

4 September 2017

Justice, Strategy and Policy
Department of Justice
GPO Box 6
Sydney NSW 2001

Dear Sir/Madam

Submission in response to the NSW Government Consultation Paper in relation to the Civil Litigation Recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse

Slater and Gordon welcome the opportunity to provide a submission to the NSW Government in response to recommendations of the Royal Commission into Institutional Responses to Child Sex Abuse (Royal Commission). The **enclosed** submission responds to the *NSW Government consultation in relation to the civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse* (Consultation Paper).

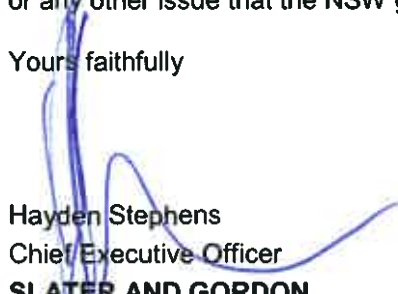
These responses are concerned with civil litigation reforms, which we believe are integral to creating fair and expeditious outcomes for survivors. The submission responses contain recommendations based on Slater and Gordon's experience in court-based and pre-litigation work in assisting child sex abuse survivors. We have not responded to questions or attempted to proffer advice to issues relevant to the insurance industry nor to institutions that exercise care, supervision and authority over children.

There are important legislative reforms to be made, which we believe are necessary in improving access to justice for survivors of child sex abuse. Along with these responses, and above all else, Slater and Gordon wish to urge the state and national governments to work together for the creation of a single national redress scheme.

This Consultation Paper, and the proposed legislative reforms recommended within it, marks an important step in ongoing progress arising from the Royal Commission. Now that we as a community understand the scale and the severity of the widespread problem of child sex abuse in institutional settings, it is vital for all stakeholders and organisations to assist in implementing strong legislative reform. This is not only to provide justice for child sex abuse survivors who have suffered immeasurably, but to significantly improve the care that exists now and in the future for children across Australia.

We thank the NSW Government for this opportunity to make a submission in response to these important issues. We would welcome the opportunity to expand on any matter in the submission or any other issue that the NSW government may deem appropriate.

Yours faithfully


Hayden Stephens
Chief Executive Officer
SLATER AND GORDON

RESPONSES TO CONSULTATION PAPER IN RELATION TO THE CIVIL LITIGATION RECOMMENDATIONS OF THE ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE

No.	Questions	Responses
<i>Definition of child abuse</i>		
1.	What kind of abuse should be covered by civil litigation reforms?	Slater and Gordon believe that civil litigation reforms in this area should cover both sexual abuse, as well as non-sexual abuse.
2.	Should the definition used in the Limitation Amendment (Child Abuse) Act 2016 (NSW) be adopted, or should a different definition be used?	<p>Whilst the focus of the Royal Commission, and a proposal for a redress scheme, deals primarily with historical child sex abuse, it is important to acknowledge that one type of abuse rarely occurs in isolation.</p> <p>We therefore agree with the proposal to adopt the definition used in the <i>Limitation Amendment (Child Abuse) Act 2016 (NSW)</i>, where 'child abuse' includes any of the following, perpetrated against a person when the person is under 18 years of age:</p> <ol style="list-style-type: none"> a. <i>sexual abuse;</i> b. <i>serious physical abuse;</i> c. <i>any other abuse (connected abuse) perpetrated in connection with the sexual abuse or serious physical abuse of the person (whether or not the connected abuse was perpetrated by the person who perpetrated the sexual abuse or serious physical abuse).</i>

