Anglican Church Diocese of Sydney

Royal Commission civil litigation recommendations – Submissions
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Submission in response to the *NSW Government consultation in relation to the civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse*

Thank you for the opportunity to contribute to the NSW Government's consideration of recommendations proposed by the Royal Commission into Institutional Responses to Child Sexual Abuse ("the Royal Commission"), in relation to reform of civil litigation concerning child sexual abuse.

Background

The Diocese of Sydney is a diocese within the Anglican Church of Australia. The Diocese is episcopally led by the Archbishop and governed by the Synod of the Diocese of Sydney. The central administration of the Diocese is the joint responsibility of the Archbishop's Office, the Diocesan Registry, the Anglican Church Property Trust Diocese of Sydney, the Sydney Diocesan Secretariat and the Glebe Administration Board.

Within the Diocese of Sydney, there are a number of Anglican organisations that have (or have had in the past) responsibility for providing services to children and young people. These include schools, foster care service providers, out-of-home-care facilities, respite care and organisations that conduct training and camps.

The Diocesan response to the NSW Government's consultation process is informed by this background.

On a preliminary note

The question of the legal duty of institutions in relation to child sexual abuse gives rise to significant policy issues. Those policy issues concern questions of great importance to the community that at times conflict.

On the one hand, civil litigation can play a crucial role in providing justice for survivors. It can also ensure protection for the community by ensuring high standards of care for children and young people. The Diocese acknowledges the need for, and strongly supports, institutions being held to account for their failures.

On the other hand, there is a strong community interest in ensuring that high quality children's services can be delivered in a sustainable way by the non-government sector. This is particularly the case, in a policy environment where the Government is more and more moving towards outsourcing social welfare and other services. The Diocese notes with concern that some of the Royal Commission's recommendations seek the imposition of liability for the intentional criminal conduct of others, in the absence of identifiable fault on the part of the institution. If adopted, these recommendations are likely to make the cost of providing many children's services unsustainable (including because of the inevitable consequences on insurance premiums, assuming insurance is available).

In order for the Government to properly assess the impact of the Royal Commission's recommendations if adopted, we urge the Government to consider the recommendations as a whole. This includes the effect of removing limitation periods, which is a recommendation that has already been implemented by the NSW Government.

We turn now to specific sections of the consultation paper.

Section 5 - a consistent definition of child abuse

If the NSW Government accepts that a new statutory duty of care should be implemented, the Diocese supports defining "child abuse" for the purpose of that duty by reference to the definition in the *Limitation Amendment (Child Abuse) Act 2016 (NSW)*.

Section 6 - Issue A: the liability of institutions

Statutory Non-delegable Duty

(a) Should there be statutory non-delegable duty for child sexual abuse?

The Royal Commission's recommendation is to extend liability in negligence to personal responsibility for the intentional criminal conduct of another through a non-delegable duty. This would be a significant change in tort law, in NSW and generally.

The Diocese is concerned about the proposal for the following reasons:

The full implications are unknown

As far as we are aware, no other common law jurisdiction has adopted the approach that the Royal Commission is recommending concerning non-delegable duty. Comparisons regarding the scope and effect of the proposal can only be made by reference to approaches taken to vicarious liability in other jurisdictions. Academic commentary suggests that the proposed duty would have a broader scope with respect to the range of persons and the acts that it covers than relevant duties in other common law jurisdictions.[1]

From an empirical perspective, the potential implications of introducing a non-delegable duty on the provision of children's services are unknown. It is premature to contemplate such a significant and broad-reaching change without further research.

[1] Silink and Stewart, "Tort Law Reform for Survivors of Institutional Child Sexual Abuse", UNSW Law Journal Vol 39(2), 2016 at 565.

Inconsistency in the law

Specifying that the non-delegable duty would only apply with respect to child sexual abuse and to certain types of institutions would create inconsistency in the law.

There is no principled basis for a statutory duty, pursuant to which claims made by survivors of abuse would be subject to different legal tests in litigation depending on the institution with which the abuse is associated (but not necessarily on the basis of the risk introduced by, or the failures of, the institution). Furthermore, the claims of survivors of other intentional criminal conduct that does not fall within the definition of "child abuse"[2] would also be treated differently irrespective of the risks or culpability of the institution in relation to that conduct.

The Diocese is concerned that this would not provide just outcomes for survivors or institutions.

