



Our **Mission** is to prevent child sexual assault in our society.
Our **Victim impact statement** is to make Australia the safest place in the world to raise a child.

5th September 2017

Royal Commission Civil Litigation Recommendations - Submissions
Justice Strategy and Policy
Department of Justice
GPO Box 31
Sydney, NSW 2001
E-mail: policy@justice.nsw.gov.au

To Whom It May Concern:

Bravehearts is pleased to provide this submission in relation to the NSW Government's response to the civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.

Bravehearts believes that civil litigation processes are important mechanisms to assist survivors of child sexual assault achieve appropriate levels of monetary redress. It is particularly important for survivors to receive appropriate compensation, given the lifelong, wide-ranging effects of child sexual assault.

As Recommendation 1 of the Royal Commission's Redress and Civil Litigation Report states: "[processes] for redress must provide equal access and equal treatment for survivors – regardless of the location, operator, type, continued existence or assets of the institution in which they were abused – if it is to be regarded by survivors as being capable of delivering justice."

The NSW government has the opportunity to ensure in its response to the recommendations that survivors in NSW are afforded the best possible support in their healing process.

Bravehearts Foundation Ltd. bravehearts.org.au

National Office: (07) 5552 3000 | Fax: (07) 5552 3088 | Bravehearts Information & Support Line: 1800 272 831
Postal: PO Box 575, Arundel BC, QLD 4214 | Email: admin@bravehearts.org.au | ABN: 41 496 913 890 | ACN: 607 315 917

Bravehearts provides the following responses in relation to the current consultation paper, *NSW Government consultation in relation to civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse*.

Definition of child abuse

1. What kind of abuse should be covered by civil litigation reforms?

Bravehearts believes that all forms of child abuse should be covered by civil litigation reforms.

From twenty years working with clients, and as noted in the consultation paper, we know that child sexual assault rarely happens in isolation from other forms of abuse, physical abuse, psychological abuse and neglect are often a factor in the harms suffered. For example, grooming of children and young people by sex offenders often involves psychological manipulation and abuse.

All forms of childhood trauma can impact on children's development across a range of domains including physical, emotional, social and cognitive. Child sexual assault and other forms of abuse have also been linked with long term poor mental health outcomes, with research also showing that those who experienced child sexual assault at greater risk of mental health issues. Diagnoses of anxiety, depression and personality disorders are common in adults with a history of child sexual assault and/or child abuse.

There are a number of well researched and documented long term impacts affecting adult survivors. Individuals with a history of child sexual assault and/or child abuse are at an increased risk for:

- mental illness;
- substance abuse;
- homelessness;
- suicidality;
- revictimisation, including domestic violence and sexual assault;
- relationship issues;
- parenting difficulties; and
- health issues.

Bravehearts believes that ensuring appropriate avenues for redress, including civil litigation, is a key responsibility and part of governments' duty of care to survivors of childhood sexual assault and abuse.

Individuals who have experienced sexual assault often face enormous barriers in disclosing. The impacts of child sexual assault typically mean that the victim does not disclose until they feel safe to do so, and this frequently does not occur until some time has passed. Ensuring that all survivors of child sexual assault and other forms of abuse have equal access and equal treatment in accessing redress is crucial to their healing process.

Bravehearts Foundation Ltd. bravehearts.org.au

National Office: (07) 5552 3000 | Fax: (07) 5552 3088 | Bravehearts Information & Support Line: 1800 272 831
Postal: PO Box 575, Arundel BC, QLD 4214 | Email: admin@bravehearts.org.au | ABN: 41 496 913 890 | ACN: 607 315 917

2. Should the definition used in the *Limitation Amendment (Child Abuse) Act 2016* (NSW) be adopted, or should a different definition be used?

While Bravehearts supports the definition as used in the *Limitation Amendment (Child Abuse) Act 2016* (NSW), we would suggest that the definition used should define the term 'serious' abuse.

In addition, we would like to see 'connected abuse' defined clearly. For example, would years of psychological abuse by one abuser, be considered 'connected' if it is seen as having made the child or young person vulnerable to sexual harm by another abuser?

New non-delegable duty of care

3. Should the Royal Commission's recommendations for a new non-delegable duty be adopted?

Bravehearts believes that the Royal Commission's recommendations for a new non-delegable duty should be adopted by the NSW Government.

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?

Our position is that all organisations suggested by the Royal Commission should be included. However, in addition we would also advocate that community-based, non-government, not for profit and volunteer organisations be added.

Bravehearts holds, that any organisation that provides services to or work with children (including those that also provide services or work with adults) have a duty of care to ensure, as far as practicable, the safety and well-being of those children and young people who they have contact with.

5. Should legislation list the organisations on which the non-delegable duty would be imposed, or would a more general definition be appropriate?

