

PROVINCE OF SYDNEY AND ARCHDIOCESE OF CANBERRA AND GOULBURN

SUBMISSION IN RESPONSE TO THE NSW GOVERNMENT'S CONSULTATION PAPER ON THE CIVIL LITIGATION RECOMMENDATIONS OF THE ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE

Introduction

- 1 The Province of Sydney and Archdiocese of Canberra and Goulburn (**NSW Province**) welcomes the opportunity to provide this submission to the NSW Government in response to the release of the consultation paper on the civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse (**Consultation Paper**).
- 2 The bishops of the dioceses in the NSW Province have a longstanding commitment to child protection and to justice for survivors. In NSW, there has been a very close working relationship between the dioceses and State institutions protecting children, such as the NSW Ombudsman.
- 3 The recommendations of the Royal Commission are acknowledged by all of the bishops of NSW Province to be important groundwork for the development of public policy and legislation to deliver the continuous improvement in child protection that our entire community rightly expects. Through the Truth Justice and Healing Council, the bishops of NSW Province have extensively co-operated with, and made several policy submissions to, the Royal Commission. With the rest of the Catholic Church in Australia, the bishops of NSW Province have a strong commitment to ensuring that child safety plays a prominent role in all activities where children may be present.

The NSW Province of the Catholic Church

- 4 The Catholic Church is complex and diverse. It comprises diverse groups of dioceses, religious institutes and societies of apostolic life, as well as networks of lay organisations, that are each juridically separate. There is no one leader of the Catholic Church in Australia.
- 5 A diocese is generally a territorial or geographical unit of administration. There are 28 dioceses in Australia with defined geographical areas. There are other dioceses in Australia that are not geographically defined but are for special categories of people, such as the Military Ordinariate. Dioceses are independent of each other and are under the authority of a bishop (or, in the case of an archdiocese, an archbishop). The bishop of each diocese has the Pope as his superior.

- 6 This submission is made on behalf of the NSW Province which comprises the 11 dioceses geographically located in New South Wales as follows:
- Archdiocese of Canberra and Goulburn (partially located in NSW and partially located in the Australian Capital Territory);
 - Archdiocese of Sydney;
 - Diocese of Armidale;
 - Diocese of Bathurst;
 - Diocese of Broken Bay;
 - Diocese of Lismore;
 - Diocese of Maitland-Newcastle;
 - Diocese of Parramatta;
 - Diocese of Wagga Wagga;
 - Diocese of Wilcannia-Forbes; and
 - Diocese of Wollongong.

It is noted that Eastern Rite Churches in New South Wales are separate Catholic entities with their own jurisdiction unrelated to the 11 dioceses of the NSW Province.

- 7 As set out above, each archdiocese is under the jurisdiction of an archbishop. Each diocese is under the jurisdiction of a bishop. Whilst each archbishop and bishop governs his diocese, they come together as a Province. In NSW Province, the bishops seek to work collectively in relation to policy decisions that affect all NSW Province dioceses and to promote common pastoral action in the NSW/ACT region.
- 8 The Archdiocese of Sydney is known as a metropolitan diocese. The Archdiocese of Canberra and Goulburn and the other dioceses of NSW Province are suffragan dioceses.
- 9 The Archbishop of Sydney is known as the Metropolitan of the NSW Province and has certain functions in respect of the suffragan dioceses, but no powers of governance outside the Archdiocese of Sydney.

General comments on the proposed civil litigation reforms

- 10 NSW Province extends in principle support for the civil litigation reforms proposed by the NSW Government. However, this support is conditional upon:
- (a) the reforms applying prospectively only (which we understand to be the proposal put forward);
 - (b) uniform application of the reforms to all institutions which provide services for children;

- (c) the availability of sufficient insurance cover to those institutions at a reasonable cost in respect of 'child abuse' claims commenced under the new legislation; and
- (d) the autonomy of institutions and their right to organise their affairs, as appropriate to their existing structures and the services that they provide, being recognised and preserved.

Discussion questions raised in the Consultation Paper

11 Turning to the discussion questions raised in the Consultation Paper, the NSW Province submits as follows.

A consistent definition of child abuse

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

12 NSW Province has no objection to the civil litigation reforms extending to 'child abuse' as defined broadly in the *Limitation Amendment (Child Abuse) Act 2016* (NSW) (**Limitation Act**) on the basis that:

- (a) the civil litigation reforms apply prospectively and to all institutions that provide services for children; and
- (b) sufficient insurance cover is available to those institutions at a reasonable cost in respect of 'child abuse' claims commenced under the new legislation.

