



Submission from the Association of Independent Schools of NSW

Royal Commission civil litigation recommendations

4 September 2017

The Association of Independent Schools of New South Wales Limited

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Royal Commission civil litigation recommendations

Submission from the Association of Independent Schools of New South
Wales (AISNSW) Ltd

This submission has been prepared by the Association of Independent Schools of NSW (AISNSW)
with input from member schools.

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The AIS will be pleased to elaborate on any aspects of this submission as required.

Yours sincerely,

A handwritten signature in black ink that reads "Michael Carr". The signature is written in a cursive style with a large initial 'M' and a distinct 'C'.

Mr Michael Carr

Acting Chief Executive

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Introduction

The Association of Independent Schools of New South Wales (AISNSW)

The AISNSW is the peak state body representing the independent schools sector in NSW, most of which are members. The AISNSW has 420 members in NSW, and a further eleven member schools in the ACT. Independent schools may be primary, secondary or combined, co-educational or single sex. Forty nine members provide boarding facilities and there are also special schools that cater for students with disabilities and other special needs. Approximately sixty percent of members have an SES of less than 104 and sixty four percent of members have less than 200 students.

Independent schools are not-for-profit institutions founded by religious or other groups in the community and are registered with the regulatory authority, the NSW Education Standards Authority. Many independent schools provide a religious or values-based education. Others promote a particular educational philosophy or interpretation of mainstream education.

The AISNSW provides advice, support and training in the area of child protection, workplace management and governance to its members as a core service. As an association of independent schools, the AISNSW is committed to working in partnership with our members to achieve excellence in all aspects of safeguarding children. The functions of AISNSW in relation to child protection include providing training to boards of schools and all staff, and if requested, investigating allegations of child abuse. The AISNSW plays a significant role in assisting member schools to understand their obligations for establishing strong child safe principles, policies and procedures with regard to child protection.

The independent sector is committed to the principles of child safety. To this end, in excess of 10, 000 employees undertook AISNSW facilitated child protection training in 2016, under a 'request for service' model. This, in many cases, was in addition to the annual child protection training requirement for schools to undertake under their NESA registration requirements. AISNSW training covered topics including: Identify and respond to children and young people at risk; Reportable Conduct and Exploring Professional Boundaries; Creating Safer Independent Schools (Child Safe Organisations); and Child Protection Legislation.

AISNSW welcomes the opportunity to respond to the consultation Paper in relation to the Royal Commission into the Institutional Responses to Child Sexual Abuse. This submission has been developed with consideration of the circumstances of independent schools, and the AISNSW looks forward to working further with the NSW Government as these proposals are refined.

General Comments

The AISNSW and its members recognise that the sexual abuse of children is abhorrent. Institutions, including schools, play a pivotal role in supporting the safety, welfare and wellbeing of children.

AISNSW and its members are committed to this endeavor.

In developing further frameworks to protect children it is critical to get the correct balance; strategies are needed to hold leaders and institutions accountable whilst also motivating them to imbed the values of a child safe organisation through the implementation of responsive, meaningful and sustainable change.

AISNSW is concerned that the Royal Commission has suggested measures which will not improve the safety and wellbeing of students attending independent schools, but would place a burden on schools which would be both inequitable and expensive. In recent years a number of changes have been made which have heightened the accountability of schools regarding child sexual abuse, and the ability of victims to seek redress.

The strategies, landscape and attitudes according to which schools operate have changed considerably over the last few years due, in large part, to the Commission's work. The provisions contained in various statutes have worked to provide a solid basis to prevent, detect and protect children and young people from sexual abuse. These statutes include:

- Child Protection (Working with Children) Act 2012
- Children and Young Persons (Care and Protection) Act 1998
- Ombudsman Act 1974, and
- Crimes Act 1900.

In addition the Limitation Act in New South Wales provides that there is no limitation of the period in which proceedings can be taken in respect of child sexual abuse.

The recommendations of the Commission and the Consultation Paper suggest two principal reasons for the measures proposed. The first is to create incentives for organisations to ensure that abuse is prevented. The second is to provide financial redress for victims of child abuse.

It is also particularly relevant, as the Consultation Paper notes, that the decision in **Lepore** has been revisited by the High Court in **Prince Alfred College Incorporated v ADC** (2016) HCA 37. This decision addresses some of the most serious concerns of the Royal Commission.

Independent schools are committed to adopting best practice child protection measures, with enforcement strategies being a necessary precursor to the readiness of schools to implement safeguards for children.

The AISNSW believes that schools are now very aware of their responsibilities in relation to the children under their care. As with any cultural change there is a continuum, with some schools further along the continuum towards comprehensive child safe provision than others. This is partly due to the issues drawn to their attention by the Commission and the realization of the reputational damage that can be suffered by a school, and partly to the measures being taken to educate schools and school staff in relation to child abuse and the measures they need to take to prevent it.

Feedback on recommendations

Definition of Child Abuse

If it is considered necessary to define 'child abuse' the AISNSW considers that it would be appropriate for reasons of consistency to adopt the definition in the Limitation Amendment (Child Abuse) Act.

New Non-delegable Duty of Care

The AISNSW believes that it is settled law that schools have non-delegable duty of care. This has been settled law at least since the decision of the High Court in *Commonwealth v Introvigne* [1982] 180 CLR 258.

