



# Discussion Paper

## Royal Commission into Institutional Responses to Child Sexual Abuse

Duty of Institutions – recommendations 89-93

December 2018

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## 1 Introduction

Following a five-year inquiry, the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) presented its Final Report to the Governor-General on 15 December 2017.<sup>1</sup>

The Final Report is divided into 17 stand-alone volumes and makes 189 new recommendations combined with the 220 recommendations of its three earlier reports – *Working with Children Checks, Redress and Civil Litigation*, and *Criminal Justice*. This includes a total of 409 recommendations for the Australian Government, state and territory governments, and non-government organisations.

The Western Australian State Government (State Government) is working to address historical abuse that occurred, prevent abuse from happening in the future, and identify and respond swiftly to abuse should it happen again. The State Government has provided support for the vast majority of the Royal Commission's recommendations and is continuing to implement agreed reform measures.<sup>2</sup> A report regarding the State Government's progress with the recommendations is to be tabled in the Western Australian Parliament during 2019.

The Royal Commission demonstrated in its 2015 *Redress and Civil Litigation Report*<sup>3</sup> that survivors of child sexual abuse have not had the same ability to access compensation as other injured persons. The Royal Commission recommended civil litigation reforms regarding:

- limitation periods (recommendations 85-88);
- duties of institutions (89-93);
- identifying a proper defendant (recommendations 94-95); and
- model litigant approaches (recommendations 96-99).

The State Government has already made substantive progress in the implementation of civil litigation reforms.

- The *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* (WA) commenced on 1 July 2018 to lift statutory limitation periods for child sexual abuse actions and to provide for identification of a proper defendant.
- Guiding principles for the whole-of-government in responding to civil litigation involving child sexual abuse have also been published.<sup>4</sup>

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<sup>1</sup> Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (15 December 2017), [*Royal Commission Final Report*].  
<https://www.childabuseroyalcommission.gov.au/final-report>

<sup>2</sup> Government of Western Australia, *Royal Commission into Institutional Responses to Child Sexual Abuse - Response by Minister McGurk on behalf of the Government of Western Australia*, (June 2018) [*WA Government Response*], (pp.3; 9).  
[https://www.dpc.wa.gov.au/ProjectsandSpecialEvents/Royal-Commission/Pages/The-WA-Government-Response-to-Recommendations-\(June-2018\).aspx](https://www.dpc.wa.gov.au/ProjectsandSpecialEvents/Royal-Commission/Pages/The-WA-Government-Response-to-Recommendations-(June-2018).aspx)

<sup>3</sup> Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (September 2015), [*Redress and Civil Litigation - Report*].  
<https://www.childabuseroyalcommission.gov.au/redress-and-civil-litigation>

<sup>4</sup> The Department of Justice has published a series of 'Frequently Asked Questions' regarding the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* together with 'Guiding Principles for Responding to Civil Litigation involving Child Sexual Abuse'.  
<https://www.department.justice.wa.gov.au/C/child-sexual-abuse.aspx>

This Discussion Paper considers Royal Commission recommendations **89-93**. These recommendations relate to the introduction of new duties on institutions to further improve access by survivors to civil compensation and to deter child sexual abuse from occurring.

The Discussion Paper is to assist interested persons and organisations to make submissions to the Western Australian Department of Justice. It is intended that feedback will help inform future consideration by the State Government of Royal Commission recommendations 89-93.

Submissions are invited in response to the specific questions in the Discussion Paper and other relevant matters. Information on the process for lodging a submission is provided in section 2 of this paper.

Please note that the information provided in the Discussion Paper is current as at 13 December 2018. The material has been prepared by the Department of Justice for the purpose of consultation only. The Discussion Paper is not to be relied upon as an official document and does not represent the views of the State Government.

## 2 How to make a submission

If you wish to comment on matters contained in this paper **you can make a written submission**.

To be considered by the Department of Justice, submissions must be received **by close of business Monday, 11 March 2019**.

Submissions should be titled “**Duty of Institutions – Discussion Paper**” and emailed to:

[LegPolicy@justice.wa.gov.au](mailto:LegPolicy@justice.wa.gov.au)

Alternatively, hard copies can be sent to:

Ms Lisa Taylor  
Senior Policy Officer  
Strategic Reform Division  
Department of Justice  
GPO Box F317  
PERTH WA 6841

If any parts of your submission contain **confidential** information – this must be clearly identified (*on the cover page – and the relevant parts*) in your submission. If confidentiality is sought please specify in reasonable detail the basis for the claim.

Please be aware of requirements regarding the *Freedom of Information Act 1992* (WA) and Department of Justice processes (please refer to the Department website at [https://department.justice.wa.gov.au/F/freedom\\_of\\_information.aspx?uid=3704-4920-6860-1895](https://department.justice.wa.gov.au/F/freedom_of_information.aspx?uid=3704-4920-6860-1895)).