New non-delegable duty of care

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

13 NSW Province accepts, in principle, that it is appropriate to establish a new non-delegable duty of care requiring institutions to exercise reasonable care, and to ensure that reasonable care is taken, to prevent the abuse of all children who are in the care, supervision and/or control of the institution.

14 NSW Province does so on the basis that the civil litigation reforms apply equally to all institutions that provide services for children irrespective of size, whether or not operated for profit, whether that service is provided by employees or by volunteers, and whether that service is provided by the State, or by a secular or religious institution.

- 15 Indeed, NSW Province's entire submission is underpinned by its belief that the reforms should be of uniform application, which we regard as necessary to achieving the overriding purpose of the reforms which is to:
- (a) facilitate access to justice for survivors of child abuse; and
 - (b) ensure all children are safe and protected from abuse.
- 16 It is an unfortunate fact that there are limits on what any organisation can do to prevent crime in a free society. Organisations that exist to serve or to provide services for the general public are not held by the community to be responsible for crimes where they are not directly responsible, or where they have taken reasonable steps to ensure there are procedures in place to ward against crime. In the context of the Consultation Paper, NSW Province does not understand it to be intended (and seeks clarification on this point) for the new non-delegable duty be a general duty to prevent child abuse.¹ That is: the Consultation Paper proposes that the duty only apply insofar as the crime was committed by somebody directly linked with the relevant institution, and the institution did not put in place reasonable steps to prevent the crime. We address the issues of the necessary link to the institution and the reasonable steps required below.
- 17 Given the wide variety of facilities and services provided by religious institutions, NSW Province is concerned by what it considers to be the overly-broad proposal that the duty be imposed on:
- “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”.*
- 18 This wording is taken directly from Recommendation 90f. in the Royal Commission's report. In making this recommendation, the Royal Commission articulated no basis for this differential treatment of religious organisations. It is clear from the overall work of the Royal Commission that child abuse is a society-wide phenomenon affecting government, secular and religious institutions alike. The application of a duty to the operations of religious organisations only would not only discriminate against those organisations but lead to the consequence that secular and government organisations providing the same services are held to a different and lesser standard. It would be particularly anomalous (especially from a survivor perspective) if the situation was that for profit organisations had lesser standards applied to them than not for profit organisations delivering the same services, where those not for profit organisations happened to be religious. There should be one standard applied to all organisations delivering services in NSW.
- 19 As presently drafted, facilities and services provided by religious institutions exclusively for adults, such as aged care facilities and adult disability

¹ This understanding arises, for example, from paragraph 6.21 of the Consultation Paper.

services (such as day centres, individual 1:1 care and social groups), would be subject to the new non-delegable duty. This would not lead to improved child protection or prevention of child abuse. Although the Royal Commission provided no explanation for this recommendation, NSW Province has difficulty understanding that this could be the intended outcome. This is especially so given that the practical effect would be to place religious organisations under more onerous obligations with respect to facilities and services provided exclusively for adults compared with equivalent non-religious organisations.

- 20 NSW Province also submits that clarification should be provided as to the application of the new non-delegable duty to *“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”*. As we understand it, the intention is to capture institutions which provide facilities and services to children and adults. NSW Province submits that *“a period of time”* is uncertain and may lead to inconsistent application across institutions.
- 21 For the reasons set out in response to discussion question 4, NSW Province submits that the concerns expressed above may be addressed by appropriately defining the scope of the new non-delegable duty of care.

New non-delegable duty of care

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?*

- 22 As stated above, NSW Province submits that the civil litigation reforms should apply equally to all institutions that provide services for children.
- 23 NSW Province agrees that if a service provided by an institution has the potential to deliver services to children – either directly or indirectly – steps should be taken to ensure that children are protected from harm, as children have a right to experience safely in all institutions. Placing new responsibilities on all institutions to achieve this purpose is appropriate and reasonable.
- 24 NSW Province accepts that the new non-delegable duty of care should extend to organisations which provide services to children as well as adults. However, as explained below, this should:

