator need to be to result in potential liability? For example:

- (a) Should an institution be liable for abuse perpetrated by an employee of a contracted cleaning company? What about a subcontractor of that cleaning company?
- (b) Should an institution be liable for abuse committed by an employee or volunteer in their own home, against a child met through the institution?

7. Issue B: Ensuring there is someone to sue

(a) What did the Royal Commission recommend?

- 7.1. To ensure that survivors can easily identify a defendant to sue, the Royal Commission has recommended that all institutions with associated property trusts should be required to nominate a 'proper defendant' (an entity that can be sued) to civil claims for child abuse. The proper defendant would be required to have sufficient assets to meet any liability arising from the proceedings (Recommendation 94).
- 7.2. If an institution failed to do so, a 'fall back' option would be to deem the institution's property trust to be the proper defendant to the claim. Compensation could then be paid to the survivor from the trust assets. The recommendation applies to all property trusts, including private property trusts which have not been established by legislation.
- 7.3. The recommendation would have a retrospective effect, because it would require 'proper defendants' to be nominated for claims in respect of all abuse, *including past abuse*.

(b) What is the purpose of the recommendation?

- 7.4. Survivors of institutional child abuse are often unable to make claims against responsible institutions because they are legally structured in a way which means they cannot be sued.
- 7.5. Many not-for-profit institutions and religious organisations are unincorporated, meaning that they have no 'legal personality', and cannot be sued.²⁸ For example, a 'church' is not a separate legal entity, but is made up of a collection of people with a common belief who have combined together.
- 7.6. Another problem is that the assets of institutions may be bound up in trusts and are not available for civil claims. Historically, many unincorporated associations (which cannot own property) have adopted trust arrangements, to allow property to be held and managed on behalf of the institution. These can be private trust arrangements, or trusts established by legislation.²⁹
- 7.7. Although these trusts may have significant assets, they may not be available to pay compensation in civil claims, because (a) trusts, like unincorporated associations, have no legal personality, so cannot be sued, and (b) although the trustees of the trust can be sued, they are generally not liable for child abuse, as their responsibility is limited to managing the trust's assets.
- 7.8. Some unincorporated associations have relied on these aspects of the law to avoid liability in child abuse claims. The defence was used by the Catholic Church in the *Ellis* case,³⁰ concerning child sexual abuse perpetrated by an assistant priest in the 1970s. The survivor, Mr Ellis, was not able to establish a case against:
 - (a) The individual perpetrator, who was deceased at the time the claim was brought,
 - (b) The Archbishop, who could not be liable for the conduct of his predecessor, or

²⁸ *Williams v Hursey* (1959) 103 CLR 30, 53 to 55 per Dixon CJ

²⁹ More than 40 organisations in NSW have statutory property trusts under NSW legislation, including churches and community organisations such as the Girl Guides, Scouts and the YMCA.

³⁰ *Trustees of the Roman Catholic Church v Ellis and Anor* [2007] NSWCA 117

- (c) The trustees of the property trust for the Diocese of Sydney, who were not liable for the actions of the perpetrator or the former Archbishop, because the relevant Act³¹ did not confer power on the trustees to appoint, manage, discipline or remove priests.
- 7.9. The Court held that the trustees could not be sued because at the time of the abuse there was no evidence that the trustees were involved in pastoral activities.³² The trustees could not be liable for all claims associated with church activity.³³
- 7.10. In March 2014, the Royal Commission conducted public hearings in relation to this so-called ‘Ellis defence’. Evidence revealed that the Catholic Church had defended the matter to create a precedent to prevent claims by other victims. It was also found that the defence had been used by the Salvation Army.
- 7.11. In Case Study 3, the Royal Commission found that the Anglican Diocese of Grafton had also denied liability on this basis for the abuse of 20 children at the North Coast Children’s Home, (which was located on church land and funded in part by the Anglican Church). The Church argued that the corporate trustees of the diocese, which had net assets of almost \$209 million in 2007, could not be liable for the actions of people at the home, because the trustees did not employ the staff, or supervise or control the home.³⁴
- 7.12. The Royal Commission’s recommendation is aimed to end the use of the ‘Ellis defence’ and to ensure that plaintiffs are not improperly deprived of the opportunity for full consideration of the merits of their claim. All institutions with associated property trusts would be required to nominate an entity with legal personality to be the ‘proper defendant’ to civil claims for child abuse.
- 7.13. The success of the ‘proper defendant’ recommendation would depend on the cooperation of the institution. To address this uncertainty, the Royal Commission recommended that a ‘fall back’ option apply to institutions that fail to nominate defendants. In those circumstances, any property trust associated with the institution would be deemed to be a default ‘proper defendant’.