### 3 Background

#### 3.1 The liability of institutions

There are generally three ways that an institution can be liable for civil damages:

- Where an institution has breached a duty to exercise reasonable care and in doing so has caused harm to the person to whom the duty of care was owed. That is, the institution must have been at fault.
- Being vicariously liable for the actions of employees and agents who have caused harm to the person.
- By breaching a personal non-delegable duty to take care and to ensure that care is taken of persons over which an institution has a special protective relationship. There are a number of well-recognised categories at common law where a non-delegable duty is owed including institutions that work with children such as schools and hospitals. The duty may also apply in relation to third parties such as independent contractors.

Australian courts have been reluctant, in the absence of fault on the part of an institution, to determine that an institution is liable to compensate survivors for the deliberate criminal act of child sexual abuse perpetrated by one of its employees or members. In the leading case of *New South Wales v Lepore* (2003) the High Court held that non-delegable duties apply in respect of acts of negligence and that a non-delegable duty of care does not extend to others' intentional torts or criminal conduct.<sup>5</sup>

Vicarious liability is a 'strict' liability and does not depend on fault. In general, vicarious liability does require that a tort was committed while the perpetrator was an employee (or agent) and in the course of employment.

The High Court's observations in *Prince Alfred College v ADC* (2016) may suggest that the common law could evolve to expand the concept of vicarious liability to accommodate deliberate acts of child sexual abuse. The High Court considered that vicarious liability could arise where the employment situation not only provided the opportunity, but was the 'occasion' for the commission of the wrongful act. In deciding whether the apparent performance of the employee's role (assigned by the employer) may be said to give the occasion for the wrongful act, particular features of 'authority, power, trust, control and the ability to achieve intimacy with the victim' may be taken into account.<sup>6</sup>

Vicarious liability of employers is limited to the conduct of employees and agents. This represents a barrier to claims against priests, volunteers and contractors who have not traditionally been regarded as 'employees'. The requirement that the tort occur in the

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<sup>5</sup> *New South Wales v Lepore* [2003] HCA 4.

<sup>6</sup> At the time the Royal Commission released its redress and civil litigation recommendations in 2015, the leading authority on these points was *New South Wales v Lepore* [2003]. In *Lepore*, a majority of the High Court was reluctant to conclude that an employer could be vicariously liable for the deliberate criminal act of an employee. This case concerned abuse of students by teachers in state primary schools. The court considered that the abuse could not be considered part of the intended or proper performance of the employment.

In *Prince Alfred College Incorporated v ADC* [2016] HCA 37, the High Court considered vicarious liability in regard to child sexual abuse committed by a housemaster of the victim's school dating back to 1962. The High Court held that the claim was statute barred by the *Limitation of Actions Act 1936* (SA) as too much time had elapsed since the abuse occurred. Despite this, the majority felt compelled to provide some guidance on the question of vicarious liability generally and particularly in cases involving an intentional or criminal act.

‘course of employment’ could also represent barriers to establishing liability if abuse occurs away from the workplace or outside normal working hours.

### 3.2 Overview of the recommendations

The Royal Commission has recommended two main changes to legislation in states and territories to provide clear pathways for survivors to claim legal compensation and to prevent institutional child sexual abuse from occurring.

- a) The imposition of a strict **non-delegable duty of care** on particular types of institutions. The duty would ensure that these institutions are liable for abuse regardless of whether the institution is at fault.
- b) Imposing a separate duty on a wider range of institutions in the form of a **reverse onus of proof**, so that liability would be established in a claim unless the institution can prove it took ‘reasonable steps’ to prevent the abuse from occurring.

In conjunction with these proposed changes, the Royal Commission has also recommended that relevant institutions who care for, supervise or have control over children should be liable for abuse committed by persons ‘associated’ with the institution. This extends liability beyond those persons who are employees.

The new duties have been recommended to apply prospectively (and not retrospectively).

### 3.3 Purpose of the recommendations

It is reasonable to expect that institutions have in place strong preventative measures against the risk of child sexual abuse by their employees or officers. The impact of child sexual abuse on survivors and their families can be devastating and have a profound impact on survivors. In addition to harm and suffering that may be endured by survivors, the effects of abuse may lead to loss of earning capacity, medical and counselling expenses and legal costs.

In making its recommendations, the Royal Commission considered that **compensation** would be made available for harm (and provide a capacity for institutions to spread their loss through mechanisms such as insurance). The principle underlying compensation is that those who are liable for the harm suffered should pay for the costs of their actions or omissions. It acknowledges unjust loss, damage and hardship caused by the perpetrator and provides survivors with the financial means to access services and support.<sup>7</sup>

Generally, only a small number of survivors sue the individual perpetrator of abuse. Often, by the time a claim is brought to light, perpetrators of the abuse have died or lack sufficient funds to pay compensation.