- (a) be limited to the provision of services that are intended to be provided for children; and
 - (b) explicitly exclude any child abuse perpetrated by a child's parent, guardian or sibling on an institution's premises, or at the family home (if that is where the service is provided).
- 25 Institutions provide services to both children and adults to varying degrees. In addition, institutions such as churches play a fundamental role in the development of children into adulthood. In many cases, they provide a key social setting outside of school for children to develop, including as older children taking leadership roles within the church community. There needs to be sufficient flexibility to ensure that these roles continue. For example, different, but no less safe, norms will be needed for children's liturgy and sacramental preparations for primary school students compared to a youth group aimed at promoting interactions between teenagers and young adults (aged between 16 and 19 years old). As a further example, in the social welfare context, institutions often provide supported play groups for children which complement the effective provision of services to adults.
- 26 Without clearly defined limits on the extent to which the new non-delegable duty of care should apply to the provision of services to both children and adults, institutions which are currently not as experienced as Catholic Church institutions in putting in place appropriate child protection measures are likely to experience difficulty in identifying and implementing the appropriate measures for the purpose of satisfying the duty. This in turn would impact upon the availability of defences to claims brought against institutions alleging a breach of the new non-delegable duty. This will be particularly important should the onus of proving that 'reasonable steps' have been taken be reversed and placed on the institution (discussed further below).
- 27 Further, if no limitation is put in place, it is likely that institutions which provide services predominately targeted to adults, with there being a possibility (a less than 50% probability) that children will be in attendance, would be subject to the new non-delegable duty of care in the same way as an institution that provides services exclusively or predominately for children. NSW Province submits that this would be overly burdensome for institutions which provide services predominately targeted to adults, and may stifle their operations and the provision of those services to adults, with there being no real child protection benefits.

New non-delegable duty of care

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

- 28 In the interests of ensuring application to all institutions that provide facilities and services for children, NSW Province submits that it is appropriate for there to be a general definition of the institutions to which the new non-delegable duty of care would be imposed.

New non-delegable duty of care

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?*

- 29 On the basis that insurance is available at a reasonable cost, NSW Province does not anticipate the civil litigation reforms would impact on the ability of the 11 dioceses of NSW Province to provide services for children.
- 30 Each of the 11 dioceses already have in place measures to ensure the safety and protection of children from abuse in their works. For example, "designated agencies" for the purpose of the *Ombudsman Act 1974* (NSW) (**Ombudsman Act**) (including social welfare agencies and education offices) of the NSW Province dioceses must comply with the child protection provisions of the *Ombudsman Act*.
- 31 NSW Province is committed to continuing to work to achieve best practice in this area. Examples of this commitment are the NSW Province working party that meets regularly to collaborate on child safety policies and procedures as well as, nationally, the establishment by the Catholic Church in Australia (endorsed by NSW Province) of a new entity, Catholic Professional Standards Limited, to develop, audit and report on compliance with professional standards, including in relation to child safeguarding, across Catholic Church entities.

Reverse onus of proof

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

- 32 On the basis that:
- (a) the civil litigation reforms apply prospectively and to all institutions that provide services for children; and
 - (b) sufficient insurance cover is available to those institutions at a reasonable cost,
- NSW Province accepts the reversal of the onus of proof in claims arising from a breach of the new non-delegable duty of care or existing cause of

action in negligence for 'child abuse' as defined in Limitation Act, as an appropriate measure.

- 33 We submit that the new non-delegable duty and reverse onus of proof should only apply in cases where the evidence meets the definition of 'child abuse' in the Limitation Act. If the evidence does not, then the claim would be a common law action and the case would be assessed as a common law claim.

Reverse onus of proof

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

34 NSW Province submits that 'reasonable steps' should be defined in legislation, to fulfil the need for certainty in construing the provisions.

35 It would be appropriate for 'reasonable steps' to be linked to national standards to achieve consistency and avoid a potentiality inconsistent state based approach. These national standards may be referable to the proposed child safe elements articulated by the Royal Commission in its paper entitled *Creating Child Safe Institutions*².

Reverse onus of proof

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

36 NSW Province submits that it would be useful for guidelines or industry standards to be developed as to what is considered to be 'reasonable'.

37 Further to the submission made in response to discussion question 8, whilst a national rather than state based approach is preferable, we submit that it would also be appropriate for guidelines or industry standards to be developed in consultation with the NSW Ombudsman.

