



THE LAW SOCIETY
OF NEW SOUTH WALES



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13 April 2018

Mr Stephen Bray
A/Director, Civil Law
Policy and Reform
Department of Justice
160 Marsden Street
Parramatta NSW 2124

By e-mail: policy@justice.nsw.gov.au

Dear Mr Bray,

Proposed responses to the Royal Commission's civil litigation recommendations

Thank you for the opportunity to comment on the proposed responses to the Royal Commission into Institutional Responses to Child Sexual Abuse ('Royal Commission') civil litigation recommendations ('proposed response'). This is a joint submission on behalf of the Law Society of New South Wales and the Australian Lawyers Alliance and has been prepared on the basis of input from the Law Society's Injury Compensation Committee.

The Law Society and ALA welcome the majority of reforms in the proposed response, however we note issues below that remain of concern to the legal profession.

Retrospectivity

The Law Society and ALA are concerned that a number of the reforms in the proposed response only apply prospectively, and not retrospectively. Although a general principle of the rule of law is that laws should apply prospectively so as they are both known and knowable at the time an act is done, we are of the view that the unique position of victims of abuse warrants the modification of this principle in respect of civil litigation. The Commonwealth Attorney-General's Department 'Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers' states that exceptions to the principle "have normally been made only where there has been a strong need to address a gap in existing offences, and moral culpability of those involved means there is no substantive injustice in retrospectivity"¹. We consider that this situation warrants such an exception. The Royal Commission found that over 55% of survivors reported the abuse over 30 years after it occurred.² As such, the imposition of prospective-only legislation would serve to effectively and unjustly limit the number of survivors who could make a claim, making the remedy unavailable to entire classes of survivors.

¹ Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011), p15

² Royal Commission into Institutional Responses to Child Sexual Abuse, 2017, 'Final Report: Identifying and disclosing child sexual abuse', p34

Further, we consider the reforms seek to implement what is arguably already the position of the common law in light of the decision in *Prince Alfred College Inc v ADC*.³ The proposed response acknowledges that the common law in this area has developed at a very slow pace, predominantly due to the disproportionately large number of claims for injuries arising from sexual abuse that are settled rather than proceeding to trial. We submit that if the reforms do not apply retrospectively, survivors negotiating settlements will be hampered by significant and unnecessary legal uncertainty.

Vicarious liability, the close connection test and the proper defendant

The Law Society and the ALA note the Royal Commission's recommended approach to expanding the vicarious liability of institutions to 'associated persons', however we are of the view that the 'close connection' test established at common law in jurisdictions such as the United Kingdom and Canada – and effectively adopted in the Australian case of *Prince Alfred College* – is a preferable approach. It is our view that the 'close connection' test is less restrictive and formulaic in nature than the 'associated persons' test, and better suited to the multitude of different relationships that may possibly arise. We also consider that the adoption of the 'close connection' test would remove liability in circumstances where there is not a sufficiently close connection between the risk imposed by the institution and the abuse.

The Law Society and ALA also support the proposed reform to ensure that the assets of organisations be made available to survivors of abuse seeking to access civil remedies. We support a prescriptive legislated approach to this issue and consider it necessary to eliminate the ability for organisations to utilise the 'Ellis defence'. Further, we agree with the recommendation that any provision be both retrospective and prospective in nature, which would again appropriately provide for a greater level of certainty for victims of abuse in the past. We note however that allowing for retrospectivity in relation to the availability of assets whilst disallowing it in relation to vicarious liability would create a logical gap where a victim abused prior to the reforms coming into force will have access to an appropriate defendant, but will be prevented from establishing vicarious liability.

Definition of child abuse

The Law Society and ALA submit that the proposed definition of 'child abuse' should be broadened to include 'associated psychological abuse', as has been the case in other recent legislative reforms.⁴ We submit that consistency in relation to this definition is necessary to ensure justice for survivors. Further, we also submit that in practice the inclusion of 'associated psychological abuse' within the definition would also serve to create greater certainty in relation to claims, as it would remove the requirement to make difficult and sometimes indistinguishable delineations between the sexual, physical and associated psychological abuse suffered by a victim.

Conclusions

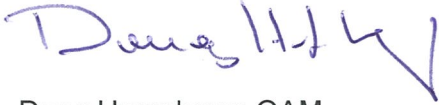
Overall, the Law Society and the ALA are of the view that the reforms proposed in the response would represent a major step forward in ensuring justice for survivors of childhood sexual abuse, and we generally commend it, subject to the concerns expressed above.

³ (2016) CLR 134; [2016] CHA 37.

⁴ See *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic); *Limitation Amendment Act 2017* (Tas); *Limitation Amendment (Child Abuse) Act 2017* (NT)

Should you have any questions or require further information, please contact Jonas Lipsius, Principal Policy Lawyer, on (02) 9926 0218 or email jonas.lipsius@lawsociety.com.au.

Yours sincerely,



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