The law poses additional challenges for survivors attempting to sue organisations for child sexual abuse because:

- Establishing that an institution has a duty of care to prevent abuse from occurring can be difficult.
- Civil liability does not always extend to intentional criminal conduct such as sexual abuse.
- Institutions may only be liable for the conduct of employees and agents while those persons are acting in the course of their employment.

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<sup>7</sup> NSW Government, *Consultation Paper – Royal Commission civil litigation recommendations* [NSW Consultation Paper], [p.8].  
[https://www.justice.nsw.gov.au/justicepolicy/Pages/lpclrd/lpclrd\\_consultation/royal-commission-civil-litigation-recommendations.aspx](https://www.justice.nsw.gov.au/justicepolicy/Pages/lpclrd/lpclrd_consultation/royal-commission-civil-litigation-recommendations.aspx)

The Royal Commission has recommended that relevant institutions should be liable for deliberate acts of abuse by persons who are entrusted with the care and protection of children. In doing so, the Royal Commission gave consideration to whether acts of abuse would be closely connected to the responsibilities of the perpetrator with respect to the institution.

The Royal Commission also considered that the **deterrent** effect of the imposition of a non-delegable duty of care, in particular, on the management of institutions would be the most effective means by which a community could endeavour to ensure the safety of children in the care of another.<sup>8</sup>

### **Royal Commission recommendations – Duty of Institutions**

**89.** State and territory governments should introduce legislation to impose a non-delegable duty on certain institutions for institutional child sexual abuse despite it being the deliberate criminal act of a person associated with the institution.

**90.** The non-delegable duty should apply to institutions that operate the following facilities or provide the following services and be owed to children who are in the care, supervision or control of the institution in relation to the relevant facility or service:

- 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;
- 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;
- 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.

**91.** Irrespective of whether state and territory parliaments legislate to impose a non-delegable duty upon institutions, state and territory governments should introduce legislation to make institutions liable for institutional child sexual abuse by persons associated with the institution unless the institution proves it took reasonable steps to prevent the abuse. The ‘reverse onus’ should be imposed on all institutions, including those institutions in respect of which we do not recommend a non-delegable duty be imposed.

**92.** For the purposes of both the non-delegable duty and the imposition of liability with a reverse onus of proof, the persons associated with the institution should include the institution’s officers, office holders, employees, agents, volunteers and contractors. For religious organisations, persons associated with the institution also include religious leaders, officers and personnel of the religious organisation.

**93.** State and territory governments should ensure that the non-delegable duty and the imposition of liability with a reverse onus of proof apply prospectively and not retrospectively.

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<sup>8</sup> *Redress and Civil Litigation* – Report [p.490].

## 4 Reforms in other jurisdictions

### 4.1 Victoria reverse onus of proof

Victoria was the first jurisdiction to legislate to introduce a specific duty of care in respect of institutional child abuse by way of reversing the onus of proof in negligence claims against liable institutions.<sup>9</sup>

The Victorian legislation imposes a duty of care on a ‘relevant organisation’ to take the care that in all the circumstances is reasonable to prevent the abuse of a child by an ‘individual associated with’ the organisation while the child is under the care, supervision or authority of the organisation.

The duty applies to sexual abuse and/or physical abuse of a child<sup>10</sup>, which aligns with previous reforms addressing child abuse<sup>11</sup> in response to the Victorian *Betrayal of Trust* inquiry report<sup>12</sup>. The duty is prospective and commenced on 1 July 2017.

This legislation incorporates aspects of a non-delegable duty of care (as recommended by the Royal Commission) by providing that relevant organisations cannot avoid liability by delegating their care, supervision or authority of children to another organisation. This ensures that organisations maintain liability in relation to contracting out of services and other arrangements.<sup>13</sup>

For example, if a school sends its students to a privately run camp and a member of the camp’s staff abuses a student, the school is required to prove that it took reasonable precautions to prevent that abuse.<sup>14</sup> The legislation also provides that liability will be maintained in regard to foster care arrangements.<sup>15</sup>

The duty extends to all ‘relevant organisations’ that exercise care, supervision or authority over children whether as part of their primary functions, activities or otherwise.<sup>16</sup> The range of organisations include (but is not limited to) community service organisations providing services to children, out-of-home care services, religious bodies, government agencies or departments providing services for children, education and care services (such as childcare centres, family day care services, kindergartens and outside school hours care services), schools and other educational institutions, sporting groups, youth organisations, local councils, charities and benevolent organisations providing services for

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<sup>9</sup> *Wrongs Amendment (Organisational Child Abuse) Act 2017* (Vic).  
<http://www.legislation.vic.gov.au/>

<sup>10</sup> *Wrongs Act 1958* (Vic) [s.88] defines ‘abuse’ to include ‘physical abuse’ and ‘sexual abuse’.

<sup>11</sup> See *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic) and *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic).