Reverse onus of proof

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?*

² <http://childabuseroyalcommission.gov.au/getattachment/5d0dc659-68c2-46f9-847b-fafd52f58673/Creating-child-safe-institutions>

- 38 NSW Province submits that it would not be appropriate for a definition of 'reasonable steps' to be graduated according to the type of facility or service provided for children.
- 39 Consistent with the view that the civil litigation reforms should have uniform application, it is appropriate for a readily understood and objective standard to be applied to all institutions that provide services for children, when determining what reasonable steps ought to be put in place to prevent harm to children in the care of those institutions.
- 40 While there should be readily understood and objective standards, there needs to be flexibility and common sense built into the definition of 'reasonable steps'. The examples provided at paragraph 25 above demonstrate the potential breadth of application of these reforms. It should not be an outcome of these reforms that institutions must significantly change the nature of important services and forums for youth because of interventions by lawyers seeking to achieve strict compliance with inflexible laws.

Reverse onus of proof

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

- 41 As submitted above, the concept of 'reasonable steps' should be aligned to national standards and recognised best practices.
- 42 One approach might be to measure objectively the effect of 'reasonable steps' by reference to, for example, the number of claims filed with the court, or complaints made to and upheld by the NSW Ombudsman. Another approach may be to link the 'reasonable steps' to an external audit process.

Reverse onus of proof

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

- 43 NSW Province does not anticipate that reversing the onus of proof will impact on the ability to provide services for children. This submission is made on the basis that the reform will apply to all institutions that provide services to children, and that sufficient insurance will be available at reasonable cost to those institutions.

- 44 As set out in the response to discussion question 6 above, each of the 11 dioceses comprising the NSW Province have already put in place measures to ensure the safety and protection of children in their works, as well as compliance with statutory requirements (such as the Ombudsman Act).

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?*

- 45 NSW Province submits that the scope of 'all persons associated with an institution' should be clearly identified as persons within an institution who:
- (a) hold an official appointment, including an appointment in accordance with the internal rules or norms of an institution; and
 - (b) in that role, the person is providing services that are intended to be provided for children; or
 - (c) it is reasonably foreseeable that children will be present when services not specifically targeted to them are delivered.
- 46 In relation to (c), NSW Province submits there should be a carve-out for liability in circumstances where children are present and under the direct control of their parent or guardian. The primacy of the parent or guardian role in caring for their child or children should be recognised and acknowledged. It is appropriate, in our submission, for the parent or guardian to take reasonable steps to ensure that their child or children are protected whilst present when services for children are provided. Further, it should not be an outcome of this reform that institutions are at risk of litigation or redress claims because of parenting actions that a child may come to realise as an adult adversely affected their wellbeing or development.
- 47 In making this submission, NSW Province is not to be understood as suggesting that an institution providing services to a child or children under the direct control of their parent or guardian will not have obligations to have in place child protection or risk mitigation measures. Nor do we suggest that in these circumstances any duty of care directly owed by the institution to a child ought to be displaced. However, we think that the presence of a child's parent or guardian must be regarded as a strong 'reasonable step' taken by the institution to prevent child abuse of that child. Further, in circumstances where a parent or guardian is present, the question of whether their child or children are under their direct control should be a question of fact, with consideration given to the child protections measures in place when determining whether 'reasonable steps' have been taken.

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?*

- 48 NSW Province submits that 'associated with' should be defined in legislation, to fulfil the need for certainty in construing the provisions.

Persons 'associated with' an institution

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; and*
 - (b) for religious organisations: religious leaders, officers and personnel.*

- 49 On the basis that the scope of 'all persons associated with an institution' is clearly identified as set out in the response to discussion question 13 above, NSW Province submits that the persons referred to in the Royal Commission's recommendation is appropriate.

Persons 'associated with' an institution

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?*

- 50 NSW Province submits that there should be a close and formal or official association or connection between the institution and the perpetrator before liability is found. Where institutions engage contractors or third parties to provide services to children, or where it is intended that children will be present, NSW Province accepts that the institution should be responsible for ensuring the safety of children (however should be entitled to seek contribution or indemnity from those contractors or third parties and their insurers).

- 51 However, there should be no change where those criteria are not met. As such, an institution should not be liable for acts of its contractors or agents as proposed at discussion question 16(a). It is appropriate for those contractors or agents to be liable for their own acts.
- 52 NSW Province accepts that it may be appropriate for obligations to be placed on institutions requiring 'reasonable steps' be taken to ensure (for example):
- (a) that contracts entered into require contractors to comply with child protection legislation;
 - (b) that contractors are not left alone with children whilst performing their duties;
 - (c) there are appropriate procedures in place to assess the risk a contractor may present to children; and
 - (d) where a contractor is assessed to present a risk to children, ensuring that appropriate measures are implemented to ensure that children are safe.
- 53 In response to discussion question 16(b), NSW Province submits that the new non-delegable duty should not be imposed on institutions for child abuse committed by an employee or volunteer in their own home against a child met through the institution. An institution should not be held liable under the new non-delegable duty for acts and omissions occurring outside the delivery of the facilities and services it provides, as it exercises no control beyond the provision of those services.

