

## Options for the implementation in the Northern Territory of the civil litigation reforms recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse

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## MAKING A COMMENT

The Department of the Attorney-General and Justice is seeking your comments on proposed options for the implementation in the Northern Territory of the civil litigation reforms recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse.

Comments can be as short or informal as an email or letter, or can be a more substantial document. Comments do not have to address all aspects of the options paper nor do they need to be confined to the options as discussed in this paper.

Electronic copies of comments are preferred and should be sent whenever possible by email to [Policy.AGD@nt.gov.au](mailto:Policy.AGD@nt.gov.au).

Comments can also be sent to:

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The contact officer is Ms Josine Wynberg.

**The closing date for comments on this Consultation Paper is Friday 2 November 2018.**

Any feedback or comment received by the Department of the Attorney-General and Justice will be treated as a public document unless clearly marked as 'confidential'. In the absence of such clear indication, the Department of the Attorney-General and Justice will treat the feedback or comment as non-confidential.

Non-confidential feedback or comments are likely to be made publicly available and published on the Department of the Attorney-General and Justice website. The Department of the Attorney-General and Justice may draw upon the contents of such and quote from them or refer to them in reports, which may be made publicly available.

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## BACKGROUND

The Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) was established by the Commonwealth Government in January 2013. Broadly, its reference was to inquire into how institutions like schools, churches, sports clubs and government organisations (institutions) have responded to allegations and instances of child sexual abuse. The Royal Commission was directed to focus on systemic issues, informed by individual cases, and make findings and recommendations to better protect children against sexual abuse, and alleviate the impact of abuse on children when it occurs.

On 14 September 2015, the Royal Commission released its Report on Redress and Civil Litigation (the Report). The Report made a number of recommendations for reforms to the civil law to make it easier for victims of sexual abuse in the institutional context to sue for damages.

A full copy of the Report can be found at:

<https://www.childabuseroyalcommission.gov.au/redress-and-civil-litigation>

## ROYAL COMMISSION RECOMMENDATIONS

The Royal Commission made 99 recommendations regarding the establishment of a redress scheme and civil litigation reforms. Recommendations 85-99 of the Report proposed reforms to limitation periods (85-88), the duties and liability of institutions (89-93), the identification of defendants (94), insurance (95) and model litigant principles (96-99).

The Northern Territory Government has already addressed the following two areas of reform identified by the Royal Commission:

- (a) limitation periods – the *Limitation Amendment (Child Abuse) Act 2017* was passed in the May 2017 Sittings of the Northern Territory Legislative Assembly and commenced operation on 15 June 2017. The Act removes limitation periods contained in the *Limitation Act* for claims for personal injury arising out of child abuse, allowing survivors to bring claims regardless of the date of the alleged abuse. The Act applies retrospectively.
- (b) Model litigant approaches – in September 2017, the Northern Territory Government approved a revised Model Litigant Policy for the Northern Territory incorporating recommendations from the Royal Commission.<sup>1</sup>

Redress and insurance are currently being considered as a separate package of work by the Department of the Attorney-General and Justice and the Department of the Chief Minister.

This Discussion Paper considers the Royal Commission's recommendations regarding the duties and liability of institutions and the identification of defendants.

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<sup>1</sup> A copy of the Solicitor for the NT's Model Litigant Policy is available online at:

<https://justice.nt.gov.au/attorney-general-and-justice/northern-territory-government-legal-services/solicitor-for-the-northern-territory>

## PURPOSE

The purpose of this paper is to seek feedback from survivors of institutional child sexual abuse, organisations providing services to children, legal professionals, and any other interested members of the public on proposed options for reforms to Territory laws being considered by the Department of the Attorney-General and Justice in response to the Royal Commission's recommendations regarding the duties and liability of institutions and the identification of defendants.

In particular, this paper seeks stakeholder's views in relation to:

- (a) how achievable and effective the proposed reforms would be, and
- (b) the potential impact of any changes on survivors of institutional child abuse, government, non-government organisations (**NGOs**) and the public interest.

The outcomes of this consultation process will assist in the Government's development of the proposed reforms.