<sup>12</sup> Parliament of Victoria, Family and Community Development Committee, *Betrayal of Trust - Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (tabled 13 November 2013). <https://www.parliament.vic.gov.au/fcdc/article/1788>

<sup>13</sup> *Wrongs Act 1958* (Vic) [s.90(1)(c)]. An ‘individual associated with a relevant organisation’, upon whom the statutory duty of care is imposed, will also include an individual who is associated with another organisation who has had functions and services delegated to it by the relevant organisation.

<sup>14</sup> Victoria State Government, Department of Justice and Regulation, *Betrayal of Trust Fact Sheet – the new organisational duty of care to prevent child abuse* (2017) [*Victorian Duty of Care - Fact Sheet*].  
[https://www.justice.vic.gov.au/home/safer+communities/protecting+children+and+families/betrayal+of+rust+fact+sheet+the+new+organisational+duty+of+care+to+prevent+child+abuse](https://www.justice.vic.gov.au/home/safer+communities/protecting+children+and+families/betrayal+of+trust+fact+sheet+the+new+organisational+duty+of+care+to+prevent+child+abuse)

<sup>15</sup> *Wrongs Act 1958* (Vic) [s.90(1)(d); s.88 definition of ‘specified carer’].

<sup>16</sup> *Wrongs Act 1958* (Vic) [s.88 definition of ‘relevant organisation’].

children, housing services and homeless services, health services including public and private hospitals, drug and alcohol treatment services and disability services providers.<sup>17</sup>

The duty applies to abuse perpetrated by an ‘individual associated with’ a ‘relevant organisation’ while a child is under the care, supervision or authority of the organisation.<sup>18</sup> Individuals associated with an organisation can include (but are not limited to) employees, volunteers, office holders, contractors, ministers of religion, religious leaders, foster or kinship carers.<sup>19</sup>

The Victorian duty differs from the strict non-delegable duty recommended by the Royal Commission. If abuse is perpetrated by an ‘individual associated with’ a relevant organisation while the child is ‘under the care, supervision or authority of the relevant organisation’, there is a presumption that the organisation failed in its duty of care unless it can prove (on the balance of probabilities) that ‘reasonable precautions’ were taken to prevent the abuse.<sup>20</sup> This reverse onus shifts the responsibility of proof onto organisations, helping to reduce barriers in legal proceedings for survivors.

‘Reasonable precautions’ have not been defined in the legislation, which allows institutions to take the necessary steps that are suitable for them (e.g. employment screening and systems checks).<sup>21</sup> The legislation recognises that what is reasonable might depend on a range of factors such as the nature of the organisation, the role of the perpetrator in that organisation, and the relationship between the organisation and the child.<sup>22</sup> A court’s interpretation of what is reasonable will vary depending upon the facts of each individual claim. For example, the standard of what is reasonable may be lower in circumstances where an institution may not have had direct control over either the child in question or the perpetrator of the abuse.<sup>23</sup>

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<sup>17</sup> *Victorian Duty of Care - Fact Sheet.*

<sup>18</sup> *Wrongs Act 1958 (Vic)* [s.91(2)].

<sup>19</sup> *Wrongs Act 1958 (Vic)* [s.90(1)].

<sup>20</sup> *Wrongs Act 1958 (Vic)* [s.91(3)].

<sup>21</sup> *Victorian Duty of Care - Fact Sheet.*

<sup>22</sup> *Wrongs Act 1958 (Vic)* [s.91(3)].

The note to s. 91(3) provides that reasonable precautions will vary depending on factors (but not limited to) the nature of the relevant organisation; the resources that are available to the relevant organisation; the relationship between the relevant organisation and the child; whether the organisation has delegated the care, supervision or authority over the child to another organisation; and the role in the organisation of the perpetrator of the abuse.

<sup>23</sup> *Victorian Duty of Care – Fact Sheet.*

## 4.2 New South Wales

The *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018* (NSW Act) was passed on 17 October 2018 and received royal assent on 26 October 2018.<sup>24</sup>

The NSW Act shares a number of similarities with the Victorian legislation by introducing a new non-delegable statutory duty of care that imposes a reverse onus of proof. However, it goes further in codifying a strict vicarious liability (without recourse to a reasonable precautions defence) for child abuse and to extend this to individuals that are ‘akin to employees’.

These measures only apply to sexual or physical abuse of a child (‘child abuse’)<sup>25</sup> consistent with other civil liability reforms in NSW<sup>26</sup>. The Second Reading Speech for the draft legislation provided that a plaintiff may still seek damages for other forms of abuse. For example, psychological or emotional harm suffered as a result of the sexual or physical abuse (the extent of which may be significant in quantifying an award of damages for a successful claim of physical or sexual abuse).<sup>27</sup>

The statutory duty of care and the vicarious liability provisions are prospective and apply to child abuse that occurs after the commencement of the relevant provisions.