Identifying a proper defendant

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

- 54 The Catholic Church in Australia is committed to identifying or establishing an appropriate entity or entities to sue for child abuse. The 11 dioceses within the NSW Province have been considering this issue for some time and are working together to attempt to settle upon a uniform solution.
- 55 It is important to remember that there are 11 discrete dioceses in NSW (including the Archdiocese of Canberra and Goulburn, partially in NSW) and each bishop is the episcopal head of his diocese and responsible for governance of the diocese. As such, each bishop will need to decide the appropriate entity to sue for his diocese. Any entity that is established to be the proper defendant must respect canon law and the position of the bishop.

Identifying a proper defendant

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

- 56 The fact that historically religious organisations have typically been unincorporated bodies has raised difficulties for survivors of child sexual abuse seeking to litigate claims in respect of harm suffered whilst under the care of institutions. The difficulties in identifying a proper defendant to these claims arise from the nature of an unincorporated association itself, in that it does not have legal personality and is not capable of being sued.
- 57 Unincorporated associations are not unique to religious institutions. The legal principles of liability of unincorporated associations are well established and conventional. There are a variety of non-religious organisations that are unincorporated associations and which provide services to children, including social and community organisations.

Identifying a proper defendant

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

- 58 It is important that all institutions which provide facilities and services for children be subject to the same rules and standards in relation to child protection and that the civil litigation reforms enacted be of uniform application.
- 59 NSW Province submits that the creation of different standards for religious and non-religious organisations in NSW does not further the aims of access to justice for survivors of child abuse, or ensuring that children are safe and protected from abuse.

Identifying a proper defendant

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?*

- 60 NSW Province supports there being a uniform position in relation to all institutions that do not nominate a proper defendant: any appropriate legal entity with a sufficient connection to the complaint that is capable of meeting the liability for that institution or organisation should be able to be named as a defendant to represent that institution or organisation.

- 61 The question of a proper defendant is to be considered against all of the options available to a claimant to bring their claim. For example, pursuant to the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) it is also open to a claimant to seek leave to bring proceedings directly against an institution's insurer.
- 62 It should be noted that the *Roman Catholic Church Trust Property Act 1936* (NSW) does not create statutory trusts, but, instead, statutory bodies corporate. While Catholic Church property that existed in trusts prior to the commencement of that act vested in those bodies corporate upon creation, the current position is likely to be that assets are held on a combination of trust and direct ownership. Many assets may be held for specific purposes, including in circumstances where they have been jointly funded or improved for specific purposes by Church and non-Church resources (including with government funding).

Identifying a proper defendant

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?*

- 63 The 11 dioceses within the NSW Province each nominate an appropriate defendant for claims; however we recognise that there is a need for permanent and uniform lines of responsibility and therefore appropriate defendants. As expressed above, we also consider it appropriate for institutions to have autonomy to organise their affairs as suitable to their existing structures and services provided.
- 64 It is possible that unincorporated associations (including religious organisations) may need the support of government (for example, through legislation) to arrange their affairs in a way that meets these needs as well as meeting the need for such organisations to be able to arrange their affairs in accordance with their needs, rules and norms.

Identifying a proper defendant

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

- 65 NSW Province supports there being a requirement for institutions to nominate a 'proper defendant' for all child abuse claims.

- 66 The 11 dioceses within NSW Province have had procedures in place for some time to assist litigants to identify the responsible party and nominate proper defendants to claims so survivors are able to ventilate their substantive claims in the courts.

Identifying a proper defendant

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

- 67 NSW Province submits that institutions should be able to adopt any appropriate legal structure available for the purpose of establishing a proper defendant to claims going forward.

- 68 NSW Province welcomes the proposal to engage in active dialogue with the NSW Government. Similarly, we submit that it would be appropriate for the NSW Government to take steps to facilitate implementation of appropriate legal structures through legislation.

Identifying a proper defendant

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

- 69 The 11 dioceses within the NSW Province are committed to nominating a defendant to child abuse claims. We address the issue of statutory bodies corporate in our response to discussion question 26 below.