## 1. DUTIES AND LIABILITY OF INSTITUTIONS

### 1.1 What the Royal Commission considered

In the absence of fault on the part of an institution occasioning a breach of a duty of care it owed to a child, there are two ways an institution can be found liable for child abuse:

- (1) being found vicariously liable for the actions of employees and agents who have caused harm to the child; and
- (2) an action for breach of non-delegable duty of care to ensure reasonable care is taken to prevent harm in respect of persons over which the institution has a special protective relationship.

The problem for survivors who sue institutions (as opposed to the perpetrator) is that their claims are generally founded upon the deliberate criminal acts of the perpetrator. Australian courts have been reluctant, in the absence of fault on the part of the institution, to hold the institution liable to compensate survivors of child sexual abuse for deliberate criminal acts of its members or employees.

In considering how to address these issues, the Royal Commission reviewed the leading case law in Australia and overseas and, in doing so, identified the following two options for reform:

- (1) enact legislation to extend the scope of vicarious liability to encompass independent contractors and intentional and criminal acts; or
- (2) enact legislation to impose a non-delegable duty on certain institutions to take reasonable care to prevent the abuse of children under their care, supervision and control, despite it being the deliberate criminal act of a person associated with the institution.

## Vicarious liability

Vicarious liability is the legal liability of one person for the actions of an employee, despite the first person being free from fault. Vicarious liability is strict.

However, Australian courts have not generally held institutions vicariously liable for intentional or criminal child abuse perpetrated by their associates. This is for two reasons:

- (1) courts are reluctant to find that vicarious liability exists where no employment or similar relationship exists between the organisation and the perpetrator, as in the case of some religious personnel or independent contractors; and
- (2) courts consider criminal child abuse a deliberate criminal act that cannot be regarded as being undertaken by a person 'in the course of their employment'.

At the time the Royal Commission published the Report, the leading authority on these points was the High Court case of *State of New South Wales v Lepore (Lepore)*.<sup>2</sup> In that case, a majority of the High Court was reluctant to conclude that an employer could be vicariously liable for the deliberate criminal acts of an employee. Although then Chief Justice Gleeson indicated that an employer may be vicariously liable for the acts of an employee, even where there has been serious misconduct, the other judges disagreed. The case failed to provide any clear guidance on the question of when vicarious liability could be established.

The High Court has since determined, in *Prince Alfred College Incorporated v ADC (Prince Alfred College)*,<sup>3</sup> that institutions *can* be vicariously liable for criminal offences committed by employees, provided that the employer provided the *occasion for the commission of the wrongful act*. However, liability remains limited by the fact that employers can only be held vicariously liable for the actions of 'employees and agents'. As a result, there is still a barrier to claims against priests, volunteers and contractors. The 'course of employment' test would also give rise to difficulties in cases where the abuse occurred out of hours or away from institutional premises.

## Non-Delegable Duty of care

A non-delegable duty of care is a personal duty of care borne by a person or organisation. It imposes an obligation on a person not merely to exercise reasonable care but also, where the performance of that duty is entrusted to another, to ensure that reasonable care is taken by the other person. Such a duty is normally found to apply where there is a vulnerability with one party such that it gives rise to an imbalance of power between the parties to a relationship, such as: guardian and ward; schools (and teachers) and their students; and hospitals (and doctors) and their patients.

While there is no prohibition on the party who bears the duty entrusting its performance to another, the duty itself, and liability for breach of that duty, cannot be passed on or delegated. While this is similar to vicarious liability, the difference is that the bearer's liability arises from failing to discharge its own duty as opposed to assuming liability for the negligence of an employee. A further point of distinction is that at common law, non-delegable duties of care are not subject to the 'employment like relationship' limitation. However, as with vicarious liability, liability in respect of non-delegable duties is strict.