Example

If the Royal Commission’s recommendations had been adopted at the time Mr Ellis commenced his claim, the Catholic Church (an institution with an associated property trust) would have been required to nominate a proper defendant for Mr Ellis to sue, with sufficient assets to meet an award for damages. If the Church failed to do so, Mr Ellis would have been entitled to sue the trustees of the property trust for the Diocese of Sydney, as the default ‘proper defendant’.

(c) What have other jurisdictions done to address this problem?

- 7.14. In the United States, Canada and the UK, the so-called ‘Ellis defence’ has not prevented courts from holding faith-based institutions liable for child abuse.

³¹ *Roman Catholic Church Trust Property Act 1936* (NSW)

³² *Trustees of the Roman Catholic Church v Ellis and Anor* [2007] NSWCA 117 at 141

³³ *Ibid* at 149

³⁴ Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No. 3 Anglican Diocese of Grafton’s response to child sexual abuse at the North Coast Children’s Home*, October 2014

- 7.15. In the United States, religious organisations have typically incorporated as ‘non-profit corporations’.³⁵ As a result, most religious organisations, including the Catholic Church, are incorporated and capable of being sued.
- 7.16. Claims in the United States can also be made against unincorporated organisations, because the federal Rules of Civil Procedure, and other similar state procedural rules, allow civil claims to be made against members of an unincorporated association in the association’s name.³⁶
- 7.17. In 2005, this was taken further with the development of a harmonised legal framework for non-profit associations in the United States, Canada and Mexico. The Uniform Act provides that an unincorporated non-profit association is itself “an entity distinct from its members and managers” and can therefore sue and be sued in its own name.³⁷ The Act has been adopted by a number of states.
- 7.18. Similar rules exist in South Australia and Tasmania. The Supreme Court Rules in those states allow an unincorporated association to sue or be sued in the name of the association.³⁸ However, the validity of the rules is unclear³⁹ and there are no similar rules in NSW.

(d) What institutions should be subject to reform?

- 7.19. Given the magnitude of the change to standard legal relationships which is contemplated by the recommendation, it will be important for any reforms to target only those organisations which are difficult to sue. On the evidence of the Royal Commission, this appears to include almost exclusively religious organisations.
- 7.20. In response to its Consultation Paper, the Royal Commission only received one example of difficulties in suing an appropriate defendant where the responsible institution was not a religious institution.⁴⁰
- 7.21. Although religious organisations have formalised governance structures, and some sub-organisations or services have been established as corporate entities,⁴¹ they generally do not have legal personality. For example, the Catholic Church is made up of an intricate

³⁵ The charitable corporation became the most popular organisational form for non-profit activities in the United States because incorporation enabled a charitable organisation to receive legacies and bequests, and ensured that title to property could be defended in the name of the corporation (to sustain a charitable bequest in certain states, courts had to find an intent to make a gift to a specific corporation for its proper purposes, rather than an attempt to create a trust for indefinite and uncertain beneficiaries) : J.J Fishman, ‘The Development of Nonprofit Corporation Law and An Agenda for Reform’, 34 Emory L.J.617 (1985) 638-639.

³⁶ Federal Rules of Civil Procedure r17(b), 23.2 provides that certain members of an unincorporated association can be named as representative parties to a civil proceeding. In California, section 388 of the Code of Civil Procedure provides that when two or more persons transact in any business under a common name, they can be sued under that common name in the same manner as if all members of the association had been named as defendants.

³⁷ *Uniform Unincorporated Nonprofit Association Act* (2008) s5(a). The Act also provides that a non-profit association will have perpetual existence (s5(b)).