Lack of a deterrent purpose and possible negative social outcomes

In Canada, a firm connection is required between the risk created by an enterprise and the wrongful acts of those for whom the enterprise is vicariously liable. On the question of a deterrent purpose, in *Bazley* [1999] 2 SCR 534 at 560 [42] McLachlin J stated that:

> Where vicarious liability is not closely and materially related to a risk introduced or enhanced by the employer, it serves no deterrent purpose, and relegates the employer to the status of an involuntary insurer.

Her Honour went on to note that "short of closing the premises or discharging all employees, little can be done to avoid the random wrong" (at 42).

A non-delegable duty would provide a strong incentive for institutions to do all that they can to prevent abuse from occurring. However, since not all risks can be eliminated, it may also lead to institutions making difficult but commercially necessary decisions to reduce activities that carry high inherent risks (such as out-of-home care), because of the cost of insurance or a lack of funding to meet the real cost of providing the services.

There are alternative approaches to legal duty in our view that still ensure high standards of care, but avoid the negative outcomes of failing to achieve a deterrent effect and risking cutbacks to important community services.

Unintended effects on the development of the common law

A statutory change to the legal duty (especially one that leads to inconsistency in the law and is not the subject of sufficient research) may well influence the development of the common law through analogical reasoning. Justice Leeming has stated:

> …statutes are an under-appreciated component in the academic literature on the Australian legal system: their role lies not merely in stating norms of law, but in influencing judge-made law and as a critical driver of change and restraint in the Australian legal system.[3]

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[2] For example elder abuse or abuse of other vulnerable adults.

[3] Justice Mark Leeming, "Theories and Principles Underlying the Development of the Common Law – The Statutory Elephant in the Room'" (2013) 36 University of New South Wales Law Journal 1002

In this respect, changing the legal duty prospectively by statute has the capability to influence the law retrospectively as the common law responds to prospective changes to the duty.

(b) If there is to be a statutory non-delegable duty, to which institutions should it apply?

For the reasons set out above, the Diocese does not support the introduction of a non-delegable duty for child sexual abuse claims. As well as the questions of utility and fairness outlined above, the Diocese is particularly concerned about the need for high quality children's services to be delivered in a sustainable way by the non-government sector, including the Church.

However, in the event that the Government proposes otherwise, we submit that the proposed duty should be introduced on a more limited basis than that recommended by the Royal Commission.

Firstly, the duty should be limited to institutions that operate for-profit or that receive Government funding for the services they provide to children. Generally these institutions will have the capacity to recover the additional operating costs that will arise due to increased insurance premiums or the direct costs of responding to claims in the event that insurance is unattainable. Furthermore, if that capacity is lacking, it would be open to those institutions to make a commercial decision about limiting or ceasing services.

By contrast, the broader not-for-profit sector is highly sensitive to legal reforms that increase the cost of providing services in a substantial way. This is because not-for-profit organisations are often unable to recover cost increases from the recipients of their services, cannot readily absorb cost increases from existing reserves and cannot raise capital.

Secondly, there is no apparent basis for the Royal Commission's recommendation that a non-delegable duty apply to "any facilities or services operated or provided by religious organisations" but not to community-based not-for-profit or volunteer institutions that offer opportunities for children to engage in cultural, social and sporting activities.[4] The Commission's concern that the increased cost of insurance may force the latter institutions to cease to provide services and activities for children applies equally to not-for-profit institutions that happen to operate for religious purposes.

The recommendation appears to have a discriminatory effect. There may also be considerable cross-over in activities involving children that are cultural, social and religious in character.

Thirdly, any non-delegable duty should be limited to abuse committed by employees and should not apply to volunteers.

Reverse onus of proof

We note recommendation 91 in the Royal Commission's report, which is to the effect that (irrespective of whether a non-delegable duty is imposed on institutions) all institutions should be made liable for "institutional child sexual abuse by persons associated with the institution unless the institution proves it took reasonable steps to prevent the abuse".

[4] Royal Commission into Institutional Responses to Child Sexual Abuse Redress and Civil Litigation Report (2015), p491. The Commission's recommendation regarding religious organisations is also inconsistent with its own comments on p.490 of its Report that "it would be reasonable to impose liability on any residential facility for children, any school or day care facility, any religious organisation or any other facility that is operated for profit".

In the absence of a non-delegable duty, this would appear to be akin to a statutory form of vicarious liability that is subject to a reversed onus of proof and a reasonable steps defence.

We submit that any reversal in the onus of proof ought only to apply to paid staff (including employees and clergy), but not volunteers.

Having said that:

1. We recognise that there is a considerable evidentiary burden borne by the party with responsibility for discharging the evidentiary onus in civil proceedings relating to child sexual abuse, especially when there is a long period of time between the occurrence of abuse and a claim being brought.

