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NSW Government Consultation - Civil Litigation Recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.

Thank you for the opportunity to provide a submission as part of the NSW Government's review of the civil liability recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.

The Insurance Council of Australia (ICA) is the representative body of the general insurance industry in Australia¹. ICA members provide a range of general insurance products including public liability insurance for institutions involved with the care and supervision of children.

The ICA acknowledges the policy reasons behind the Royal Commission's recommendations now being considered by the NSW Government, including reforms to address the difficulties faced by survivors of abuse in accessing compensation. However, we wish to highlight the impact some of these recommendations, if implemented, would have on insurance availability and affordability for institutions and organisations who are involved in supervision and care of children.

As outlined in our submission to the Royal Commission of 9 March, 2015, any reforms to liability settings that expand the circumstances in which an institution can be found liable for abuse, such as a non-delegable statutory duty or a reverse onus of proof, will increase the underwriting risk for insurers who provide liability insurance in this sector of the market. This is likely to impact the affordability and availability of insurance for these institutions, especially those that are smaller or less resourced.

¹ Our members represent more than 90 percent of total premium income written by private sector general insurers. Insurance Council members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance).

Organisations involved with the supervision and care of children and insurance risk

In considering the insurance availability and affordability impact likely to flow from the implementation of the Royal Commission's recommended changes to civil liability settings, the ICA wishes to highlight that organisations that are involved in the care and supervision of children are already subject to a more onerous standard of care compared to other organisations or entities.

Consequently these organisations are, from an insurance perspective, already a high underwriting risk. This is reflected in the cost of public liability insurance premiums for these institutions as well as any additional extra insurance an institution may take out to cover child sexual abuse.

In relation to insurance availability, the ICA also wishes to highlight that the insurance market for underwriting liability insurance for child sexual abuse in Australia is not large nor expanding. Not all insurers are prepared to offer this insurance. Those that do offer this type of insurance to institutions often do so very selectively.

It is within this context that changes to liability settings should be carefully considered.

Insurance coverage for intentional criminal acts and sexual abuse

We note the Consultation paper lists a number of questions regarding insurance. In particular whether the insurance industry currently offers insurance against liabilities arising from the commission of intentional criminal acts?

Public liability insurance policies generally exclude insurance coverage for claims or liabilities arising from of intentional criminal acts of employees. This would include claims arising from any form of child sexual abuse.

However, insurance coverage for claims involving intentional criminal acts such as sexual abuse may be provided by some insurers as an extra form of coverage for which the insured must pay additional premium.

Of the insurers who do underwrite insurance for sexual abuse, some have advised the ICA that the decision to provide this extra insurance coverage is made on a 'case-by-case' basis after further investigations are made about the institution and the risk (and not merely upon the payment of the proscribed extra premium).

This additional insurance coverage is, like standard liability insurance for organisations involved in the care of children, often expensive. This reflects the existing high duty of care applied to these institutions as well as the high underwriting risk they have.

Changes to Civil Litigation - non-delegable duty of care; reverse onus of proof.

The introduction of a non-delegable duty of care and/or a reverse onus of proof would impact the cost and the availability of insurance premiums for organisations who are involved in the care and supervision of children and to which these amendments would apply.

This is because these changes would make it easier for survivors of abuse to obtain compensation from organisations. This would consequently increase the insurance underwriting risk for these institutions, which may see an increase in their insurance premiums and/or a reluctance by insurers to offer insurance to these institutions.

Our members advise that the introduction of a non-delegable duty of care or a reverse onus of proof would particularly impact smaller organisations in regard to their ability to access affordable insurance for child abuse risk. This could also impact these organisations ongoing viability.

Likely repercussions of the proposed changes to the duties of institutions

The design and scope of the Royal Commission's recommended changes to liability settings may also create greater uncertainty for insurance underwriters which could have a further impact on the availability and affordability of insurance for some organisations.

For example, the broader the definition of child abuse (eg. a definition that incorporates all forms of physical and psychological abuse) introduced as part of any liability reform, the greater the impact on insurance affordability and availability due to the increased scope of potential claims that would be caught under revised liability settings.

Likewise, extending an institution's liability for the actions of the broad class of 'all persons associated with an institution', as recommended by the Royal Commission, will have a more significant insurance risk / underwriting impact compared to a more narrowly defined group, particularly if this was to be introduced in conjunction with a new non-delegable duty of care.

Mechanisms to support affordability and availability of insurance cover

Some ICA members have advised that certain child safety risk mitigation measures are a prerequisite for providing insurance coverage for child abuse. These could be requirements to have child-safe or risk management system in place to help provide an environment where incidents of abuse were less likely to occur.

The ICA strongly supports measures that promote and lead to direct risk mitigation that reduce the likelihood of abuse occurring. The adoption of child-safety policies and frameworks such as those outlined in the Royal Commission's 'Creating Child Safe Institutions' information publication can have an impact in reducing risk.

However, it is the experience of some insurers that smaller, less resourced organisations have more difficulty implementing these types of risk mitigation. It is these organisations that may be particularly exposed to difficulties obtaining insurance should the Royal Commission's recommended changes to civil liability settings be implemented.

Therefore, programs that educate and provide support for smaller, less resourced organisations could be undertaken to help create safer environments for children that directly reduce risk and lead to reduced likelihood of abuse occurring.

This direct risk mitigation approach, as opposed to purely legislative responses that focus on increasing the risk of liability exposure, can have a beneficial impact on insurance affordability and availability by helping to reduce the likelihood of abuse occurring, and should also be considered by the NSW Government as part of their current review of the Royal Commission recommendations.

The ICA would be happy to discuss this submission and the review with you further.

If you have any questions please contact Fiona Cameron, General Manager, Policy, Consumer Outcomes via email fcameron@insurancecouncil.com.au, or phone (02) 9253 5100.

Yours sincerely



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