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<sup>2</sup> (2003) 212 CLR 511

<sup>3</sup> *Prince Alfred College Incorporated v ADC* [2016] HCA 37 at [81]

While non-delegable duties apply in respect of acts of negligence, in *Lepore* the High Court held that a non-delegable duty of care does not extend to liability for intentional acts such as criminal child abuse. Unlike in relation to vicarious liability, this position has not changed in relation to the non-delegable duty of care. Although the issue was also raised in *Prince Alfred College*, the High Court considered that the 'submissions for the respondent do not address the matters required to invoke the authority of [the High Court] to reconsider a previous decision', namely *Lepore*.

## 1.2 What the Royal Commission recommended

### Non-delegable duty of care

The Royal Commission favoured the imposition, via legislation, of a non-delegable duty of care for all institutional child sexual abuse given the level of care, supervision and control that some institutions may have over children. It did so on the basis that a non-delegable duty of care represented the imposition of strict liability, that it saw no reason not to extend the strict liability to circumstances involving care and supervision of children and it considered that such an extension would be consistent with decisions of the courts in which strict liability had been recognised.

The scope of the Royal Commission's preferred non-delegable duty is as follows:

- The Royal Commission was concerned not to impose a non-delegable duty (with strict liability) on foster and kinship care services, along with other community-based and not-for-profit and volunteer organisations that provide children with cultural, sporting and social activities. There was particular concern the risk of liability, or the cost of insuring against it, may force those operators to cease providing services and activities for children. The Royal Commission also noted that institutions that arrange foster and kinship care services do not generally have the degree of supervision or control of the foster care or kinship care home environment to justify the imposition of a non-delegable duty.
- The Royal Commission did not expressly suggest the statutory formulation of the content of the non-delegable duty, or, whether it should mirror the common law, other than to suggest that an institution should be liable for damage occasioned by an accident or event that is the result of a failure to exercise reasonable care. In addition, where the duty is non-delegable, the institution must ensure that reasonable care is taken by those to whom it entrusts the performance of its duty of care.
- The non-delegable duty should apply to conduct which constituted deliberate criminal acts of a person associated with the institution.
- The Royal Commission recognised that the imposition of a non-delegable duty of care would have the effect of increasing insurance premiums, hence the reason it suggested it not apply to community based not-for-profit or volunteer organisations that offer opportunities for children to engage in cultural, social and sporting activities.
- The Royal Commission also recommended the prospective application of the duty.

### Reverse onus duty of care

The Royal Commission also recommended that, irrespective of whether states and territories decided to introduce legislation to impose a statutory non-delegable duty of care on certain institutions, legislation should be introduced to make all institutions liable for child sexual abuse by persons associated with the institution, unless the institution proves it took

reasonable steps to prevent the abuse. Again the Royal Commission recommended that this duty should apply prospectively.

Although not entirely clear, it appears the Royal Commission was recommending effectively that the scope of vicarious liability be extended to cover an institution's 'members and employees' comprising officers, office holders, employees, agents, volunteers, persons contracted by the institution and priests (and other religious associates with the institution).

The Royal Commission recognised that the proposed statutory liability may lead to increased insurance premiums for institutions. However, it also noted that it might also engender higher standards of care, governance and risk mitigation within those institutions, thereby minimising the potential for abuse. The Royal Commission also noted that:

- with the proposed prospective application of the duty, most institutions would be in a position to provide evidence of the steps the institution took to prevent the abuse; and
- the steps that are reasonable for an institution will vary depending on the nature of the institution and the role of the perpetrator within the institution.

### 1.3 Reforms in other jurisdictions

#### Victoria

Victoria was the first jurisdiction to legislate to introduce a specific duty of care in respect of institutional child abuse. 'Abuse' in that jurisdiction means sexual abuse and physical abuse. The *Wrongs Act 1958* (Vic), and in particular section 91(2), now establishes a duty of care that enables certain organisations to be held liable in negligence for child abuse committed by individuals associated with the organisation.

The Victorian legislation also incorporates aspects of a non-delegable duty of care, as proposed by the Royal Commission, by providing that organisations will not be able to avoid liability by delegating their care, supervision or authority of children to other organisations. This is achieved by section 90(1)(c) of the *Wrongs Act*, which provides that an 'individual associated with a relevant organisation', upon whom the statutory duty of care is imposed, will also include an individual who is associated with another organisation who has had functions and services delegated to it by the relevant organisation. Thus the statutory duty will be cast on a relevant organisation even where it has delegated its functions or services to others.

