



Anglican Church Diocese of Sydney

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

BY EMAIL: policy@justice.nsw.gov.au

Dear Mr Bray,

NSW government report on proposed responses to the Royal Commission's civil litigation recommendations

Thank you for your letter of 27 March 2018 inviting the Anglican Diocese of Sydney to make a submission in respect to this report.

I make this submission on behalf of the Royal Commission Steering Committee of the Standing Committee of the Anglican Diocese of Sydney.

We made a submission on the Department of Justice's consultation paper last year, and note that many of the proposals in the report are consistent with our recommendations.

There are two matters in the report about which we would like to make further submissions.

Individuals 'associated with' the institution

There are two key issues in the proposed statutory duty of care that form part of a cause of action in negligence that require careful consideration and drafting in the proposed bill. These concern the 'association' between the perpetrator and the institution, and the 'association' between the abuse and the context in which it occurs.

Firstly, the "association" between the perpetrator and the institution.

The blue box on page 19 proposes that the non-exhaustive list of associated individuals include "volunteers". There can be a very wide spectrum of arrangements that fall under this term. Potentially almost all of the members of a church (or other community organisation) could be regarded as volunteers in the ordinary sense, since typically nearly all members contribute to the running of the church in some capacity, such as arranging flowers, contributing to morning tea, mowing lawns, playing music during services and so forth.

We note that the text in the first paragraph on page 20 of the report indicates the duty will extend to “all persons employed by the institution or in a relationship sufficiently analogous or akin to an employment relationship”. It may therefore be intended that only volunteers who work under an arrangement that is analogous or akin to employment will be regarded as ‘associated’. We recommend that the term “volunteer” be defined in the legislation to have this meaning.

Secondly, the “association” between the context of the abuse and the institution.

The proposed duty appears to be modelled on s 91(2) of the *Wrongs Act 1958 (Vic)* which imposes a duty on institutions to ‘take the care that in all the circumstances of the case is reasonable to prevent the abuse of a child by an individual associated with the relevant organisation while the child is under the care, supervision or authority of the relevant organisation’. This makes clear that the duty applies in the case of abuse that occurs “while the child is under the care, supervision or authority” of the institution.

By contrast, the text in the blue box on page 19 appears to only use the test of “care, supervision or authority over children” to define the class of institutions to which the proposed statutory duty will apply. If this is so, it could mean that the duty applies to an institution within this class in relation to abuse perpetrated by an associated individual in a context where the child was not under the care, supervision or authority of the institution.

There may be situations where a person associated with an institution commits abuse in a domestic context or another context over which the institution has no operational control or influence. We submit that the proposed legislation should provide similarly to the Victorian legislation and make clear that the statutory duty of care to prevent abuse applies while the child is under the care, supervision or authority of the relevant organisation.

Proper defendants

The starting point should be that if there is a body corporate with sufficient assets that is the proper defendant for the claim, the plaintiff should sue this entity. Preliminary discovery is already available to plaintiff lawyers under Rule 5.3(1) of the *Uniform Civil Procedure Rules 2005 (NSW)* to gain particulars of the correct entity to name as a defendant in proceedings. The existence of an associated property trust should not relieve a plaintiff lawyer from the obligation to identify a proper defendant when one exists.

There are a number of issues that need to be resolved in relation to this proposal. The timeframe provided for responding to the report does not permit us to examine each of these in detail, however it may be helpful to list the issues that occur to us:

1. The report does not provide much detail on the proposed test for determining if the property trust in question is “associated” with the unincorporated association. We submit that a property trust should only be a proper defendant for a claim if the head institution with which the property trust is itself associated had ultimate control of the governance or operations of the relevant undertaking at the time of, or immediately prior to, the abuse occurring. In our context, there are schools and childrens’ homes that, for historical reasons, use the names “Anglican” or “Church of England”, which have little or no formal connection with an Anglican diocese.
2. The *Income Tax Assessment Act 1997 (Cth)* requires that “an entity must apply its income and assets solely for the purpose for which the entity is established” (s 50-50, among other provisions). Potentially a NSW law enabling the assets of associated property trusts to be applied for the purpose of satisfying child abuse judgments could give rise to inconsistency between Commonwealth and State Law and s 109 of the Constitution may apply.
3. Property trusts associated with religious denominations will often hold real and personal property in many different trustee capacities. If there are no assets that are generally or specifically available to meet a child sexual abuse claim, how does the property trust go about

deciding which of the trust assets it should draw upon? Will it have a complete discretion or will residual trustee obligations still apply that bear upon the property trust's decision?

4. The report only refers to the use of assets to satisfy child abuse judgments. Many claims settle before trial. These settlements may or may not be the subject of a consent judgment depending on whether the plaintiff has filed a statement of claim and the status of the claim in the court process. The ability for a property trust to apply assets should extend to settlements where there is no judgment.
5. A property trust will incur costs in addition to the payment of compensation. The legal and other associated costs of the property trust responding to the claim, and any order for the plaintiff's costs, should also be able to be met from trust assets.
6. The legislation should deal with the application of deeds of release in respect to child sexual abuse claims where the plaintiff has signed a deed to settle the claim but the associated property trust is not a releasee under the deed. If an associated property trust is attributed with liability for a claim, it should also be attributed with the terms of any past settlement of that claim, including any bar on proceedings.
7. There may be a need for a mechanism to resolve disputes between the unincorporated association, a defendant nominated by that association and an associated property trust. For example, a person might commence proceedings against a particular unincorporated church or diocese, the church or diocese might nominate a particular school as being the proper defendant, but the school may dispute this and submit that the associated property trust should be liable. There will need to be a cost effective means of resolving such disputes so that property trusts are not left being liable for claims when there is a proper defendant with sufficient assets.
8. There will likely be issues around the capacity of associated property trusts to obtain insurance for sexual molestation on reasonable terms.

Opportunity to comment on exposure draft legislation

If the government is minded to do so, it would be beneficial if an opportunity was provided to comment on an exposure draft before any bill is introduced into parliament. The two matters we have covered in this letter are particularly susceptible to unintended consequences arising from detail in the drafting.

Yours sincerely

STEVE LUCAS

Legal Counsel and Corporate Secretary

On behalf of the Royal Commission Steering Committee, Anglican Diocese of Sydney