In these circumstances there would not appear to be a need to legislate this duty in respect of schools, and it is critical that any legislative changes intended to clarify the responsibilities of schools do not instead introduce uncertainty in an area which is already clearly understood and accepted.

Reverse Onus of Proof

The AISNSW has concerns with the workability of implementing this proposal. It is clear, as mentioned above, that a reason for proposing a reverse onus of proof is because it is believed that this will create an incentive for schools to prevent child abuse. We submit that there are already very good reasons for preventing such abuse including, and not limited to, a desire to ensure the safety of children, reputational damage and possible financial repercussions.

The concerns held by the AISNSW with the proposal arises largely from the fact that there is no limitation period for a person to lodge a claim alleging sexual abuse in New South Wales. While recognising that, for a range of reasons, there can be an extended period of time between the occurrence of abuse and the commencement of proceedings, it is still important that schools be able to defend cases brought against them. In the current regulatory and legislative landscape, it is likely that schools would find it very challenging to defend the claim by establishing the measures taken to prevent abuse after a significant number of years has passed.

The AISNSW agrees that this concern could be partly overcome if reasonable steps schools should follow to ensure their duty of care in relation to the prevention of child abuse were set out in legislation. However this provision would need to be accompanied by a provision which contemplated regular auditing of these measures and providing an audit certificate which could provide a rebuttable defense.

Persons ‘Associated with’ an Institution

The AISNSW believe that extreme caution should be exercised before legislating to extend the liability for acts of child abuse in schools.

Schools are generally aware that usually they would be liable for the acts of volunteers. They may also be liable for the acts of contractors depending on the circumstances. There are a myriad of different situations that may exist in relation “associated” persons. If it was intended to extend liability care would need to be taken not to extend it to people in respect of whom the school could not exercise control. The AISNSW would welcome the opportunity to work further with the NSW Government to understand who is intended to be within scope of this suggested measure.

Identifying a Proper Defendant

AISNSW makes no submission on this topic.

Insurance

The AISNSW believes that currently many members would have insurance which covers claims in respect of child abuse. A requirement to effect such insurance may have little effect on the independent schools sector.

Overall Impact of Reforms.

While acknowledging the positive intent of the suggested reforms, if all the proposed reforms were implemented they could have a significantly but unintended negative effect on schools, particularly smaller schools with limited resources.

It is most important to acknowledge and understand that whatever measures a school puts in place there will be occasions when child abuse will occur. This is because of the nature of the people perpetrating the offence and the measures such people take to gain the confidence of the child, the school and sometime the parents and other carers of the child. For this reason we suggest below another possible approach to the issue as a basis for future discussion.

Other considerations

The Royal Commission has emphasised the need to deter and the need for a victim to obtain redress. We suggest that it is worth considering other models which have been engaged when the legislation has identified similar systemic problems. In particular we draw attention to Work, Health and Safety legislation and Workers Compensation legislation. The Consultation Paper has also referred to the Work Health and Safety legislation as providing some guidance.

Both these regimes impliedly, acknowledge that ‘injuries’ occur regardless of measures taken to prevent those injuries. While independent schools and the AISNSW are committed to child safety and the implementation of rigorous and comprehensive practices in this space, due to the nature of perpetrators, child sexual abuse is also in this category.

The AISNSW acknowledges that the intent of the proposed reforms is to provide victims with an accessible and efficient pathway to the resolution of claims. Regimes such as Workers Compensation are designed to provide low cost access by the injured, and a comparatively quick resolution of the claims. Statutory compensation schemes such as Comcare (workers compensation scheme) have rationalised and standardised the compensation received for physical and psychological injury and reduced the cost of litigation for claimants and insurance for organisations. Such schemes may provide an alternative model to be considered by the NSW Government in response to the Commission’s recommendations. As with Workers Compensation, it could also be possible to create an “insurance pool” funded by the contributions of participants in the industry.

The other factor the Commission addressed is the need for deterrence. If an insurance-based model is adopted, this could be achieved by publication of the names of institutions involved and the circumstances of the case. If further deterrence was necessary a distinct criminal offence could be introduced for where a person was known to be aware of child sexual abuse and failed to take any action where they were in a position to do so.

It is relevant to note that because of the serious ramifications of breaches of work, health and safety legislation by schools, school boards have become acutely aware of the need to manage risk in this area. We suggest such a regime could be extended to the area of child protection where officers and

directors were required to take specified actions (reasonable steps) to provide protection against child abuse by persons under the authority of the school. Although a number of such requirements are already in place in independent schools due to a combination of regulatory requirements administered by NESAs and relevant legislation such as *Children and Young Persons (Care and Protection) Act 1998* (NSW), this review may provide an opportunity for “reasonable steps” to be more explicitly articulated.

Child abuse is the most significant risk that schools need to manage and it should be prominent in the school’s overall risk management strategy. The work, health and safety legislative regime has been very successful in reducing the numbers of fatalities at work especially in heavy industry where death or injury is the greatest risk. In schools child abuse is the greatest risk so consideration could be given to a similar regime for child abuse in organisations providing services to children.

AISNSW emphasises that these thoughts are put together for discussion only. We have not consulted members on the issue and would need to review the concept further if it is thought appropriate to progress this approach further.