In both cases, whether the duty is cast directly on the relevant organisation or on it by virtue of not being able to delegate the duty, a breach of the duty will be presumed (if certain facts are made out) unless the relevant organisation proves it took reasonable precautions to prevent the abuse in question. Victoria has thus provided a defence in respect to the direct statutory duty and in circumstances where the duty continues to apply even if there has been a delegation of services or functions.

#### New South Wales

In November 2017, the Civil Liability Amendment (Institutional Child Abuse) Bill 2017 (NSW) was introduced in the New South Wales Legislative Assembly. The Bill is a private members bill and seeks to amend the *Civil Liability Act 2002* (NSW) to impose a duty of care on certain institutions to make them liable for institutional child abuse by persons associated with the institution, unless the institution proves it took reasonable steps to prevent the abuse.

The proposed amendment is broadly consistent with the *Wrongs Amendment (organisational Child Abuse) Act 2017* (Vic).

The Bill was referred to the Legislation Review Committee and has now lapsed and will not be progressed in that form.

## 1.4 Proposed Reform of Territory Laws

Having considered the recommendations of the Royal Commission, the Department of the Attorney-General and Justice recommends adopting an approach similar to that in the Victorian legislation. That is, to introduce a statutory duty of care provision which incorporates a non-delegable element and a reverse onus provision (the Proposed Duty).

The benefits of this option are that it provides certainty about the standard of care expected of institutions that cannot be delegated, and balances interests by providing a defence if reasonable steps are taken to prevent child abuse. This factor is expected to be relevant where an institution seeks to take out insurance cover for this type of liability.

If this option is approved, it is suggested that the Proposed Duty will extend to related physical and psychological abuse. There appears to be no sound policy reason to provide a more favourable position to survivors of sexual abuse only as serious physical abuse can cause similar damage and often the two types of abuse co-occur. Psychological abuse arising from sexual or serious physical abuse is also generally inseparable from the physical offending, and is consistent with the approach taken by the Northern Territory in the *Limitation Amendment (Child Abuse) Act 2017*.

### Discussion questions

1. What are your views on adopting a statutory duty of care that incorporates a non-delegable element and a reverse onus provision, as opposed to the two distinct duties recommended by the Royal Commission?
2. What are your views on the proposal to extend the Proposed Duty to related physical and psychological abuse?
3. What financial or associated impacts would the Proposed Duty have on Territory institutions, such as the cost and availability of insurance and the ability to provide services to children?

## 1.5 Matters requiring further consideration

### Need for imposition of Proposed Duty on all organisations

The Royal Commission recommended that its proposed reverse onus duty should apply to all institutions, including not-for-profit and volunteer organisations as well as organisations that administer foster or kinship care services (recommendation 91).

#### Discussion question

4. Are there any organisations to which the Proposed Duty should not apply? If so, why?

### Institutional associates

The Royal Commission recommended that, regardless of which of the two civil liability recommendations are adopted, institutional liability should extend to the actions of ‘all persons associated with the institution’ (recommendation 92), including:

1. for non-religious institutions: the institution’s officers, office holders, employees, agents, volunteers and contractors; and
2. for religious organisations: religious leaders, officers and personnel.

While there appears to be no reason not to adopt this recommendation, consideration is required in relation to whether any limits should apply in respect of ‘associates’.

To this end, it is noted that in November 2017 the New South Wales Department of Justice published a consultation paper (the NSW Consultation Paper)<sup>4</sup> in relation to the Royal Commission’s civil litigation recommendations in which they noted that recommendation 92 raises the following 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?’

#### Association between perpetrator and institution

In relation to the first issue, NSW noted that it will be important to consider whether liability should be imposed on institutions in respect of persons which they could not reasonably be expected to have control, such as a parent who volunteers at their child’s school once a year, as it may be difficult for the institution to take steps to prevent abuse being perpetrated by such persons.