<i>New non-delegable duty of care</i>		
3.	<p>Should the Royal Commission's recommendations for a new non-delegable duty be adopted?</p>	<p>We wholeheartedly agree with recommendation 89 from the Royal Commission, that there should be a strict non-delegable duty imposed upon institutions in relation to abuse claims.</p> <p>There should be no doubt as to whether a duty of care is owed to children by an organisation, whose responsibility it is to care for children. Imposing a non-delegable duty also acts as a vital motivation for institutions to safeguard against abuses from individuals under their control.</p>
4.	<p>If the recommendation is adopted, which organisations should be subject to a new non-delegable duty of care? For example, should a new duty:</p> <ul style="list-style-type: none"> 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? 	<p>Slater and Gordon are of the view that this duty should extend to any institution that exercise care, supervision or authority over children in any capacity.</p> <p>To that extent, we agree with recommendation 90 by the Royal Commission, that the strict non-delegable duty should extend, but not be limited to the following organisations:</p> <ul style="list-style-type: none"> 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;

<p>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; and</p> <p>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.</p> <p>Further to this, and in response to the question, it is also our view that this strict duty should:</p> <ul style="list-style-type: none"> a. not only be applied to for-profit institutions, but to also non-for-profits who are responsible for the care of children; b. be applied to all institutions regardless of their size; and c. be applied to all organisations who are responsible for children, regardless of whether that is their primary function, including whether they provide services to adults. 	
<p>We are of the view that it would be worthwhile having a broad general definition of "any institution that exercises any care supervision or authority of children".</p> <p>However, for the avoidance of any doubt, it would be appropriate to include a list that provides guidance (such as the one provided in recommendation 90 by the Commission) by which the above general definition is not limited.</p>	<p>5. Should legislation list the organisations on which the non-delegable duty would be imposed, or would a more general definition be appropriate?</p>

<i>Reverse onus of proof</i>		
6.	<p>Should the Royal Commission's recommendation to reverse the onus of proof in child abuse claims be adopted?</p>	<p>Yes. It is important that the onus is placed on the defendant to show that it took <i>all reasonable steps</i> to prevent any abuse from occurring under its control.</p> <p>This was the approach adopted by the Victorian Government in section 91 (3) of <i>The Wrongs Amendment (Organisational Child Abuse) Act 2016 (Vic)</i>, which provides that:</p> <p><i>"In a proceeding on a claim against a relevant organisation for damages in respect of the abuse of a child under its care, supervision or authority, on proof that abuse has occurred and that the abuse was committed by an individual associated with the relevant organisation, the relevant organisation is presumed to have breached the duty of care" ... "unless the relevant organisation proves on the balance of probabilities that it took reasonable precautions to prevent the abuse in question."</i></p> <p>We would support the adoption of a similar approach in any equivalent NSW legislation.</p> <p>Adopting this onus of proof would make it incumbent upon the institutions, which exercise care, supervision and authority over children, to implement proper risk identification, risk assessment and risk control mechanisms, in order to appropriately mitigate the risks of child abuse.</p>
7.	<p>What would be the benefit and/or implications of defining the term 'reasonable steps' in legislation?</p>	<p>'Reasonable steps' should not be confined to a strict definition in the legislation. An inflexible definition could lead to outcomes that are not appropriate for the unique circumstances of a given case.</p>

		<p>Instead, it is important that the court is afforded flexibility in determining what would constitute 'reasonable steps' on a case by case basis, with consideration of the following factors in common law in determine the appropriateness of steps:</p> <ol style="list-style-type: none"> a. the likelihood of the hazard or the risk concerned occurring; b. the degree of harm that might result from the hazard or the risk; c. what the organisation concerned knows, or ought reasonably to know, about the hazard or risk, and ways of eliminating or minimising the risk; d. the availability and suitability of ways to eliminate or minimise the risk; and e. after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk. <p>Whilst Slater and Gordon do not believe a prescriptive definition should exist in the legislation, the term should be defined as 'all reasonable steps', rather than simply any reasonable steps. It must be shown that an institution did everything in its capacity to prevent abuse of children.</p>
8.	<p>If the recommendation is adopted, would it be useful to develop guidelines or industry standards about what is considered to be 'reasonable'?</p>	<p>Slater and Gordon believe institutions should have as much guidance as possible as to what constitutes 'reasonable steps' in preventing abuse of children.</p> <p>For example, section 18 The Work Health and Safety (WHS) Act 2011 (Cth), deals with 'what is reasonably practicable in ensuring health and safety' in the workplace. A useful interpretive guide for</p>