Legislation should list the organisation on which the non-delegable duty would be imposed, as per Recommendation 90 of the of Royal Commission's Redress and Civil Litigation Report:

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.

In addition to these organisations, as noted in our response under Consultation Question 4 above, we would also advocate that community-based, non-government, not for profit and volunteer organisations be added.

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?

As an organisation that provides direct therapeutic, support and educative programs, Bravehearts holds that we have a duty of care to ensure the safety and protection of children and young people with whom we work. The imposition of a non-delegable duty would further enshrine our focus on the best interests of the child in services, program delivery, policy and process.

Bravehearts is committed to ensuring it is a child-safe organisation, including focuses on governance, culture, practice, and risk management, with an emphasis on transparency and accountability.

As an aside, we have also advocated that insurance for organisations working with children and young people should be dependent on audits to ensure that the organisation can prove it is compliant with regard to:

- Child protection and risk management practices – governance, policy and procedure;
- Appropriate and regularly refreshed training and evaluation in relation to child protection; and
- Adherence to mandatory reporting.

Reverse onus of proof

7. Should the Royal Commission's recommendation to reverse the onus of proof in child abuse claims be adopted?

Bravehearts thoroughly supports the adoption of the Royal Commission's recommendation to reverse the onus of proof in claims relating to child sexual assault and abuse.

8. What would be the benefit and/or implications of defining the term 'reasonable steps' in legislation?

Defining the term 'reasonable steps' might be beneficial in that it will give organisations guidance about the scope of what would be reasonable, and added clarity around the minimum expectations of organisations.

9. If the recommendation is adopted, would it be useful to develop guidelines or industry standards about what is considered to be 'reasonable'?

Guidelines or industry standards would provide a useful guide as to what is expected as a minimum standards.

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?

As noted under our response to Consultation Question 8, defining 'reasonable steps' would provide guidance around expectations for organisations. We note that while it may be appropriate for a definition of 'reasonable steps' to be graduated according to the type of service provided, it may be difficult as organisations vary in size and structure. The 'reasonable steps' for organisation A may vary to that of organisation B.

There are basic minimum standards that would be applicable to all organisations, for example: that the interests, safety and protection of children and young people is paramount; that appropriate child protection policies and procedures are in place; that regular risk management audits are conducted; that a reporting/complaints procedure is transparent and in place; and that staff are regularly trained in child protection issues.

11. How could it be ensured that 'reasonable steps' were actually effective to improve the safety of children?

Bravehearts advocates that child-safe organisation include not just a focus on policy and process, but on instilling a child-safe culture, embedding the organisation's commitment to child protection in practice and attitudes throughout the organisation.

In addition, similar to Safe Work Australia, a body and 'code of practice' may need to be established to oversee organisations to ensure that they are taking all necessary steps.

12. Would the recommendation to reverse the onus of proof affect an organisation's ability to provide services to children?

Bravehearts believes that adopting the recommendation to reverse the onus of proof will have a positive impact in motivating organisations to ensure that they are focused on child protection and prioritise the safety of children and young people they deal with.

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?

Bravehearts supports the Royal Commission recommendation to extend all institutional liability to all persons associated with an institution.

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

We note in relation to the considerations relating to the connection between the perpetrator or the abuse and the organisation, if the contact with the victim is facilitated by or through the organisation or as a direct result of the organisation, the organisation has a responsibility and duty of care to ensure that proper safeguard are in place and that policy, process and procedures are followed.

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.

Bravehearts supports the inclusion of the full range of persons ‘associated with’ an organisation as per the Royal Commission’s recommendation.

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?

Yes, institutions should be liable in both instances in Consultation Question 16. The organisation has a duty of care to ensure the suitability of those engaged under contracts and to ensure any contact with children or young people is appropriately monitored.

In relation to example (b) we note through our work with survivors that often the sexual assault or abuse did not occur on the premises of the school or organisation, but in the home environment by volunteer, employees, teachers who the victim met through the organisation. It is critical that organisational policies are in place around contact with children and young people. In matters where the organisation has not taken appropriate steps to ensure policy around contact with children and young people met within the

organisation is in place, the organisation has failed in its duty of care and therefore should be liable if a child is harmed in such circumstances.

Identifying a proper defendant

17. Should the Royal Commission's 'proper defendant' recommendation be adopted?

Bravehearts is supportive of adoption of the Royal Commission's 'proper defendant' recommendation.

18. Do the difficulties in identifying a proper defendant arise in respect of non-religious organisations?

Bravehearts is aware of instances where identifying a proper defendant has occurred beyond religious contexts. An example of this discussed in the Royal Commission's Redress and Civil Litigation Report, via a submission by Slater and Gordon in relation to the litigation concerning Fairbridge Foundation, a secular organisation. In that case, Fairbridge denied that they ran the school and denied that they had care of its child residents. The Foundation instead nominated a multiplicity of individuals, groups of individuals, and institutions (other than itself) which it argued had the running of the school and the charge of the children at various times.