³⁸ Supreme Court Civil Rules 2006 (SA) rr87-88, Supreme Court Rules 2000 (TAS) rr315-334

³⁹ In *Williams v Hursey* (1959) 103 CLR 30 at 54, Fullagar J expressed doubts about the validity of the Tasmanian rule, given that it altered the substantive law of unincorporated associations, but was made pursuant to rule-making powers to regulate procedural issues

⁴⁰ Submissions given by Slater and Gordon regarding the Fairbridge Farm litigation: Royal Commission into Institutional Responses to Child Sexual Abuse Redress and Civil Litigation Report (2015), p507

⁴¹ Submission from the Truth Justice and Healing Council to the Royal Commission into Institutional Responses to Child Sexual Abuse re Issues Paper No.5, Civil Litigation, 15 April 2014

complex of disparate religious institutions, some of which engage in commercial, profit making enterprises with substantial revenue. However, the majority of organisations within the Church have no legal personality, so cannot be sued.

(e) Which property trusts could be subject to reform?

- 7.22. The Royal Commission's recommendations are expressed to apply to all 'institution[s] with which a property trust is associated'. This means that reform is intended to apply to *all trusts* relating to *all property*, not just to those which have been created by legislation.
- 7.23. Trust structures are used widely and for a variety of reasons. Reform of this scale would therefore have a significant impact on a variety of organisations and would potentially expose a large number of trusts to liability, including superannuation trusts, trusts created by will or settlement and trusts of business assets (provided that they are 'associated' with an unincorporated association).
- 7.24. The extent to which an institution and property trust must be 'associated' is also unclear. For example, would there be a sufficient 'association' between a family-run children's dance class and the family's private trust? Should the family be required to incorporate the dance class or to form a new corporate body to be a 'proper defendant' to any claim for child abuse?

Discussion questions

17. Should the Royal Commission's 'proper defendant' recommendation be adopted?
18. Do the difficulties in identifying a proper defendant arise in respect of non-religious organisations?
19. How would the proposed reforms impact on non-religious organisations?
20. Should the recommendations apply to all property trusts (including private trusts), or to statutory trusts only? What level of association should there be between the institution and the trust?

(f) Concerns with the Royal Commission's proper defendant recommendation

Concerns with the requirement to nominate a 'proper defendant'

- 7.25. In submissions to the Royal Commission, stakeholders expressed a number of concerns about the suggestion that institutions be required to nominate a 'proper defendant'. The main concerns are the following.

7.25.1. A 'proper defendant' may not be liable for abuse

Nominated 'proper defendants' are unlikely to be legally liable for abuse which may have been perpetrated many years before they were established, by people who have no association with the nominated 'proper defendant'.

Catholic Church Insurance noted that there could be no legal liability 'resting upon the subsequently incorporated entity for sexual abuse committed by a perpetrator years or decades earlier'.⁴²

⁴² Submission from Catholic Church Insurance to the Royal Commission into Institutional Responses to Child Sexual Abuse re Issues Paper No.5, Civil Litigation, 6 March 2015, pp4-5

7.25.2. Requiring 'proper defendants' to be structured in a particular way would cause difficulty for institutions

Some organisations, including the Truth Justice and Healing Council and the Uniting Church in Australia, suggested that it would be problematic to impose a mandatory legal structure on all 'proper defendants'.

The Truth Justice and Healing Council was concerned that legislation may interfere with the right of religious institutions to 'arrange their affairs according to their norms or beliefs'.⁴³

Some institutions also noted that they had already nominated proper defendants to be sued in cases of child abuse.⁴⁴ For example, the current Catholic Bishop of Ballarat, Paul Bird has nominated himself as the proper defendant to sex abuse claims dating back to the 1960s.⁴⁵

7.25.3. A 'proper defendant' may not be covered by existing insurance

It is unlikely that nominated defendants which are created or nominated after an institution has obtained public liability insurance would be covered by that existing insurance policy.

7.25.4. A 'proper defendant' may not be responsible for all sub-organisations

It is not clear whether each sub-organisation within a religious institution would be able to agree on a nominated defendant entity.

In its submissions, the Truth Justice Healing Council acknowledged the difficulties in achieving consensus on the appropriate process for responding to complaints of child abuse, noting that each individual Catholic diocese, religious institute and parish in NSW is autonomous and separately governed.⁴⁶

This complexity raises a number of questions, such as:

- Which sub-organisations or services of a religious organisation would a nominated 'proper defendant' be liable for?
- Would the entity take on the legal obligations of sub-organisations that no longer exist?
- In what proportion would each religious institute, diocese, school, or welfare service fund a nominated entity?
- Which organisation would be responsible for ensuring that the 'proper defendant' is sufficiently funded?
- How would a plaintiff know which was the correct 'proper defendant' to sue?