		<p>organisations, as to what 'reasonably practicable' exists for this legislation'. A similar document would likely be useful in the context of institutions whose responsibility it is to care for children.</p>
<p>9.</p>	<p>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?</p>	<p>We believe that if an institution has care, supervision or authority over children in any capacity it should take reasonable steps in order to prevent abuse from occurring, regardless of what type of service that organisation provides.</p> <p>Slater and Gordon's view is that the NSW government adopt the wording of <i>The Wrongs Amendment (Organisational Child Abuse) Act 2016 (Vic)</i>, in which the following factors are provided for guidance:</p> <ul style="list-style-type: none"> a. the nature of the relevant organisation; and b. the resources that are reasonably available to the relevant organisation; and c. the relationship between the relevant organisation and the child; and d. whether the relevant organisation has delegated the care, supervision or authority over the child to another organisation; and e. the role in the organisation of the perpetrator of the abuse. <p>Whilst in this wording 'nature of the relevant organisation' may be a factor the courts could consider, the service that the organisation provides is not a necessary factor to be considered.</p>
<p>10.</p>	<p>How could it be ensured that 'reasonable steps' were actually effective to improve the safety of children?</p>	
<p>11.</p>	<p>Would the recommendation to reverse the onus of proof affect an organisation's ability to provide services to children?</p>	

¹ Safe Work Australia: Interpretative Guidelines-Model Work Health and Safety Act- The Meaning of Reasonable Practicable
https://www.safeworkaustralia.gov.au/system/files/documents/1702/interpretive_guideline_-_reasonably_practicable.pdf

<i>Persons 'associated with' an institution</i>	
12.	<p>Should the Royal Commission's recommendation to extend institutional liability to 'all persons associated with an institution' be adopted?</p>
13.	<p>If the recommendation is adopted, should the term 'associated with' be defined in legislation, or decided on a case by case basis?</p>
14.	<p>Should the range of persons 'associated with' an institution capture all of those referred to in the Royal Commission's recommendation? That is:</p> <ul style="list-style-type: none"> 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.

Slater and Gordon agrees with the recommendation by the Royal Commission to extend institutional liability to 'all persons associated with an institution' should be adopted.

Further, it is our view that the definition of 'associated with' is derived from the wording used in the Victorian legislation, which is as follows:

(1) An individual associated with a relevant organisation—

- a. includes but is not limited to an individual who is an officer, office holder, employee, owner, volunteer or contractor of the relevant organisation; and
- b. if the relevant organisation is a religious organisation, includes but is not limited to a minister of religion, a religious leader, an officer or a member of the personnel of the religious organisation; and
- c. if the relevant organisation has delegated, by means of contract or otherwise, the care, supervision or authority over the child to whom the claim relates to any organisation, includes but is not limited to an individual who is referred to in paragraph (a) or (b) in relation to the delegator organisation or the delegate organisation; and
- d. if the relevant organisation has delegated, by means of contract or otherwise, the care, supervision or authority over the child to whom the claim relates to a specified carer and a permanent care order in respect of the child has not been made, includes but is not limited to—
 - i. an individual who is referred to in paragraph (a) or