Plaintiffs may bring an action under both the non-delegable statutory duty (under division 2 of the NSW Act) and the vicarious liability provisions (under division 3). However, an award of damages under either avenue in respect of the same conduct must be taken into account to avoid double compensation.<sup>28</sup>

### 4.2.1 Duty of care

The NSW Act provides for a statutory duty of care in negligence<sup>29</sup>, which is non-delegable and incorporates a reverse onus of proof. The duty arises where an organisation has responsibility for a child<sup>30</sup> and where child abuse is perpetrated by an ‘individual associated with’ the organisation ‘in connection with the organisation’s responsibility for the child’.

Organisations will not be able to avoid liability by delegating the exercise of the care, supervision or authority over children to another organisation. If such delegation occurs each organisation is ‘responsible’ for the child<sup>31</sup> and any individual associated with an

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<sup>24</sup> Refer: Parliament of New South Wales, ‘Civil Liability Amendment (Organisational Child Abuse Liability) Bill 2018’ [NSW Bill]. <https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3559>

<sup>25</sup> *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018* (NSW) [NSW Act] [ss.6F(5) and 6H(4)]. <https://legislation.nsw.gov.au/#/view/act/2018/56>

<sup>26</sup> For example, see NSW Act [s.6I].

<sup>27</sup> NSW Bill, Second Reading Speech.

<sup>28</sup> NSW Act [s.6B(2)].

<sup>29</sup> NSW Act [s.6F(1)].

<sup>30</sup> NSW Act [s.6D(a)]. An organisation is ‘responsible’ for a child if it (or any part of it) exercises care supervision or authority over the child (or purports to do so) or is obliged by law to do so.

<sup>31</sup> NSW Act [s.6D(b)].

organisation to whom care has been delegated is also taken to be an individual associated with the (original) delegating organisation<sup>32</sup>.

The NSW Act provides that an 'individual associated with' an organisation includes (but is not limited to) an officer, office holder, employee, owner, volunteer or contractor. In regard to a religious organisation, this includes a religious leader (such as a priest or a minister) or member of the personnel of the religious organisation. An 'individual associated with' an organisation can also include anyone who is prescribed by regulation and authorised carers, including foster carers.<sup>33</sup>

In regard to the reverse onus of proof, the NSW Act requires an organisation with 'responsibility' for a child to take 'reasonable precautions' to prevent an 'individual associated with' the organisation from perpetrating abuse of the child 'in connection with the organisation's responsibility for the child'.<sup>34</sup> If a plaintiff establishes that an individual associated with the organisation perpetrated the child abuse in connection with the organisation's responsibility for the child, a 'breach of the duty' will be 'presumed' unless the organisation establishes that it took reasonable precautions to prevent the child abuse.<sup>35</sup>

The NSW Act provides guidance regarding factors that a court may take into account in determining whether an organisation took 'reasonable precautions' to prevent child abuse.<sup>36</sup> The reasonableness of the measures must be measured against the facts of the case, the nature of the organisation itself, and child safety standards applicable at the time.<sup>37</sup>

#### **4.2.2 Vicarious liability**

The NSW Act provides for an organisation to be held vicariously liable, for the deliberate criminal act of child abuse perpetrated by an employee of the organisation, subject to certain conditions being satisfied.

The Second Reading Speech provided that the purpose of this codification is to reflect the High Court's approach in *Prince Alfred College Incorporated v ADC* (2016) and to extend vicarious liability to individuals 'akin to employees' as has already occurred at common law in overseas jurisdictions.<sup>38</sup>

Although not specified as one of its recommendations, the Royal Commission identified that courts had not extended vicarious liability to volunteers or, in many cases, to clergy who will often not be categorised as employees.

The NSW Act provides that an individual is 'akin to an employee' if 'the individual carries out activities as an integral part of the activities carried on by the organisation and does so for the benefit of the organisation'.<sup>39</sup> In faith-based organisations this could include

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<sup>32</sup> NSW Act [s.6E(3)].

<sup>33</sup> NSW Act [s.6E(1)].

<sup>34</sup> NSW Act [s.6F(2)].

<sup>35</sup> NSW Act, [s.6F(3)].

<sup>36</sup> NSW Act, [s.6F(4)].

<sup>37</sup> NSW Bill, Second Reading Speech.

<sup>38</sup> NSW Bill, Second Reading Speech.

<sup>39</sup> NSW Act [s.6G(2)].

members of the clergy or similar, and across other relevant organisations this could include volunteers or contractors who are often involved in the child services sector.<sup>40</sup>

The NSW Act qualifies that an individual is ‘not’ akin to an employee if his or her activities are carried out for recognisably independent business of the individual or of another person or organisation, or the activities are carried out in the individual’s capacity as an authorised carer.<sup>41</sup>

The statutory form of vicarious liability does not extend to foster and kinship carers. The Royal Commission excluded these categories from the scope of their recommendations regarding imposition of a strict liability as it considered that these categories are “too far removed from the care, supervision and control of the relevant institution to justify imposing liability”.<sup>42</sup>

Regarding the test for vicarious liability, the NSW Act provides that the court must consider whether the role in which the organisation placed the employee ‘supplies the occasion’ for the perpetration of the child abuse by the employee. The court is to take into account whether the organisation gave the employee ‘authority, power or control over the child, trust of the child [or] the ability to achieve intimacy with the child’.<sup>43</sup>

The NSW Act provides that the statutory codification of vicarious liability does not affect the common law of vicarious liability.<sup>44</sup>

### **4.3 Other legislative developments**

The Queensland Government introduced a Bill on 15 November 2018 to impose a reverse onus under which an institution must prove it took reasonable steps to prevent the sexual abuse of a child in its care by a person associated with the institution to avoid legal liability for the abuse.