2. We submit that what constitutes 'reasonable steps' for the prevention of abuse should be clear at the outset. We support the Government providing guidance in the form of standards which outline the reasonable measures that institutions should take for the prevention of abuse. These standards would set a benchmark for what constitutes 'reasonable steps', although it would be open to a survivor or an institution to argue that in the circumstances reasonable steps involved more or less than the steps required by the standard.

<u>Association with the Institution</u>

Perpetrator and Institution

The concept of "persons associated with the institution" recommended by the Royal Commission would capture a much broader range of persons than vicarious liability. The Royal Commission lists officers, office holders, employees, agents, volunteers and contractors (and in the case of a religious organisation, also religious leaders, officers and personnel).

We do not support extending vicarious liability through a concept of association. There will be considerable variation within each category and it is not clear what criteria would be used to determine if a person is within one of the categories. It will be particularly unclear who falls within the categories of "volunteer" and "personnel" since these terms do not have established legal meanings.

For example, some volunteers are effectively members of staff of the organisation and work under documented arrangements. Other volunteer arrangements would have little more formality than a name appearing on a roster. It is also not clear from the Royal Commission's recommendations whether a volunteer must have responsibilities involving children. Many volunteers do not work with children, but may still have contact with children (for example, as a member of a church congregation). Such volunteers would not require a Working with Children Check clearance under NSW legislation and would typically not have undergone child protection training.

An institution should not be responsible simply because a person is a volunteer, especially in circumstances where they may not have any responsibilities involving children.

We do support vicarious liability having a wider ambit than employment, in particular because non-employment arrangements are common throughout the religious and not-for-profit sector. We support a similar approach to that taken in Canada and the United Kingdom on vicarious liability in this respect, by including arrangements that are in substance analogous to employment. This would typically include a person who holds an

ecclesiastical office, such as a minister or priest, who is licensed or authorised by or on behalf of the institution and works within the undertaking of the institution.

Abuse and Institution

The Royal Commission's report on Redress and Civil Litigation was published without the benefit of consideration of the High Court's judgment in *Prince Alfred College v ADC* [2016] HCA 37. The matter was on appeal at the time of publication of the Royal Commission's report.

As the Consultation Paper notes, the High Court has now confirmed that an institution can be vicariously liable for criminal offences committed by employees where the employer assigned the employee a role which provided the "occasion for the commission of the wrongful act". This involves an assessment of the authority, power, trust, and control arising from the employee's position, as well as the ability of the employee to achieve intimacy with the survivor through their employment.

This is a significant expansion in the law on vicarious liability as it applies to intentional criminal conduct in Australia. We submit that *Prince Alfred College* sets out appropriate indicia for determining when vicarious liability should arise for intentional criminal conduct.

Submissions:

In summary of these points, we submit that:

(a) The Government should not legislate to impose a non-delegable duty on institutions. If, contrary to this submission, the Government does so legislate, the Diocese submits that the duty should be limited to matters involving the paid staff of for-profit institutions and other institutions to the extent that they provide Government-funded services to children.

(b) If the onus of proof is reversed, it should be limited to matters involving paid staff. There should be standards that outline the measures that institutions should take for the prevention of abuse, which operate as a benchmark for what constitutes 'reasonable steps'.

(c) The scope of persons for which an institution may be vicariously liable should be expanded to include arrangements that are 'analogous' or 'akin to' employment, similar to the approach taken in Canada and the United Kingdom.

(d) The common law should otherwise determine when vicarious liability arises for intentional criminal conduct committed by such a person (consistent with the High Court's decision in *Prince Alfred College*).

Section 7 - Issue B: Ensuring there is someone to sue

The Royal Commission has recommended that all institutions with associated property trusts be required to nominate a 'proper defendant' for civil claims for child sexual abuse (Recommendation 94). The Royal Commission has proposed that this requirement apply retrospectively.

Associated property trusts

In many cases, notwithstanding the existence of an associated property trust, there will be a proper defendant for a claim that has legal personality and assets, indemnities or insurance to respond to the claim. An Anglican school that is a body corporate is an example. As with any other plaintiff in these circumstances, survivors of child sexual abuse should identify and commence proceedings against this defendant.

We agree with the Royal Commission that if no such proper defendant exists, then a survivor should, in principle, be able to sue an associated property trust of the institution or such other solvent legal person that the institution may nominate instead.

However, we acknowledge that there are a number of issues that would first need to be resolved, as follows.