		<p><i>(b) in relation to the relevant organisation; and the specified carer.</i></p> <p>ii.</p> <p><i>(2) An individual is not associated with a relevant organisation solely because the relevant organisation wholly or partly funds or regulates another organisation.²</i></p>
15.	<p>How closely associated should an institution and a perpetrator need to be to result in potential liability? For example:</p> <p>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?</p> <p>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?</p>	<p>As indicated in the above answer, we agree the legislative definition of “all persons associated with an institution” should also include all volunteers and contractors (including subcontractors).</p> <p>In relation to the scope of how far outside the institution liability should apply, we agree a test ‘to determine whether a reasonable person in the position of the child would reasonably have assumed that the person was part of, or associated with, the institution at the time of the abuse’³ would be a useful measure.</p>
<i>Identifying a proper defendant</i>		
16.	<p>Should the Royal Commission’s ‘proper defendant’ recommendation be adopted?</p>	<p>Institutions with care, supervision and authority should be mandated to name a proper defendant in relation to child abuse claims.</p> <p>To that end, Slater and Gordon believe that unincorporated bodies with the benefit of perpetual succession for property ownership should also bear the burden of succession to meet claims of child sexual abuse.</p>
17.	<p>Do the difficulties in identifying a proper defendant arise in</p>	<p>Regrettably, it is the firm’s experience that identifying a proper</p>

² The Wrongs Amendment (Organisational Child Abuse) Act 2016 (Vic), Section 90

³ As suggested in the Consultation Paper: Royal Commission civil litigation recommendations, page 22

	<p>respect of non-religious organisations?</p>	<p>defendant is a problem that extends beyond religious contexts.</p> <p>Slater & Gordon acted on behalf of plaintiffs in a class action in relation to child abuse committed at the Fairbridge Farm School Molong.</p> <p>One of the defendants in that litigation is the Fairbridge Foundation, a secular organisation which the claimants assert ran the school and had the care of its child residents. However, its defence denies this allegation and instead nominates a multiplicity of individuals, groups of individuals, and institutions (other than itself) which it says had the running of the school and the charge of children at various times. Its representatives have even referred in open Court to this raising an "Ellis question."</p>
18.	<p>How would the proposed reforms impact on non-religious organisations?</p>	
19.	<p>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?</p>	<p>Slater and Gordon believe that all unincorporated bodies with the benefit of perpetual succession for property ownership should bear the burden of succession to meet claims of child sexual abuse. Our view of this encompasses all property trusts, whether they be private or statutory.</p> <p>In any event, Slater and Gordon believe legislation should require that institutions who exercise care supervision or authority over children be incorporated.</p>
20.	<p>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?</p>	
21.	<p>Should institutions be required to nominate a 'proper defendant' for all claims, including past abuse?</p>	<p>Following on from our response to question 17 above, Slater and Gordon agree with the recommendation that any institution must name a proper defendant for all claims, including past abuses.</p>
22.	<p>Should institutions be required to nominate a proper</p>	<p>We do not believe there is any reasonable excuse for an</p>

	<p>defendant with a particular legal structure? If so, what would an appropriate legal structure be?</p>	<p>institution to not incorporate and we support legislative reform to ensure it is mandatory for institutions which exercise care supervision or authority over children, to be incorporated as legal entities that are able to be sued.</p>
23.	<p>If an institution does not cooperate by nominating a defendant to a child abuse claim, what would a reasonable 'fall back' option be?</p>	<p>The unique structures of organisations, such as churches, are an anachronism which derives from a time where the modern corporate entity and unincorporated associations were not features of the law. We are of the firm belief that these institutions should be treated in the same way as any other entity that enjoys the benefit of perpetual succession.</p>
24.	<p>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?</p>	<p>It is our view that, with such a reform, the potential for such institutions to not cooperate by nominating a proper defendant would be eliminated.</p>
25.	<p>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?</p>	<p>Yes. We believe that where any defendant does not have sufficient assets to meet the damages of a particular claim, and there are any associated trusts attached to that entity, the assets of the associated trusts should be made available to claimants.</p>
26.	<p>Is the Royal Commission's recommendation workable? What are other options for reform?</p>	<p>We agree with the intent of the Commission's recommendation, that institutions with associated property trusts should be required to nominate a 'proper defendant', in that it ensures that survivors can easily identify a defendant to sue.</p> <p>However, we are afraid that this recommendation does not go far enough.</p> <p>It is our firm view that if it was mandatory for all of these relevant institutions to be incorporated, the problem of unincorporated associations unjustifiably relying on legal technicalities to avoid liability in child abuse claims, would be remedied.</p>
27.	<p>Is the approach in the United States (where claims can be made against unincorporated associations) a more effective</p>	<p>There may be room for civil procedure law reform, which seeks to make it possible to sue unincorporated bodies. However, even if</p>