⁴³ Royal Commission into Institutional Responses to Child Sexual Abuse *Redress and Civil Litigation Report* (2015), p505

⁴⁴ The Australian Baptist Ministries, Salvation Army Australia and the Uniting Church

⁴⁵ Charlotte King, 'Ballarat bishop agrees to be sued for historic sex abuse claims in lieu of dead predecessor', *ABC News*, 17 February 2016

⁴⁶ Submission from the Truth Justice and Healing Council to the Royal Commission into Institutional Responses to Child Sexual Abuse re Issues Paper No.2, Towards Healing, 30 September 2013, p20

Discussion questions

21. If applicable: Has your organisation already established a proper defendant for child abuse claims? If so, does it have responsibility for taking steps to prevent child abuse from occurring? Which sub-organisations is it responsible for?
22. Should institutions be required to nominate a 'proper defendant' for all claims, including past abuse?
23. Should institutions be required to nominate a proper defendant with a particular legal structure? If so, what would an appropriate legal structure be?

Concerns with the 'fall back option' of suing property trusts

7.26. Concerns have also been expressed about the proposed 'fall back option', whereby property trusts could be deemed to be 'proper defendants' to claims where an institution does not nominate a 'proper defendant'. The main concerns are the following.

7.26.1. Some property trusts have been established for specific charitable purposes, meaning that the assets of the trusts may not be used for any other purpose

Property trusts (particularly those created by statute) are often established for charitable purposes, including the advancement of religion.⁴⁷ Trustees have a fundamental duty to obey the terms of the trust,⁴⁸ including, in the case of a charitable trust, to ensure that trust assets are only used for the charitable purpose. It's not clear how this legal duty would be impacted if the assets of a charitable trust were deemed to be available for civil claims in respect of child abuse.

7.26.2. Suing a property trust may not be practical

Because charitable trusts are for the public benefit, proceedings in respect of them are usually instituted or defended by the Attorney General. The *Charitable Trusts Act 1993* provides that proceedings relating to charitable trusts are not to be commenced in the Supreme Court of NSW without the authority of the Attorney General or leave of the Court.⁴⁹ This restriction could cause practical difficulties for survivors when commencing claims.

Discussion questions

24. If an institution does not cooperate by nominating a defendant to a child abuse claim, what would a reasonable 'fall back' option be?
25. Would it be reasonable to require every institution working with children to incorporate, or to have an incorporated 'proper defendant'? What would the impacts of this be?
26. Would it be appropriate in all cases for the assets of a property trust to be used for the purpose of civil claims for child sexual abuse?

⁴⁷ The advancement of religion is a charitable purpose at general law and for the purposes of the *Charities Act 2013* (Cth)

⁴⁸ *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484

⁴⁹ The Court must be satisfied that the Attorney General has been given an opportunity to consider whether to authorise the proceedings, or that referral to the Attorney General is not appropriate: Sections 5 and 6 of the *Charitable Trusts Act 1993* (NSW)

(g) Options for reform

7.27. There is no straightforward legislative solution to these issues. In order to address the concerns of stakeholders described above, it may be necessary to consider alternative options for reform, such as:

- Introducing legislation to allow claims to be brought against a ‘nominal defendant’, to be funded by all unincorporated organisations which provide services to children, in proportion to their size and the extent to which they engage with children (in the same way that claims may be brought against a nominal defendant under compulsory third party insurance legislation).
- Requiring organisations that provide services to children to have a mandatory legal structure, or encouraging organisations to incorporate in order to obtain tax exemptions or charitable status.
- Amending specific statutory trust legislation to ensure that trusts are liable for abuse within specified institutions.

Discussion questions

27. Is the Royal Commission’s recommendation workable? What are other options for reform?

28. Is the approach in the United States (where claims can be made against unincorporated associations) a more effective means to ensure that religious and not-for-profit organisations are legally responsible for abuse (see 7.14 to 7.17)? What is the scope for applying similar approaches in NSW?

8. Issue C: Requirement to have insurance

(a) What did the Royal Commission recommend?