However, while this may be an issue of considerable significance in relation to the non-delegable duty of care recommended by the Royal Commission, it appears to be of little significance in relation to the Proposed Duty as an institution would only be liable if it failed to take reasonable steps to prevent abuse and it is expected that the steps that might be

<sup>4</sup> Consultation Paper: NSW Government consultation in relation to the civil litigation recommendations of the Royal Commission into Institutional Child Sexual Abuse.

considered reasonable in relation to a one-off volunteer would be less than the steps required for more permanent staff.

On this basis, the Victorian legislation has incorporated recommendation 92 into a non-exhaustive list of the classes of individuals that may trigger institutional liability by the commission of child abuse so as to ensure that borderline cases are not inadvertently excluded from the scope of the duty. However, section 90(2) provides that an individual is not associated with an institution solely because the institution wholly or partly funds or regulates another organisation. The Explanatory Memorandum to the Wrongs Amendment (Organisational Child Abuse) Bill 2016 (Vic) provides that the purpose of that provision is to ensure that organisations ‘are not held liable for the actions of personnel in another organisation solely because the first organisation funds or regulates the second’.

An additional issue identified by NSW in relation to recommendation 92 which was not addressed by the Royal Commission and is not addressed in the Victorian legislation is whether liability should extend to acts of abuse committed by children under the care, control or supervision of institutions. This may be particularly relevant in a school setting.<sup>5</sup>

### Discussion questions

5. Should there be any limitation on who may be considered an associate of an institution?
6. Should liability extend to acts of abuse committed by children under the care, control or supervision of institutions? Why or why not?

### Association between abuse and institution

In relation to the second issue, NSW noted that consideration is required in relation to whether abuse would need to have occurred on institutional premises and / or during hours of operation for an institution to be liable.

In addition, the NSW Consultation Paper noted:

‘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?’

They listed the following potential options for addressing this uncertainty:

- 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;

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<sup>5</sup> Ibid, [6.32].

- adopting a similar test to the one adopted by the United Kingdom and Canadian courts – that is, whether the relationship is *sufficiently analogous* or *akin* to employment.<sup>6</sup>

### Discussion question

7. How closely associated should an institution and a perpetrator need to be to result in potential liability? For example, should an institution be liable for abuse committed by an employee or volunteer in their own home, against a child met through the institution?

### Reasonable steps

The Royal Commission did not propose a definition of ‘reasonable steps’ in relation to its recommended reverse onus duty. 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.

The Victorian legislation does not define ‘reasonable precautions’, but does provide a non-exhaustive list of factors that may affect them. Specifically:

‘Reasonable precautions will vary depending on factors including, but not limited to –

- (a) the nature of the relevant organisation; and
- (b) the resources that are reasonably available to the relevant organisation; and
- (c) the relationship between the relevant organisation and the child; and
- (d) whether the relevant organisation has delegated the care, supervision or authority over the child to another organisation; and
- (e) the role in the organisation of the perpetrator of the abuse.’

The Second Reading Speech for the Wrongs Amendment (Organisational Child Abuse) Bill 2017 provides that ‘[t]he interpretive guidance given by the bill is non-exhaustive, ensuring that the courts are able to consider any other appropriate factors on a case-by-case basis’. This seems appropriate given the substantial variation in size, structure and activities of organisations that would be captured by the proposed legislation.

New South Wales and Queensland have both queried whether it may be necessary to provide guidance about the scope of what would be ‘reasonable’ by developing legally binding standards.<sup>7</sup> In particular, the NSW Consultation Paper suggests that this could clarify what is expected of service providers and reduce the risk of lengthy disputes. For example, under the *Disability Discrimination Act 1994* (Cth) the Commonwealth Attorney-General can develop binding standards to provide certainty and guidance on obligations under the legislation.

<sup>6</sup> Above n 4, [6.36].

<sup>7</sup> Above n 4, [6.21] to [6.27]; and The State of Queensland Department of Justice and Attorney-General, The civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse: *Redress and Civil Litigation Report* – understanding the Queensland context: Issues Paper, page 12.