19. How would the proposed reforms impact on non-religious organisations?

The proposed reforms would prevent such organisations from raising these arguments (our response to Discussion Question 18) and would enable them to be able to be sued at common law.

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?

Bravehearts would suggest that the recommendations apply to both property trusts (including private trusts) and to statutory trusts.

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?

As noted by our CEO, the organisation and ultimately the Board Directors are our established proper defendant for any claims, with the ultimate responsibility of ensuring good governance and policy and procedure, for all branches and remote offices.

22. Should institutions be required to nominate a 'proper defendant' for all claims, including past abuse?

Bravehearts Foundation Ltd. bravehearts.org.au

National Office: (07) 5552 3000 | Fax: (07) 5552 3088 | Bravehearts Information & Support Line: 1800 272 831
Postal: PO Box 575, Arundel BC, QLD 4214 | Email: admin@bravehearts.org.au | ABN: 41 496 913 890 | ACN: 607 315 917

Bravehearts believes that all institutions should be required to nominate a 'proper defendant' for all claims. This would ensure that survivors are given the opportunity to make claims against responsible institutions and do not continue to be denied justice.

23. Should institutions be required to nominate a proper defendant with a particular legal structure? If so, what would an appropriate legal structure be?

Our position is that institutions that provide services for children should be incorporated. This would ensure that impecunious or non-incorporated bodies are able to be sued at common law and survivors are not denied access to justice on the basis of the nature of the institution or its financial status.

24. If an institution does not cooperate by nominating a defendant to a child abuse claim, what would a reasonable 'fall back' option be?

As stated under Question 23, Bravehearts believes that organisations that provide services for children and young people should be incorporated, or have a mandatory legal structure.

We also support the alternative option suggested in the Consultation Paper that legislation could be introduced to allow claims to be brought against a 'nominal defendant', to be funded by all unincorporated organisations that provide services to children, proportionate 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).

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?

Bravehearts position is that it is reasonable to require all institutions working with children to be incorporated, or be required to have an incorporated 'proper defendant'. We believe that evidence from the Royal Commission has demonstrated the importance of ensuring that the organisational structure is such that is focussed on the rights and best interests of those it engages with, specifically children and young people.

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?

We believe that it is appropriate for the assets of a property trust to be used for the purpose of civil claims for child sexual assault.

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

Bravehearts Foundation Ltd. bravehearts.org.au

National Office: (07) 5552 3000 | Fax: (07) 5552 3088 | Bravehearts Information & Support Line: 1800 272 831
Postal: PO Box 575, Arundel BC, QLD 4214 | Email: admin@bravehearts.org.au | ABN: 41 496 913 890 | ACN: 607 315 917

Yes, the Royal Commission's recommendations are workable. Institutions that provide services to children should be made to have a mandatory legal structure or encourage them to be incorporated, and offered tax exemptions as has been suggested.

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?

This approach does appear to be more effective and it eliminates some of the difficulties that would be associated with the options suggested by the Royal Commission.

Insurance

29. Should the Royal Commission's insurance recommendation be adopted?

Bravehearts believes they should be adopted.

30. Would the Royal Commission's civil litigation recommendations have a substantial impact on insurance premiums or the availability of insurance?

While it is likely that these recommendations will have an impact on insurance premiums, increasing premiums and potentially making insurance more difficult to obtain.

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?

We support a model similar to Workplace Health and Safety that could include controls around insurance prices against organisation responsibilities.

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?

Bravehearts believes that the recommendation should be extended to include organisations that are not funded by government, including religious organisations. We would suggest that a model based on the Workplace Health and Safety legislation would be appropriate.

33. Should the Royal Commission's recommendation that unincorporated bodies have insurance extend to recipients of 'indirect' government funding? How far should this extend?

In the best interests and protection of children and young people, we believe that all organisations that working with children should be included.

Overall impact of the proposed reforms

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.

Our organisation is focused on ensuring the protection and safety of all children and young people and believe that our procedures, policies and operations would meet requirements. However, we would do anything necessary to ensure that our service complied as a result of any of the proposed reforms.

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?

We believe that many organisations would need to undertake an audit of policies and procedures and implement any necessary changes. Likely, this would include in cultural reform and specific trainings for many organisations.

It may be necessary for some organisations to be funded to build capacity and knowledge.

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?

We believe that the recommendations as handed down by the Royal Commission would have positive changes for the safety and protection of children and young people within organisational and institutional settings.

We thank you for the opportunity to provide this submission.

Please contact us on research@bravehearts.org.au if any further information is required.

Kind Regards,



Hetty Johnston AM
Founder & Executive Chair



Carol Ronken
Director of Research

Bravehearts Foundation Ltd. bravehearts.org.au