- 8.1. Even if a survivor is successful in a civil claim, the organisation may not have the financial capacity to pay damages without insurance. It is also possible that organisations could under-fund a 'proper defendant' based on an underestimate of the likely number of child abuse claims and the potential damages which would be awarded by a court.
- 8.2. To address these issues, the Royal Commission has recommended that state and territory governments consider requiring any unincorporated bodies that they fund (directly or indirectly) to provide children's services, to maintain insurance that covers their liability in respect of institutional child abuse claims (Recommendation 95).
- 8.3. The Royal Commission's insurance recommendation extends to all funded unincorporated organisations, including those which are funded 'indirectly' (for example where the Commonwealth or a State or Territory funds children's services through local government).⁵⁰ It is not clear how 'indirect' the funding would have to be.
- 8.4. The recommendation does not, however, apply to organisations which do not receive any government funding, such as religious organisations.

(b) What is the possible impact?

- 8.5. NSW Government agencies (including NSW Health, the Department of Education and Training, and the Department of Family and Community Services) already require recipients of grant funding to provide proof of adequate insurance in order to be eligible for funding. These practices are generally supported by formal policies. However, agencies do not currently require insurance to include specific coverage for child abuse. The NSW Government could consider issuing a directive to formally require this.
- 8.6. Without coverage for sexual abuse, institutions may not be covered for claims which relate to the intentional criminal acts of a perpetrator. Most public liability policies do not cover injury resulting from acts which are intentional, such as child abuse, because insurance generally exists to provide cover for accidental loss. In addition, policies often only cover 'personal' or 'bodily' injuries, which may not extend to mental harm caused by child abuse.
- 8.7. The insurance industry is already grappling with these issues in response to the recent increase in child abuse claims. The insurance industry in the United States has offered a specific 'sexual abuse' coverage endorsement for public liability policies for an additional fee.⁵¹ Some Australian insurance companies are also offering cover for negligence claims in respect of sexual abuse.⁵²
- 8.8. However, even if insurance policies are available, they may be limited to particular forms of abuse. It is also unlikely that new insurance policies would extend to claims in respect of historic abuse. The cost of insurance premiums may also be significant, and have a disproportionate impact on small NGOs that work with children. Assistance may be

⁵⁰ Royal Commission into Institutional Responses to Child Sexual Abuse *Redress and Civil Litigation Report* (2015), pp 58 and 511

⁵¹ Peter N Swisher, *Liability Insurance Coverage for Clergy Sexual Abuse Claims*, 17 Conn. Ins. L.H. 355 (2011)

⁵² Ansvr Insurance offers insurance cover for claims for negligence in respect of sexual abuse, provided that the organisation can demonstrate quality risk management: <<https://www.ansvar.com.au/media/12110/a4-psa-factsheet-all-states-final.pdf>>, accessed 15 June 2017. The Community Underwriting Agency Pty Ltd also offers cover for sexual 'molestation' as additional coverage: <<http://tinyurl.com/hkl668f>>, accessed 15 June 2017

required to establish an insurance fund for these organisations in order to ensure that adequate coverage is available.

- 8.9. It is relevant to note that a requirement to have insurance may, however, have a positive, deterrent impact on institutions working with children and could significantly improve child protection practices.
- 8.10. Insured parties are required to notify insurers as soon as practicable of facts that might give rise to a claim.⁵³ In order to be covered for claims that subsequently arise from the circumstances, these concerns must be appropriately investigated, and sufficient detail must be provided to the insurer. As a result, all institutions which are covered for sexual abuse claims would be required to continually monitor child safety and investigate any suspected abuse or risky behaviours.
- 8.11. It is also likely that insurers would require institutions to ensure that high standards of risk management procedures are in place, to make it as difficult as possible for abuse to occur. To be effective, risk management systems would have to be tailored to the particular risks faced by the institution, and require organisational commitment and ongoing monitoring, assessment and adjustment. It is likely that such systems would be seen as a major factor to be taken into account when assessing an organisation's underwriting risk.

Discussion questions

29. Should the Royal Commission's insurance recommendation be adopted?
30. Would the Royal Commission's civil litigation recommendations have a substantial impact on insurance premiums or the availability of insurance?
31. How would an increase in insurance premiums impact on the viability of organisations offering services to children? Which types of institutions would have a problem? How could this be managed?
32. Should the recommendation also extend to organisations which are not recipients of government funding, such as religious organisations? How could the requirement be enforced in these cases?
33. Should the Royal Commission's recommendation that unincorporated bodies have insurance extend to recipients of 'indirect' government funding? How far should this extend?