This reverse onus is proposed to apply prospectively only.<sup>45</sup>

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<sup>40</sup> NSW Bill, Second Reading Speech.

<sup>41</sup> NSW Act [s.6G(3)].

<sup>42</sup> NSW Bill, Second Reading Speech.

<sup>43</sup> NSW Act [s.6H(1)-(2)]

<sup>44</sup> NSW Act [s.6H(3)].

<sup>45</sup> The Queensland Government introduced the ‘Civil Liability and Other Legislation Amendment Bill 2018’ on 15 November 2018. <https://www.legislation.qld.gov.au/view/html/bill.first/bill-2018-078/lh>

## 5 Key issues for consideration

This Discussion Paper considers the Royal Commission's recommendations regarding:

- The imposition of a 'non-delegable' duty of care on 'certain' institutions.
- The imposition of a 'reverse onus of proof' on all relevant institutions.

It also considers issues related to these recommendations, including:

- For which category of persons would an institution be liable for actions of child sexual abuse – that is which persons would be 'associated' with an institution?
- Whether the duties should apply prospectively?

Comments are sought on these issues, but submissions are not restricted to the specific questions or matters raised in the Discussion Paper.

### 5.1 Imposition of non-delegable duty of care

The Royal Commission has recommended the introduction of a 'strict' non-delegable duty of care on certain institutions (**Recommendation 89**).

This would require institutions to ensure that reasonable care is taken to prevent the abuse of children who are in the care, supervision or control of the institution for any period of time. The institution would be personally liable for abuse regardless of whether at fault.

The Royal Commission specified a range of institutions on which this strict non-delegable duty should be imposed (**Recommendation 90**):

- residential facilities for children, including residential out-of-home care facilities and juvenile detention centres (but not including foster care or kinship care);
- 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;
- disability services for children;
- health services for children;
- 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
- 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.

The duty may not only operate to provide access to litigation for future survivors, but would also motivate the management of institutions to take preventable steps to ensure the safety of children in the care of another.<sup>46</sup>

Even if an organisation could show that it took reasonable steps to prevent the abuse from occurring, it would not be entitled to a defence if abuse was shown to have occurred. This would place a strong incentive on institutions to take genuine action to prevent abuse

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<sup>46</sup> *Redress and Civil Litigation – Report* [p.490].

occurring in the first place. It may also reduce an organisation's potential insurance liability by taking reasonable steps to prevent abuse.<sup>47</sup>

The Royal Commission did not consider that it was reasonable to extend coverage of the strict non-delegable duty of care to community based, not-for-profit or volunteer institutions that offer opportunities for children to engage in cultural, social or sporting activities. The Royal Commission considered that it would not be fair to include not-for-profit or volunteer institutions as these groups generally do not provide particularly high-risk services and the risk of liability or the cost of insuring against it (given the strictness of the duty) may force them to stop providing services to children.<sup>48</sup>

While recognising that children in foster or kinship-care can be at high risk of experiencing child sexual abuse, the Royal Commission took the view that that the institution that arranges the care does not have the degree of supervision or control of the home environment to justify imposition of a strict non-delegable duty.<sup>49</sup>

If the Royal Commission's recommendations (89 and 90) regarding a non-delegable duty of care were imposed by the enactment of Western Australian legislation, a plaintiff would only need to prove that the abuse occurred and that the institution is one for which the relevant statute imposes the duty. The legislation would also need to recognise that the person who committed the abuse is 'associated' with the institution (as per Recommendation 92, discussed below).

#### **Discussion questions:**

1. Should a 'strict' non-delegable duty of care be imposed by the enactment of Western Australian legislation, and why?
2. If so, should the duty apply to institutions other than those recommended by the Royal Commission? If so, why?
3. Which institutions should be excluded from the duty? Why?
4. Should the duty apply to organisations that work with adults as well as children? For example, should GP medical practices be considered a health service for the purpose of a non-delegable duty? If so, why?
5. What financial or other impacts would the duty have on organisations? In what ways would this improve or hinder their ability to provide services to children? Would this differ depending on the size or type of organisation?
6. Would the duty motivate institutions to improve child safety? How might the possible deterrent effect of the Royal Commission's recommendations for a non-delegable duty of care be optimised?
7. Should statutory provisions similar to those in New South Wales also be included to provide a test for vicarious liability and extend the liability to persons 'akin to employees'?