One issue is determining criteria for when abuse can properly be considered to be the responsibility of that institution. This will not always be straightforward. For example, there are schools and childrens' homes that, for historical reasons, use or have used the name 'Anglican' or 'Church of England', which have little or no formal connection with an Anglican diocese. In such a situation, the property trust is not an appropriate defendant since the institution with which the property trust is associated has not given rise to the undertaking in which the abuse occurred. In our view the property trust should only be a proper defendant if the associated institution had control of the governance or operations of the relevant undertaking at the time of, or immediately prior to, the abuse occurring.

If associated property trusts are required to act as proper defendants, consideration must be given to what happens if a corporate trustee does not have the financial resources to meet claims from an available source of funds. Some property trusts may only hold funds or assets on trust for the specific charitable purposes of particular institutions or local churches. This will often be the case for rural and regional dioceses.

It should also be borne in mind that insurance is unlikely to assist with historical abuse, because policies are usually subject to a retroactive date. If earlier policies covering the relevant institution can be located, they are often subject to a low policy limit when compared with modern damages claims.

Establishing a company to act as a defendant

We note the option of requiring institutions to establish a separate company to act as a nominal defendant for claims. Such an entity will not have an undertaking of its own for the raising of funds and will be dependent on the institution to fund it. We do not consider that there would be many circumstances where the position of a plaintiff is substantially advanced by setting up a separate company since the capacity to recover would ultimately depend on the ability and willingness of the institution to provide funds to the company.

Establishing a separate company to act as a nominal defendant might be a viable solution for some institutions but it should not be a mandatory requirement.

Section 8: Issue C – requirement to have insurance

The Royal Commission has recommended that insurance for sexual molestation be mandatory for institutions in receipt of government funding (Recommendation 95).

The question of legal duty should be considered in parallel with the question of whether there should be a mandatory requirement for certain institutions to have insurance for sexual

molestation. If insurance is mandatory, logically it follows that insurers in the Australian market must be willing to offer the required insurance on terms that make it accessible to those institutions.

Our experience is that sexual molestation cover is excluded from standard policies of insurance and is difficult to obtain. Where it can be obtained, it is expensive. It will also often carry a high deductible amount.

It is noteworthy that in its submission to the Royal Commission on redress and civil litigation, the Insurance Council of Australia noted that:

> "Expanding the circumstances in which institutions could be found liable for institutional child abuse could further increase the underwriting risk and uncertainty for insurers who operate in this sector of the insurance market – and this would be reflected in higher insurance premiums."[5]

The Royal Commission's report outlines an exchange between Mr Whelan (representing the Insurance Council of Australia) and Justice Peter McClellan, where it was acknowledged that premiums would increase, but that it is "a community question as to whether or not that is a good thing having regard to the change which you may get in institutional or individual behaviour".

Insurers have the capacity to drive institutional change through providing premium incentives for institutions that implement measures to reduce the risk of abuse, but the insurance cover needs to be accessible to the institution in the first place for this to occur.

Section 9: overall impact of the reforms

The civil law needs to balance incentivising the highest standards of care with respect to children, with not making the legal and associated financial risk for institutions so high that they cease to provide some or all of their services.

As we said at the outset, civil litigation can play a crucial role in providing justice for survivors and has a role in ensuring high standards of care for children and young people. The Diocese acknowledges the need for, and strongly supports, institutions being held to account for their failures. However, there is a strong and significant community interest in ensuring that high quality children's services can be delivered in a sustainable way by the non-government sector, particularly in a policy environment where social welfare and other services are increasingly outsourced by government.

The proposed reforms may have an impact on an institution's willingness to tender for certain government contracts for services to children, or the terms on which they are prepared to tender, in order to ensure that sufficient account is taken of the increased risk and cost of insurance cover.

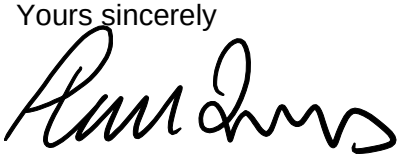
For these reasons, a distinction should be made between institutions on the basis of their capacity to recover the additional cost - either through raising the fees they charge for their services to children or increased government funding for services.

The historical circumstances that gave rise to the *Civil Liability Act 2002* (NSW), and its consequences, are worth remembering. The experience stands to highlight the potential

[5] Royal Commission into Institutional Responses to Child Sexual Abuse Redress and Civil Litigation Report (2015), p455.

adverse impact of an expansion of liability for negligence on the availability of insurance and the ability of those insured to provide services in a sustainable way on reasonable terms.

Yours sincerely



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On behalf of the Royal Commission Steering Committee of the Anglican Church Diocese of Sydney