⁵³ If there are no express notification requirements in an insurance policy, section 40(3) of the *Insurance Contracts Act 1984* (Cth) applies to require notification

Discussion questions for the insurance industry

34. Does the insurance industry currently offer policies which insure against liability arising from the commission of an intentional act?
35. What would the likely repercussions be of the proposed changes to the duties of institutions?
36. What are the elements which impact on insurance premiums?
37. When considering the risk of child abuse, what are the factors that underwriters will examine?
38. How has the insurance industry in Australia responded to the recent increase in child abuse claims? Has this been similar to the response overseas?
39. What mechanisms and responses would institutions need to have in order to support the affordability and availability of liability insurance cover for child abuse?
40. What insurance cover could be offered to nominated 'proper defendants' to child abuse claims?
41. What would be the likely cost of specific insurance coverage for child abuse? Would such coverage be available for small organisations, and at what cost?

9. Overall impact of the proposed reforms

- 9.1. The NSW Government understands that the proposed reforms are complex and that there may potentially be a range of impacts of any changes on survivors of institutional child abuse, government, non-government organisations and the public interest.
- 9.2. The NSW Government welcomes submissions on the recommendations and the potential impacts of the proposed reforms.

Discussion questions

42. Would your organisation consider making changes to the service you provide, who the service is provided to, or how the service operates as a result of any of the proposed reforms in this Consultation Paper? Please provide examples.
43. What operational changes would organisations consider to be reasonably necessary to take in light of the proposed reforms? Is it likely that the behaviour of organisations would change in response to reform? What support would organisations need to offset these changes?
44. Would the proposed changes to civil liability motivate institutions to improve child safety? How could the deterrent effect of the civil liability recommendations be optimised?

Appendix 1 – Discussion questions

Definition of child abuse

1. What kind of abuse should be covered by civil litigation reforms?
2. Should the definition used in the *Limitation Amendment (Child Abuse) Act 2016* (NSW) be adopted, or should a different definition be used?

New non-delegable duty of care

3. Should the Royal Commission's recommendations for a new non-delegable duty be adopted?
4. If the recommendation is adopted, which organisations should be subject to a new non-delegable duty of care? For example, should a new duty:
 - (a) Only be imposed on institutions which operate for profit, and have the care, supervision or control of children for a period of time?
 - (b) Only apply to large organisations?
 - (c) Extend to organisations which provide services to children as well as adults?
5. Should legislation list the organisations on which the non-delegable duty would be imposed, or would a more general definition be appropriate?
6. If your organisation provides services to children, how would the imposition of a non-delegable duty impact on your organisation? Would it affect your organisation's ability to provide services to children?

Reverse onus of proof

7. Should the Royal Commission's recommendation to reverse the onus of proof in child abuse claims be adopted?
8. What would be the benefit and/or implications of defining the term 'reasonable steps' in legislation?
9. If the recommendation is adopted, would it be useful to develop guidelines or industry standards about what is considered to be 'reasonable'?
10. Would it be appropriate for a definition of reasonable steps to be graduated according to the type of service provided? If so, on what basis?
11. How could it be ensured that 'reasonable steps' were actually effective to improve the safety of children?
12. Would the recommendation to reverse the onus of proof affect an organisation's ability to provide services to children?

Persons 'associated with' an institution

13. Should the Royal Commission's recommendation to extend institutional liability to 'all persons associated with an institution' be adopted?
14. If the recommendation is adopted, should the term 'associated with' be defined in legislation, or decided on a case by case basis?

15. Should the range of persons 'associated with' an institution capture all of those referred to in the Royal Commission's recommendation? That is:
 - (a) for non-religious institutions: the institution's officers, office holders, employees, agents, volunteers and contractors
 - (b) for religious organisations: religious leaders, officers and personnel.
16. How closely associated should an institution and a perpetrator need to be to result in potential liability? For example:
 - (a) Should an institution be liable for abuse perpetrated by an employee of a contracted cleaning company? What about a subcontractor of that cleaning company?
 - (b) Should an institution be liable for abuse committed by an employee or volunteer in their own home, against a child met through the institution?