<p>civil procedure rules are able to be changed to include unincorporated associations, it might prove difficult in practice.</p> <p>As is pointed out in the consultation paper, even in the Tasmania and South Australia context where these civil procedure rules have changed, the High Court has expressed doubt over whether it is possible to alter the substantive law of unincorporated associations with civil procedure rules.⁴</p> <p>For the avoidance of such doubt, by seeking to create a similar model to the United States, it is instead our view that relevant institutions should be required to become incorporated entities. This will be the best way to ensure survivors are not denied access to justice on the basis of the financial status or nature of the institution.</p>	<p>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?</p>
<p>Insurance</p>	
<p>28.</p>	<p>Should the Royal Commission's insurance recommendation be adopted?</p> <p>Yes. All institutions which have responsibility for the care of children should be required to have appropriate mandatory insurance that covers their liability in respect of institutional child sexual abuse claims.</p>
<p>29.</p>	<p>Would the Royal Commission's civil litigation recommendations have a substantial impact on insurance premiums or the availability of insurance?</p> <p>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?</p> <p>Should the recommendation also extend to organisations which are not recipients of government funding, such as</p>
<p>30.</p>	<p>Yes. It is our view that a requirement is made that organisations who are responsible for children, such as religious institutions,</p>
<p>31.</p>	<p>Yes. It is our view that a requirement is made that organisations who are responsible for children, such as religious institutions,</p>

⁴ *Williams v Hursey* (1959) 103 CLR 30 at 54. "These Rules do not appear to me to solve the problem created by the most fundamental of the differences between a corporation and an unincorporated society."

		<p>obtain insurance, whether they are government funded or not.</p>
32.	<p>Should the Royal Commission's recommendation that unincorporated bodies have insurance extend to recipients of 'indirect' government funding? How far should this extend?</p>	<p>The NSW and Federal can put this requirement into legislation. There are many examples which already exist of mandatory insurance requirements in legislation for non-funded organisations. All registered medical practitioners who provide health care or medical opinion in respect of the physical or mental health of any person, must ensure all aspects of their medical practice are covered by professional indemnity insurance. Equally, lawyers, law firms and community legal centres are required to obtain approved professional indemnity insurance prior to practising.⁵</p>
Questions for the insurance industry		
33.	<p>Does the insurance industry currently offer policies which insure against liability arising from the commission of an intentional act?</p>	
34.	<p>What would the likely repercussions be of the proposed changes to the duties of institutions?</p>	
35.	<p>What would the likely repercussions be of the proposed changes to the duties of institutions?</p>	
36.	<p>What are the elements which impact on insurance premiums?</p>	
37.	<p>When considering the risk of child abuse, what are the factors that underwriters will examine?</p>	
38.	<p>How has the insurance industry in Australia responded to the recent increase in child abuse claims? Has this been similar to the response overseas?</p>	
39.	<p>What mechanisms and responses would institutions need to have in order to support the affordability and availability of liability insurance cover for child abuse?</p>	
40.	<p>What insurance cover could be offered to nominated 'proper defendants' to child abuse claims?</p>	

⁵ Legal Profession Uniform Law (NSW) (2014 No 16a), Part 4.4

41.	What would be the likely cost of specific insurance coverage for child abuse? Would such coverage be available for small organisations, and at what cost?	
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.	
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?	
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?	