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Justice Strategy and Policy
Department of Justice
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Dear Sir/Madam,

Royal Commission civil litigation recommendations – Submissions on behalf of YMCA NSW

We represent YMCA NSW.

We **enclose** our client's Submission in response to the Royal Commission's civil litigation recommendations.

Yours sincerely

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Response to New South Wales Government Consultation Paper in relation to civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse

The NSW Government has released a consultation paper (**the Consultation Paper**) in relation to the civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse (**the Royal Commission**). YMCA NSW submits a response in relation to those activities and identified proposals that are relevant to its operations.

The Consultation Paper includes the following recommendations as put forward by the Royal Commission:

1. **Issue A:** Increasing the legal responsibility of institutions for child abuse;
2. **Issue B:** Ensuring there is someone to sue; and
3. **Issue C:** Requirement to have insurance.

Executive Summary

Increased Legal Responsibility of Institutions

1. YMCA NSW recognises the barriers associated with civil litigation to survivors of child sexual abuse and supports reforms being undertaken so as to ensure that survivors are provided with every opportunity to pursue civil litigation should they wish to do so.
2. YMCA NSW supports the Royal Commission's recommendation that there be a strict non-delegable duty of care on the above institutions, however, it considers that the duty of care should be limited to recognise that there are limitations on the control an institution is able to exercise over certain activities, such as the activities of sub-contractors, and that that limitation should be recognised in the proposed legislation.
3. As to the reversal of the onus of proof, while YMCA NSW supports the basis for this recommendation, it is concerned that, in practice, a reversal of the onus of proof in certain cases would be impractical. What is considered to be "reasonable steps" is not defined, and would need to be adapted for each institution based on its own structure, policies and procedures. It may be that the more appropriate standard is that which is "reasonably practicable".



4. YMCA NSW considers that the list of associated persons for when liability may be ascribed on a strict liability - or vicarious liability basis - should be limited to those persons that are under the control or authority of the institution.

Ensuring that there is somebody to sue

5. YMCA NSW recognises the difficulties identified by the Royal Commission in identifying a defendant to sue and supports the Commission's 'proper defendant' recommendation.

Requirement to have insurance

6. YMCA NSW agrees that larger institutions ought have the appropriate level of insurance that is required to respond to the scope of claims that may arise out of the activities that the institution provides and is engaged in.

Response to Issue A: Increasing the legal responsibility of institutions for child abuse

So as to increase the legal responsibility of institutions for child abuse, the two recommended changes are that:

- (a) there be a strict non-delegable duty of care on particular institutions and ensuring those institutions are liable for abuse, regardless of whether the institution itself is at fault;
- (b) reversing the onus of proof for all organisations working with children, so that liability would be established in a claim unless the institution can prove that it took reasonable steps to prevent the abuse from occurring.

Strict non-delegable duty of care

1. YMCA NSW supports the Royal Commission's recommendation for the imposition of a strict non-delegable duty of care on some institutions, which includes YMCA NSW in so far as it is a provider of early childhood education and care services.
2. However, YMCA NSW submits that the exercise of the duty of care must be limited to the actions of those parties whose activities the institution is able to control, and should also be limited to what is reasonably practicable.
3. YMCA NSW believes that survivors of child sexual abuse ought be provided with every opportunity to seek redress for the harm caused by abuse and acknowledges that compensation is a public and tangible measure for survivors to recognise the abuse that they have suffered. As identified in the Consultation Paper, a strict non-delegable duty of care will make it easier to institute proceedings against institutions. However, YMCA NSW submits that there must be an appropriate balance between access to redress and the institution's ability to control the actions of its employees and agents, as compared to third parties who do not fall directly under the institution's control.