The issue is also raised in the Second Reading Speech for the Wrongs Amendment (Organisational Child Abuse) Bill 2017, which provides:

‘The interpretive guidance given by the bill [in relation to what constitutes reasonable precautions] is non-exhaustive, ensuring that the courts are able to consider any other appropriate factors on a case-by-case basis, such as compliance with relevant standards including the government’s recently released Child Safe Standards, which are compulsory minimum standards that apply to organisations that provide services for children, and were also released in response to *Betrayal of Trust*.’

### Discussion questions

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?

## 2. IDENTIFYING A PROPER DEFENDANT

### 2.1 What the Royal Commission considered

One of the major impediments to claims for damages by survivors in respect of institutional child sexual abuse is identifying a legal entity who is capable of being sued such that it can be named as a defendant, and ensuring that the institution holds sufficient assets to meet any liability from the claim. The reasons for this include, particularly in the case of religious institutions, that the assets are generally held in a property trust, and while a survivor may also have the option of claiming directly against the perpetrator, that person may have no, or insufficient, assets to meet a claim.

The leading Australian case on the issue of the identification of the 'proper defendant' is *Trustees of the Roman Catholic Church v Ellis and Anor* [2007] NSWCA 117. In that case, the claimant sought to sue the Trustees of the Roman Catholic Church for abuse perpetrated by an assistant priest. The New South Wales Court of Appeal held that the Catholic Archdiocese of Sydney was an unincorporated association and as such could not be sued in its name. Further, the other legal entity which could be sued and which had assets, namely the Trustees of the Roman Catholic Church for the Archdiocese of Sydney, could not be held liable as they were not associated with the management or oversight of religious personnel or the conduct of religious business within the church.

### 2.2 What the Royal Commission Recommended

Recognising that the majority of claims are made against religious institutions, and that such institutions are generally associated with a property trust, the Royal Commission recommended that unless the institution nominates a proper defendant to sue that has sufficient assets to meet any liability arising from a claim:

- (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.'

### 2.3 Situation in other jurisdictions

#### Victoria

Victoria was the first jurisdiction to have implemented a statutory duty of care for institutions and it recently enacted the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic) on facilitate the identification of a proper defendant.

Section 92 of the *Wrongs Act 1958* (Vic) includes an ability for an organisation that is not capable of being sued to nominate, with the consent of the nominee, an appropriate defendant. This does not go as far as the recommendation made by the Royal Commission, namely where no-one is nominated the property trust automatically becomes the defendant which is liable from its assets. However, the Victorian amendments were focussed on implementing the recommendations from the report of the Family and Community Development Committee inquiry "Betrayal of Trust", as well as referring to the Royal Commission recommendations on civil litigation reform. It was noted that arising out of the Betrayal of Trust inquiry, some unincorporated associations and organisations, which otherwise were not capable of being sued, had proactively set up entities for child abuse plaintiffs to sue. Section 92(1) was intended to facilitate these arrangements and it is understood Victoria continues to implement the Royal Commission's recommendations with

respect to identifying a proper defendant, particularly with respect to religious organisations associated with a property trust.

## Western Australia

In November 2017, the Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Bill 2017 (WA) was introduced into the Western Australian State Parliament. The legislation came into force on 1 July 2018. The *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* (WA):

- provides a legal basis for commencing actions against institutions (whether currently incorporated or unincorporated) in the name of their current office holders for historical child sexual abuse that occurred while the institution was unincorporated;
- establishes a process for linking a historical institution to a current institution so that the current office holder can be sued and held liable in the place of the historical office holder. This includes enabling the Governor, on recommendation of the relevant minister, to make regulations naming a current institution as the relevant successor of an earlier institution where there is no current institution that is the same or substantially the same as the institution at the time of the accrual of the cause of action; and
- provides a legal basis for institutions, trustees and office holders to use assets that are held by or for liable institutions or office holders to discharge any child sexual abuse liability, notwithstanding any restrictions that would arise from an institutions asset holding structures.