Identifying a proper defendant

17. Should the Royal Commission's 'proper defendant' recommendation be adopted?
18. Do the difficulties in identifying a proper defendant arise in respect of non-religious organisations?
19. How would the proposed reforms impact on non-religious organisations?
20. Should the recommendations apply to all property trusts (including private trusts), or to statutory trusts only? What level of association should there be between the institution and the trust?
21. If applicable: Has your organisation already established a proper defendant for child abuse claims? If so, does it have responsibility for taking steps to prevent child abuse from occurring? Which sub-organisations is it responsible for?
22. Should institutions be required to nominate a 'proper defendant' for all claims, including past abuse?
23. Should institutions be required to nominate a proper defendant with a particular legal structure? If so, what would an appropriate legal structure be?
24. If an institution does not cooperate by nominating a defendant to a child abuse claim, what would a reasonable 'fall back' option be?
25. Would it be reasonable to require every institution working with children to incorporate, or to have an incorporated 'proper defendant'? What would the impacts of this be?
26. Would it be appropriate in all cases for the assets of a property trust to be used for the purpose of civil claims for child sexual abuse?
27. Is the Royal Commission's recommendation workable? What are other options for reform?
28. Is the approach in the United States (where claims can be made against unincorporated associations) a more effective means to ensure that religious and not-for-profit organisations are legally responsible for abuse (see 7.14 to 7.17)? What is the scope for applying similar approaches in NSW?

Insurance

29. Should the Royal Commission's insurance recommendation be adopted?
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31. How would an increase in insurance premiums impact on the viability of organisations offering services to children? Which types of institutions would have a problem? How could this be managed?
32. Should the recommendation also extend to organisations which are not recipients of government funding, such as religious organisations? How could the requirement be enforced in these cases?
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Questions for the insurance industry

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42. Would your organisation consider making changes to the service you provide, who the service is provided to, or how the service operates as a result of any of the proposed reforms in this Consultation Paper? Please provide examples.
43. What operational changes would organisations consider to be reasonably necessary to take in light of the proposed reforms? Is it likely that the behaviour of organisations would change in response to reform? What support would organisations need to offset these changes?
44. Would the proposed changes to civil liability motivate institutions to improve child safety? How could the deterrent effect of the civil liability recommendations be optimised?

Appendix 2 – Royal Commission recommendations

Non-delegable duty recommendation

Recommendation 89: State 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.

Recommendation 90: The non-delegable duty should apply to institutions that operate the following facilities or provide the following services and be owed to children who are in the care, supervision or control of the institution in relation to the relevant facility or service:

- a. Residential facilities for children, including residential out-of-home care facilities and juvenile detention centres but not including foster care or kinship care
- b. Day and boarding schools and early childhood education and care services, including long day care, family day care, outside school hours services and preschool programs
- c. Disability services for children
- d. Health services for children
- e. Any other facility operated for profit which provides services for children that involve the facility having the care, supervision or control of children for a period of time but not including foster care or kinship care
- f. Any facilities or services operated or provided by religious organisations, including activities or services provided by religious leaders, officers or personnel of religious organisations but not including foster care or kinship care.

Recommendation 92: For the purposes of both the non-delegable duty and the imposition of liability with a reverse onus of proof, the persons associated with the institution should include the institution's officers, office holders, employees, agents, volunteers and contractors. For religious organisations, persons associated with the institutions should also include religious leaders, officers and personnel of the religious organisation.

Recommendation 93: State and territory governments should ensure that the non-delegable duty and the imposition of liability with a reverse onus of proof apply prospectively and not retrospectively.

Reverse onus recommendations

Recommendation 91: 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.

Recommendation 92: For the purposes of both the non-delegable duty and the imposition of liability with a reverse onus of proof, the persons associated with the institution should include the institution's officers, office holders, employees, agents, volunteers and contractors. For religious

organisations, persons associated with the institutions should also include religious leaders, officers and personnel of the religious organisation.

Recommendation 93: State and territory governments should ensure that the non-delegable duty and the imposition of liability with a reverse onus of proof apply prospectively and not retrospectively.

Proper defendant recommendation

Recommendation 94: State and territory governments should introduce legislation to provide that, where a survivor wishes to commence proceedings for damages in respect of institutional child sexual abuse where the institution is alleged to be an institution with which a property trust is associated, then unless the institution nominates a proper defendant to sue that has sufficient assets to meet any liability arising from the proceedings:

- a. The property trust is a proper defendant to the litigation
- b. Any liability of the institution with which the property trust is associated that arises from the proceedings can be met from the assets of the trust.

Insurance recommendation

Recommendation 95: The Australian Government and state and territory governments should consider whether there are any unincorporated bodies that they fund directly or indirectly to provide children's services. If there are, they should consider requiring them to maintain insurance that covers their liability in respect of institutional child sexual abuse claims.