- 70 As a secondary point, the question of whether there is a nominated defendant must also be read against the rights created under *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW), which allows a claimant to proceed against an insurer, where the matter is insured. Thus, the insurer is the first 'fall back' option if an institution does not cooperate by nominating a defendant to a child abuse claim.

Identifying a proper defendant

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?*

- 71 NSW Province submits that institutions have the right to organise their affairs as appropriate to their existing structures and the functions provided and supports the need for there to be a permanent and easily understood proper defendant.

Identifying a proper defendant

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?*

- 72 As a starting point, we submit that the NSW Government should not impose any particular structures or liabilities in circumstances where there is a capacity for the organisation associated with a property trust, to meet the liability whether through insurance or other assets. The NSW Government should respect the right of organisations to arrange their affairs however they choose, provided that liabilities are able to be met.

- 73 Any civil litigation reform which envisages that the Catholic Church property trustees (which are actually statutory bodies corporate) will be the proper defendant is problematic for a variety of reasons including:

- (a) whilst the legislation refers to ‘trustees’, these are statutory bodies corporate in which property vests and is held on trust for a number of different persons (including the bishop of the diocese) and purposes;
- (b) many of the assets held on trust are not accessible; and
- (c) the Catholic Church property trustees do not appoint and supervise priests and have no connection with the facts and circumstances of child sexual abuse claims.

Identifying a proper defendant

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

- 74 For the reasons discussed above, NSW Province submits that the Royal Commission’s recommendation should only be adopted as a last resort.

- 75 It is appropriate for a purposive approach to be taken, and provided there is a proper defendant that has assets available to meet a claim, we respectfully submit the Royal Commission’s recommendation is not necessary.

Identifying a proper defendant

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?*

76 Given an overriding purpose of the civil litigation reforms is to improve access to justice for child abuse survivors, then the emphasis should be on assuring that institutions which provide services to children nominate an entity that is capable of being sued.

77 So long as this is done, NSW Province submits that institutions should have the right to organise their affairs as appropriate to their existing structures and the functions provided. Adopting the United States approach is unlikely to have any further impact in this regard.

78 Indeed, adoption of an approach along these lines may well have the effect of reducing community participation in all types of community organisations, which would be to the detriment of the community and the State.

Insurance - discussion questions 29 to 33

79 NSW Province submits that all institutions that work with children should be insured in respect of claims relating to child abuse including extending cover to any new claims available under legislation arising from the Consultation Paper.

Questions for the insurance industry - discussion questions 34 to 41

80 NSW Province does not seek to make submissions on these discussion questions.

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.*

As set out above, each of the 11 dioceses comprising the NSW Province have already put in place measures to ensure the safety and protection of children from abuse in their works. NSW already has a comprehensive legislated child protection regime. For example, “designated agencies” for the purpose of the Ombudsman Act (including social welfare agencies and education offices) of the NSW Province dioceses must comply with the child protection provisions of the Ombudsman Act.

- 81 The 11 dioceses are committed to continuing to work to achieve best practice in this area. We do not presently consider any measures in furtherance of this objective will impact upon the delivery of services for children.

Overall impact 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?*

- 82 Further to the matters raised in response to discussion question 42 above, given the child protection measures already in place, we do not presently consider that any further reforms will impact upon operational aspects or behavioural attitudes regarding the provision of facilities and services for children within the 11 diocese of the NSW Province.

- 83 This submission is made on the basis that insurance is available at a reasonable cost and that the reforms enacted are sufficiently clear and any additional costs of compliance are reasonable.

Overall impact of the proposed reforms

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?*

- 84 The child protection measures that the 11 dioceses have already implemented have been discussed throughout this submission. Insofar as the 11 dioceses are concerned, the civil litigation reforms when introduced will become operational within this matrix, and NSW Province strongly holds the view that the proposed reforms are not necessary for the purpose of deterrence and are unlikely to have any further deterrent effect.

- 85 This is because the 11 dioceses and Catholic Church in Australia already have a number of longstanding policies for the protection of children against the background of an existing regulatory regime established by the Ombudsman Act and the reporting obligations under the *Crimes Act 1900* (NSW).
- 86 As set out above, although NSW Province does not consider further measures are required for deterrence, NSW Province does support the proposed reforms (subject to conditions) on the basis that they will provide improved access to justice for victims of child abuse.

Conclusion

- 87 NSW Province appreciates the opportunity to provide these comments to the NSW Government. NSW Province would be pleased to have the opportunity to engage in dialogue with, and to assist, the NSW Government in this important work.

Date: 4 September 2017