Catholic Religious Australia

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7 September 2017

NSW Department of Justice

Policy@justice.nsw.gov.au

Dear Sir/Madam

We enclose with this correspondence our Catholic Religious Australia (CRA) submission in response to the ***NSW Government consultation in relation to the civil litigation recommendations of the Royal Commission into Institutional Responses to Childhood Sexual Abuse.***

Catholic Religious Australia (CRA) is the peak body for leaders of Religious Institutes and Societies of Apostolic Life resident in Australia. Our membership comprises more than 180 congregations of Sisters, Brothers and Religious Priests living and working in all states and territories.

Our submission deals with:

a) Liability
b) Creation of an entity to sue
c) Insurance being tied to the entity

We thank you for the opportunity to provide these submissions and we would like to have a place at the table and be involved in all future discussions of this matter.

Our contact person will be Ms Anne Walker. Her telephone number is (02) 9557 2695 and her email contact is nationalexec@catholicreligiousaustralia.org.au

Yours sincerely

Sister Ruth Durick
CRA President

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RESPONSE ON BEHALF OF CATHOLIC RELIGIOUS AUSTRALIA (CRA) TO NSW GOVERNMENT CONSULTATION IN RELATION TO THE CIVIL LITIGATION RECOMMENDATIONS OF THE ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE

1. INTRODUCTION

Child sexual abuse is an abhorrent evil.

The Royal Commission has done important work and all of its recommendations must be given close attention at the State and Federal level.

Catholic Religious Australia (CRA) is the peak body for leaders of Religious Institutes and Societies of Apostolic Life resident in Australia. Its membership comprises more than 180 congregations of Sisters and Brothers and Religious Priests living and working in all States and Territories. CRA on behalf of its member Religious Institutes across Australia is committed to treating victims of abuse with fairness, dignity and care.

A key challenge is to ensure a nationwide coherent arrangement going forward and at the same time not create artificial, complex and confusing structures.

CRA welcomes the NSW Government's consultation in relation to civil litigation recommendations of the Royal Commission into Institutional Response to Child Sexual Abuse. CRA's members are significant stakeholders in the areas affected by the proposed changes and therefore seek to be part of the discussion.

We note that the key recommendations deal with three main issues:

(a) liability;

(b) creation of an entity to sue;

(c) insurance being tied to the funding.

2. Uniform Approach

The overriding position of CRA is that all legislative changes throughout Australia should as far as possible be consistent. Most institutional Religious Orders have works throughout Australia.

CRA believes that compliance with and understanding of the new protocols and procedures in respect of child abuse will be facilitated if there is so far as possible a uniform legislative position throughout Australia.

The New South Wales Government is no doubt aware that the Victorian Government, after a lengthy period of consultation, has in fact responded to the very issues raised by the Royal Commission by putting in place amendments to the *Wrongs Act 1958 (*Vic) Sections 88 to 93.

CRA therefore believes that the enacted Victorian legislation represents an appropriate template for any changes in New South Wales and indeed in all other States in Australia.

3. **Liability**

In Victoria liability is essentially determined by the reverse onus test recommended by the Royal Commission. It does not go so far as a strict liability test which in the submission of CRA, is what is set out in the example at 6.12 namely to succeed, the Plaintiff would simply need to prove:

(i) the abuse occurred; and

(ii) the Institution was a specified institution.

CRA believes that such a change is unduly onerous and there would be inevitably no insurance offered for works affected by such a test.

Further, given the draft Paper emphasises that improving child safety practices in Institutions, deterring bad behaviour, ensuring best practice, avoiding the omissions of the past and fundamentally changing the behaviour of organisations are real aims of the proposed changes, CRA believes if there were strict liability there would indeed be little incentive to change because it would not matter what steps an organisation took to get to best practice or what resources had been invested as they would simply be liable in every case of abuse.

The "reverse onus" recommendation however both simplifies a victim's claim whilst also enabling an Institution to successfully prove that it took reasonable precautions to prevent abuse.

Section 91 of the *Wrongs Act 1958* sets out the type of reasonable precautions that may be considered by a Court. This will be an area of law that will no doubt be developed by the Courts over time. Organisations will clearly be encouraged to have in place best practice to ensure that they meet the legislative requirements and to enable them to obtain any necessary insurances.

We note however that the Victorian legislation does not define *"abuse"* other than by way of meaning *"physical abuse"* or *"sexual abuse"*. Those further terms are not defined.

CRA submits that and given the proposed introduction of a Redress Scheme and given the necessity of ensuring that serious cases are properly compensated and particularly where there is unlikely to be adequate insurance in many claims going forward, CRA believes that physical abuse and sexual abuse litigation should be confined to serious injury claims.

CRA believes that thresholds governing entitlement to damages such as are used in in the NSW Motor Accidents Legislation and the Civil Liability Act NSW should be considered to ensure that the Courts are not overwhelmed with minor claims and that the more seriously damaged victims can be properly compensated within a reasonable time frame.