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<sup>47</sup> *Redress and Civil Litigation – Report* [pp.490-492].

<sup>48</sup> *Redress and Civil Litigation – Report* [pp.490-492].

<sup>49</sup> *Redress and Civil Litigation – Report* [pp.475; 493].

## 5.2 Reverse onus of proof

The Royal Commission considered that a strict liability would be more straightforward for survivors. However, the Commission recognised that this would be considerably more onerous on institutions as a strict liability would not require any fault or failing on their part. That is, relevant institutions would not have recourse to a reasonable steps defence.

The Royal Commission recommended that, irrespective of whether legislation is enacted to impose a non-delegable duty, a 'reverse onus' of proof should be imposed on **all** institutions for child sexual abuse perpetrated by persons 'associated' with the institution unless the institution proves it took 'reasonable steps' to prevent the abuse from occurring (**Recommendation 91**).

It is not clear whether the Royal Commission intended that the reverse onus apply to the law of negligence or vicarious liability. The Victorian legislation imposes a reverse onus in relation to negligence (as described above). The Victorian duty applies to all organisations that exercise care, supervision or authority over children (whether as part of their primary functions, activities or otherwise) and are capable of being sued.<sup>50</sup> Similar arrangements apply in New South Wales.

In any event, it appears that the intent of the Royal Commission is to impose an obligation on a broader range of institutions subject to a 'reasonable steps' defence. A defence would be available to any institution that can show that it took reasonable steps to prevent abuse. The Royal Commission has not proposed a definition of what would constitute 'reasonable steps'.

The Royal Commission considered that the preventative steps that are 'reasonable' for an institution will vary depending on the nature of the institution. It may not be appropriate or practical to adopt a standard for all institutions given variations in size, structure and duties of organisations in regard to the care of children. The reasonableness of measures could at times differ for an institution depending on the nature of the particular association or 'connection' between a perpetrator and an institution. For example, different standards could be expected of institutions in relation to employees compared to that of contractors.<sup>51</sup>

The Victorian legislation recognises that 'reasonable precautions' could vary depending on a range of factors such as the nature of the relevant organisation; the resources that are available to the relevant organisation; the relationship between the relevant organisation and the child; whether the organisation has delegated the care, supervision or authority over the child to another organisation; and the role in the organisation of the perpetrator of the abuse. The legislation provides guidance, but does not limit a court's consideration of what are relevant factors.<sup>52</sup>

The Royal Commission commented that, while reversing the onus of proof may lead to increased insurance premiums for institutions, it would create a strong incentive for organisations (including those that provide foster or kinship care) to take reasonable steps to prevent abuse from occurring. This would also provide greater certainty for victims of abuse to seek compensation through litigation.<sup>53</sup>

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<sup>50</sup> *Wrongs Act 1958 (Vic)* [ss.88 and 92].

<sup>51</sup> *Redress and Civil Litigation – Report* [p.494].

<sup>52</sup> *Wrongs Act 1958 (Vic)* [s.91(3)]

<sup>53</sup> *Redress and Civil Litigation – Report* [pp.493-494].

**Discussion questions:**

8. Should a reverse onus be imposed under Western Australian legislation and why? If so, should the reverse onus be legislated together with a non-delegable duty of care (or should only one or the other be imposed under legislation) and why?
9. Should the reverse onus apply to all institutions or are there any that should be excluded? Why?
10. If a reverse onus is imposed, should legislation define what would be considered 'reasonable steps' (or reasonable precautions)? If so, how would this be defined for a broad range of different institutions?
11. In the absence of a statutory definition, how would courts determine whether an institution had taken 'reasonable steps' to prevent abuse from occurring (even if it did not prevent the specific abuse from occurring)? Should legislation provide any particular guiding principles for the reverse onus such as in Victoria and New South Wales?
12. In what ways should an obligation on institutions to take reasonable steps differ and why? For example, would obligations on commercial institutions be greater than for a community-based voluntary institution (and if so, why)? How might an institution's obligation differ depending on the nature of the association between the organisation and the perpetrator of the abuse?
13. Would it be useful for guidelines or industry standards to be developed regarding what may be considered reasonable? How would this take into account the differences referred to above? Would this be useful for the purposes of better preventing institutional child abuse and from an insurance perspective?
14. What financial or other impacts would a reverse onus have on organisations? In what ways would this improve or hinder their ability to provide services to children? Would this differ depending on the size or type of organisation?
15. Would the proposed changes motivate institutions to improve child safety? How might the possible deterrent effect of the Royal Commission's recommendations for a reverse onus be optimised?

### 5.3 Persons associated with the institution

Regardless of which of the proposed new duties are imposed, the Royal Commission recommended (**Recommendation 92**) that institutional liability should extend to the actions of ‘all persons associated with the institution’ including:

- For non-religious institutions – the institution’s officers, office holders, employees, agents, volunteers and contractors.
- For religious organisations – it would include religious leaders, officers and personnel of the religious organisation.