In relation to the first two points, the second reading speech for the Act provides that the relevant provisions:

‘...are required to overcome the difficulties that a victim may face in identifying a proper defendant, particularly those arising out of the lack of perpetual succession in unincorporated institutions as identified in the *Ellis* decision.’

It should be noted that the regulation making power of the Governor identified at dot point two is not unfettered. The relevant minister cannot make a recommendation unless satisfied that the current institution has some relevant connection to the earlier institution, or the individual or body with overall responsibility for the current institution has agreed to the current institution being taken to be the relevant successor of the earlier institution.

It should also be noted that, while an office holder may be held liable for child sexual abuse, and the office holder may satisfy the liability out of the assets held by or for the office or institution, the personal assets of the office holder cannot be used to satisfy the liability.

The legislation appears to go further than Royal Commission recommendation 94 insofar as it enables office holders of unincorporated institutions to be sued in the name of their office. However, it does not go so far as to provide that a property trust may be named as the proper defendant as an automatic fall-back position as recommended by the Royal Commission.

## 2.4 Proposed Reform of Territory Laws

The Department of the Attorney-General and Justice proposes adopting Royal Commission recommendation 94, namely, to introduce legislation to provide that where a survivor wishes to commence proceedings for damages in respect of child sexual abuse where the institution

is associated with a property trust, then unless the institution nominates a proper defendant to sue that has sufficient assets to meet any liability, the property trust will be the proper defendant to the litigation. This would mean that any liability of the institution with which the property trust is associated arising from the proceedings can be met from the assets of the trust.

### Discussion question

12. Should the Royal Commissions 'proper defendant' recommendation be adopted?
13. How would the proposed reforms impact your organisation?
14. Should a different model / approach be adopted? If so, what should it look like?

## 2.5 Matters requiring further consideration

### Controls for defendant nomination

Royal Commission recommendation 94 does not address the need for any controls that may be appropriate in respect of the nomination of proper defendants, such as whether nominations should be limited by the nature of the association between an institution and its nominee or whether the consent of the nominee should be required. For example, section 92 of the *Wrongs Act 1958* (Vic) requires the consent of the nominee before it can be named as the proper defendant.

### Discussion questions

15. Should the consent of the nominee be required before it can be named a proper defendant?
16. Should nomination be limited by the nature of association between the institution and the nominee?
17. How can victims obtain access to justice where consent of a nominee is not provided to name an alternative proper defendant?
18. Are there any other controls that you think are necessary?

### All institutions

Royal Commission recommendation 94 provides that it applies to 'institution[s] with which a property trust is associated'. The NSW Consultation Paper has interpreted this as meaning that the reform is intended to apply to *all trusts* relating to *all property*, not just to those which have been created by legislation (such as those that relate to religious institutions).<sup>8</sup> The NSW Consultation Paper further notes:

'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,

<sup>8</sup> Above n 4, [7.22].

trusts created by will or settlement and trusts of business assets (provided that they are 'associated' with an unincorporated association).'<sup>9</sup>

### Discussion questions

19. Should recommendation 94 apply to all property trusts (including private trusts), or to statutory trusts only?
20. Do the difficulties in identifying a proper defendant arise in respect of non-religious organisations?
21. Should the recommendation apply only to religious organisations?

### Extent of association with property trust

The NSW Consultation Paper notes:

'That 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 question

22. What limits, if any, should there be on the association between an institution and an associated trust?

### Incorporation

Royal Commission recommendation 94 does not require unincorporated institutions who have no association with a property trust to nominate a proper defendant, nor does it address the issue of identifying a proper defendant where the institution no longer exists.

While the Royal Commission considered that one approach might be to require compulsory incorporation by institutions who provide children's services, the Royal Commission was concerned that such an approach may impact on the delivery of services by small, temporary and informal associations that provide sporting, cultural and other activities in the community.

Nevertheless, the Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018 (WA) provides a possible solution to this issue, as well as to the issue of identifying a proper defendant where an institution no longer exists.

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<sup>9</sup> Ibid, [7.23].

**Discussion questions**

23. 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?
24. Should legislation similar to that proposed by Western Australia be adopted in the Territory? If so, what modifications, if any would you suggest and why?