In addition to such thresholds/caps on payments, there should also be consideration given towards a provision that disallows any claim for interest on heads of damage given the way in which interest claims in the experience of our Members dramatically increase the potential cost of claims to levels where they are unable to be reasonably resolved and in the long term are not sustainable.

Any changes in respect of liability, as CRA understands it from the Paper, are only to be prospective in any event and certainly that is the recommendation of the Royal Commission and is the position that CRA strongly endorses.

4. ***Creation of an Entity to Sue***

CRA notes that the Paper suggests that the creation/nomination of such an entity would be mandatory on an Institution and would be retrospective.

CRA strongly disagrees with that approach but broadly accepts that unincorporated associations should ensure going forward that there is a legal entity with so far as possible sufficient resources that may be sued, being an entity responsible for the particular work.

Retrospective Application - CRA notes that The Royal Commission recommended that these changes be prospective only. CRA believes the Royal Commission did so for good reason. CRA notes the Victorian legislation is only prospective in that regard.

CRA believes that requiring religious orders, and institutions like them, to nominate or create legal entities to be then sued in respect of past torts will create a legal fiction with enormous difficulties for both plaintiff and defendant. CRA does not believe that by simply nominating or deeming such an entity that that can translate at law into that entity being legally liable for that tort.

Retrospectivity would create considerable insurance difficulties. Such a step would not only mean that there would be no insurance for the artificially created/nominated body that would now extend to the tort, but the nomination would affect what insurance there may have been in in respect of the unincorporated entity that was actually responsible for the particular work at the particular time.

CRA adopts the concerns set out in your Paper from point 7.25-7.27.

Further and by way of emphasising our concerns that the proposed mandatory changes are unreasonable and unnecessary, it has been our Members' experience in abuse litigation to date that the question of identity of a correct defendant has not in fact been a legal barrier to any matter and that the issue has inevitably been resolved between lawyers representing the Claimant and the particular Order.

If there was a retrospective provision in New South Wales and only prospective provisions in other States, there would be structural and legal problems if Institutions had to establish fictional companies to sue in one State which would have no relevance to any other State, or similar works in those States.

That potential problem can be overcome in CRA's submission if the legislation is consistent with Section 92 of the *Wrongs Act 1958*, namely that the need to nominate a legal person firstly only arises if the entity sued is not capable of being sued, and secondly if at that stage the incapable entity (unincorporated association, etc) may (discretionary) nominate an appropriate defendant.

In CRA's submission, not only must the provision be prospective to avoid the legal difficulties highlighted earlier, but should only apply if there is no entity capable of being sued and therefore at some time either before or after the abuse in question, namely typically after litigation is foreshadowed or commenced and that at all times it is discretionary.

In any event, if, for instance, there is no entity capable of being sued then what is the penalty for failure to nominate and who is penalised.

Given that the Victorian legislation envisages that an organisation is liable for all those associated with it and given the width of the *"associations"* definition, it is difficult to imagine a scenario where there is no entity capable of being sued. However if there is and it is by extension not associated with the Organisation, then presumably there would be no practical remedy that could be enforced for failure to nominate.

It must be borne in mind that in the Victorian Act under the definitions provision, a relevant organisation is either capable of being sued or has nominated a legal entity capable of being sued. Thus, by extension, relevant organisation does not include an entity that is not capable of being sued and for that reason CRA believes that the New South Wales legislation should mirror Section 92 and the discretionary catchall provision tied into the earlier definition provisions in Section 88 of the *Wrongs Act* Vic. Section 92 is simply an enabling provision to cover any gaps in our submission but is useful for that purpose.

CONCLUSION

1. In principle, CRA accepts the need to facilitate and expedite the legal processes associated with allegations of sexual abuse of children in its Members' Institutions.
2. CRA believes that if an Order has in place a legal entity capable of identification and capable of being sued, and/or has the resources to address any successful claim against it, that it should not be mandatory that the Order create a new entity for the purposes of such litigation and that the Victorian model in that regard is the correct way forward, namely that the changes be prospective and that there be discretion to nominate an entity only if there is, in fact, in the particular matter no entity capable of being sued.

3. CRA believes that strict liability as a concept is unreasonable.

4. In CRA's opinion, the reverse onus of proof concept introduced in Victoria, whilst a significant change from the current law, is reasonable and will not only assist victims in simplifying the claims process, but should ensure that institutions put in place all necessary steps so that the mistakes of the past cannot be repeated.

5. CRA believes that common law claims should be limited to victims who have suffered more serious damage.

6. CRA believes that it is essential that there be a common Australia-wide approach to legislative change in this area and that any changes in NSW are consistent with changes already in place in Victoria.

We thank you for the opportunity to provide these submissions and would like to be involved in any and all further discussions on this matter.

Sr Ruth Durick osu
CRA President
07/09/2017