There are two main issues to consider in relation to this recommendation:

- How close should the connection be between an institution and the perpetrator in order to establish liability?
- How close should the connection be between the abuse and the institution in terms of when and where the abuse occurs?

#### 5.3.1 Association between the perpetrator and institution

In relation to this issue, should liability be imposed on institutions for abuse by persons over which the institution could not be reasonably expected to have control? For example, could an institution take reasonable steps to prevent abuse being perpetrated by an electrician on the premises to undertake repair work for a short time (as a contractor) or by a parent who volunteers at a school cafeteria once a year?

Outside of Australia, institutional liability has been found at common law where there is a ‘sufficient’ connection between what the employer was asking the employee to do (the risk created by the employer’s enterprise) and the wrongful act. In some instances, courts have held that the ‘mere opportunity’ to abuse a child is not sufficient to impose liability.<sup>54</sup> For example, a cleaner or baker at a school may or may not imply the same level of connection as a teacher or priest.

If a duty is imposed under legislation regarding a particular type of person considered to be ‘associated’ with the institution, the impacts would be different depending on the nature of liability. In regard to a reverse onus, the institution would only be liable if it failed to take reasonable steps to prevent the abuse from occurring. In the examples of the electrician and the parent, it may be reasonable to expect that precautions to prevent abuse would be less than that required for permanent staff. However, if the institution were subject to a non-delegable duty of care it would be strictly liable for the actions of the electrician and the volunteer.

As noted above, the Victorian legislation reflects that the standard of what is reasonable may be lower in circumstances where an organisation may not have had direct control over either the child in question or the perpetrator of the abuse.<sup>55</sup>

If a similar approach is applied in Western Australia, this could mean (for example) that working with children checks or child protection training is of greater relevance to employees or volunteers that have responsibilities in the care, supervision or authority over children compared to those that merely have proximity to children by way of their duties for the institution. Institutions, and ultimately courts, would need to carefully consider the reasonableness of any preventative measures depending on the particular

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<sup>54</sup> *EB v Order of the Oblates of Mary Immaculate of the Province of British Columbia* [2005] 3 SCR 45.

<sup>55</sup> *Victorian Duty of Care – Fact Sheet*.

responsibilities of persons ‘associated’ with them in carrying out the care, supervision or control over children.

If a non-delegable duty or a reverse onus is to be imposed by Western Australian legislation, consideration may also need to be given to whether the duty would extend to child abuse perpetrated by other children, particularly in a school setting.

### **5.3.2 Association between the abuse and the institution**

The connection between the abuse and the institution also needs to be taken into account. Considerations of proximity and time may be relevant in this regard.

For example, would abuse need to have occurred on the institution’s premises or during hours of operation for an institution to be liable?

Also, how long would a person need to be considered to be ‘associated’ with an institution after the relationship with the institution comes to an end? For example, if a person meets and befriends a family when briefly volunteering for a local charity and subsequently abuses a child at a private gathering of the family a year later, would there be a sufficient connection between the abuse and the charity? Should the charity be responsible when the primary connection between the abuser and the victim at the time of the abuse was directly through the family?

#### **Discussion questions:**

16. Should there be any limitations regarding who may be considered a person ‘associated with’ an institution? What factors may need to be taken into account?
17. Should ‘associated’ persons differ depending on the type of duty that may be imposed under legislation?
18. Should persons associated with an institution include children under the care, control or supervision of the institution? For example, should a school be liable for abuse committed by one or more students against another of its students?
19. Should legislation define who is associated with an institution or should this be decided on a case-by-case basis?
20. What limits (if any) should there be to exclude acts of abuse committed by a person associated with an institution, which occur in circumstances not connected with the activities of the institution (e.g. in the associated person’s home)?

#### 5.4 New duties to apply prospectively

**Recommendation 93** provides for both the non-delegable duty and reverse onus to apply prospectively and not retrospectively. The Royal Commission argued that retrospective liabilities would impose too great a burden on institutions in respect to insurance and may undermine the need for investment in redress schemes.

In regard to a 'strict' non-delegable duty, the Royal Commission considered that retrospective application would be unfair as institutions would be unable to take steps to prevent past abuse and the liability would not have the benefit of operating as a deterrent in respect of past actions.<sup>56</sup>

The Royal Commission also considered that retrospective application of a reverse onus could effectively deprive organisations of a 'reasonable steps' defence where difficulties arise in relation to procuring evidence about past practices. If a reverse onus is applied prospectively most institutions would be in a position to provide evidence of the steps the institution took to prevent the abuse.<sup>57</sup>

#### **Discussion questions:**

21. If new statutory duties to deter and compensate for institutional child abuse are imposed by Western Australian legislation, should the duties apply prospectively only? Why or why not?

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<sup>56</sup> *Redress and Civil Litigation – Report* [pp.491-492].

<sup>57</sup> *Redress and Civil Litigation – Report* [pp.475-476].