4. While YMCA NSW enforces comprehensive training concerning child safety for its staff and volunteers, it cannot exercise the same level of control in relation to the training or supervision of third parties, such as sub contractors performing other works on the premises operated by YMCA NSW. The proposed duty would potentially expose institutions to liability in relation to the conduct of third parties whom it cannot control.
5. YMCA NSW is also concerned that the proposed amendments would be inconsistent with the current State legislative regime for child protection. For example, it is mandatory for YMCA NSW employees to obtain and hold valid Working With Children Checks (WWCC). However, other third parties - such as sub-contractors who may only visit the site occasionally and who do not work with children - are not required to have a valid WWCC. The proposed amendment is at odds with this and it would be almost impossible for YMCA NSW to exercise any control over the activities of such persons such that the imposition of a non delegable duty of care would prejudice the position of YMCA NSW. YMCA NSW is not in a position to mandate that sub-contractors obtain WWCC's in circumstances where that is not mandated by NSW law. If YMCA NSW were to be liable for the actions of persons who are not required to obtain WWCC this would represent an unworkable inconsistency between the NSW legislative requirements relating to WWCC's and the potential liability of institutions for the conduct of those who are not governed by that regime.
6. YMCA NSW is also concerned that the imposition of an unlimited non delegable duty may result in litigation over matters in relation to which YMCA NSW has had no effective control.
7. YMCA NSW acknowledges that the only way to avoid liability for child abuse is to prevent child abuse from happening in the first place. However, an extended regime imposing greater potential liabilities on institutions must acknowledge that there are limitations on the control that an institution may exercise in relation to the actions of some categories of persons. While YMCA NSW does not dispute that institutions should be accountable and liable for the actions of its employees and others who fall under its direct control, it submits that there must be some limitations on their potential liability.

Reversal of the onus of proof and the 'reasonable steps' defence

8. YMCA NSW submits that, if the onus of proof is changed to a reverse onus in matters of child sex abuse, then the operation of the available defence must be clarified so that institutions can ensure that they not only adopt a best practice model but also ensure that they comply with the requirements of the relevant legislation.
9. YMCA NSW submits that the proposed 'reasonable steps' defence should take into account subjective factors, relevant to the size, operations and undertaking of the institution. For that reason, it submits that the 'reasonably practicable' defence which features in Work Health & Safety legislation would be a more appropriate formulation as it has regard to the specific nature of the institution and its operations.
10. If the proposed legislation is enacted, YMCA NSW submits that institutions should be provided with guidance in the operation of the reverse onus and the availability of the defence. YMCA NSW submits that the following factors would be relevant factors to consider when assessing whether an institution took all reasonable steps or, alternatively, did all that was reasonably practicable to prevent the abuse from occurring:



- (a) the performance of risk and hazard assessments;
 - (b) the imposition of effective screening mechanisms when engaging employees, contractors or volunteers;
 - (c) the provision of child protection training to employees, contractors and volunteers upon commencement of their engagement and regularly throughout the relationship;
 - (d) adherence to internal policies and procedures for reporting and investigating suspected infringements;
 - (e) an investigative and disciplinary regime so that any suspected infringements are dealt with promptly.
11. YMCA NSW has introduced, and maintains, each of the measures outlined above and further submits that a compliance based legislative regime would be more effective if the legislation prescribed the steps that would allow an institution to rely upon the proposed defence.
12. YMCA NSW has been proactive in implementing avenues for survivors to pursue redress. YMCA Australia co-ordinates redress actions for YMCA NSW and other YMCA Associations.
13. YMCA Australia has incorporated three main elements in its approach to redress (with which YMCA NSW complies and subscribes to):
 - (a) An offer of a direct personal response by the institution;
 - (b) The provision of support to access counselling and psychological care; and
 - (c) The offer of monetary payments.
14. Where survivors have made an application for redress, survivors:
 - (a) have 90 days to consider offers made by the Redress Panel; and
 - (b) are provided the opportunity to seek independent advice as to any offer by the Redress Panel before deciding to accept the offer.
15. Importantly, YMCA NSW also considers that an application for redress should not preclude any person from exercising their rights to any remedies which may be available to them by way of civil litigation should they wish to pursue those remedies. This is reflective of YMCA Australia's approach to redress to maintain the applicant's rights to civil litigation.

Response to Issue B: Ensuring there is someone to sue

1. YMCA NSW acknowledges the difficulties identified by the Royal Commission addressing the problems posed by the lack of legal personality of some institutions, particularly religious institutions, and supports the Commission's 'proper defendant' recommendation.



Response to Issue C: Requirement to have insurance

1. YMCA NSW agrees that larger institutions should have the appropriate level of insurance to ensure that it is equipped to respond to the scope of claims that may arise out of the institution's activities.
2. YMCA NSW notes, however, that there is not currently any obligation for institutions to insure volunteers or third parties (for example, sub-contractors). If a non delegable duty is introduced by legislation, then it is submitted that steps should be taken to ensure that the requirements for insurance reflect the extent of the change, particularly if the duty extends to parties outside institutions' control.

Yours kindly,

Lisa Giacomelli
Chief Risk Officer
YMCA NSW