# NSW Government's response to the civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse

## FACT SHEET 1: THE DUTY OF INSTITUTIONS

## Purpose of recommendations

Survivors of child abuse currently face significant legal obstacles to civil claims against the institutions in which they were abused. This is because:

- Most institutions are only liable for the conduct of employees and agents
- Liability generally doesn't extend to intentional, criminal conduct such as sexual abuse
- Establishing that an organisation had a duty of care to prevent abuse from occurring can be very difficult.

The Royal Commission has made the following recommendations to increase the civil liability of institutions for child abuse and make it easier for survivors to sue for compensation.

## A new non-delegable duty

**What is the recommendation?**

The Royal Commission has recommended the imposition of a new, strict **non-delegable duty** of care on **particular organisations** (listed below), to be owed to children over which they have **care, supervision or control**.

The new duty would require institutions to ensure that care is taken by all persons associated with the institution, to prevent institutional child abuse.

Institutions would be **personally liable** for a breach of the duty, even if the institution itself was not at fault.

**Would the new duty apply to my organisation?**

The Royal Commission has recommended that the new duty be imposed on the following institutions:

- Residential facilities for children, including out-of-home care facilities and juvenile detention centres
- Day and boarding schools
- Early childhood education and care services
- Disability services for children
- Health services for children
- Any other facility operated for profit 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)
- 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)

**How would this change the law?**

Non-delegable duties currently only apply to a small number of organisations, such as schools and hospitals. Even where the duties exist, it is

unclear whether they extend to intentional, criminal acts, such as child abuse.

The recommendation would significantly simplify litigation. A survivor would only need to prove (a) that the abuse occurred, and (b) that the institution was one of the specified institutions on which the statute imposed a non-delegable duty of care.

**Example**

***Currently**: If a child was sexually abused by a religious leader at Sunday school, the church would not be liable for breach of a non-delegable duty to the child, given that:*

*(a) Religious organisations are currently not subject to non-delegable duties*

*(b) Even if the church had a non-delegable duty, it would not be liable for an intentional, criminal act such as sexual abuse.*

***If the recommendations were adopted**: The church would be liable, given that:*

*(a) Services provided by a religious organisation would be subject to a statutory, non-delegable duty*

*(b) The duty would require the church to ensure that care is taken by all persons associated with the church to prevent abuse*

*(c) The church would be personally liable to the child regardless of whether the institution itself was at fault.*

**Whose behaviour would my organisation be responsible for?**

All persons 'associated with' the institution.

For non-religious institutions, this would include the institution's officers, office holders, employees, agents, volunteers and contractors.

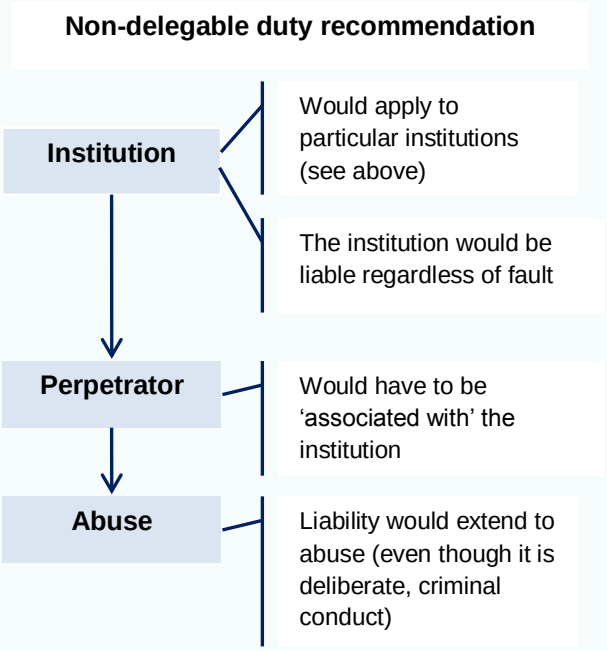
For religious organisations, this would include religious leaders, officers and personnel.

**How could I limit my organisation's potential liability?**

The non-delegable duty recommendation would mean that institutions would be liable for abuse, regardless of whether the institution itself was at fault. The only way to avoid liability would be to prevent child abuse from occurring in the first place.

**Would the change apply to past abuse?**

No. The Royal Commission has recommended that the change be applied prospectively (only to abuse which occurs after the law is changed).




## Reversing the onus of proof

**What is the recommendation?**

Regardless of whether the non-delegable duty recommendation is accepted, the Royal Commission has also recommended **reversing the onus of proof** for child abuse claims so that an institution would be liable for abuse **unless** it could prove that it took **reasonable steps** to prevent the abuse from occurring.

The Royal Commission has recommended that liability extend to all persons associated with the institution.

**Would the change apply to my organisation?**

Yes. The change would apply to all organisations.

**How would this change the law?**

Under the current law, an institution can only be liable for:

(a) the conduct of *employees* and *agents*,

(b) where the actions are committed in the *course of their employment*.

This requirement can be a barrier to claims against priests, volunteers and contractors who are not employees.

The 'course of employment' requirement is also particularly difficult to establish in assault cases. The High Court has recently confirmed that the test is whether the employee's role and responsibilities provided the occasion for the commission of the abuse. This can be hard to prove, particularly if abuse occurs away from the workplace or outside normal working hours.

In light of this uncertainty, the Royal Commission has recommended extending the liability of institutions for child abuse to all persons associated with the institution, unless the institution can prove that it took reasonable steps to prevent the abuse from occurring.

**Example**

***Currently**: If a child commenced a civil claim against a foster care agency for abuse perpetrated by a foster parent, it would be the responsibility of the child to prove, for a claim for vicarious liability:*

*(a) That the abuse occurred*

*(b) That the foster parent was an employee of the foster care agency*

*(c) That the abuse was committed in the 'course of employment'*

*or, for a negligence claim:*

*(a) That the foster care agency owed the child a duty of care to prevent the abuse*

*(b) That the agency's act, or failure to act, amounted to a breach of that duty*

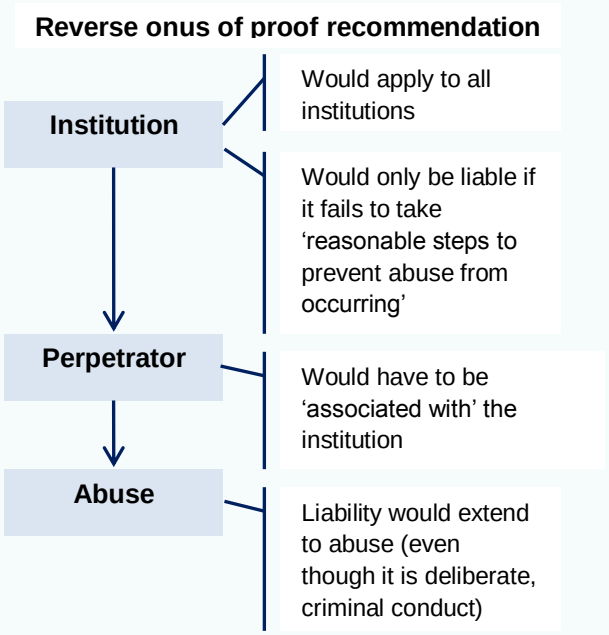
*(c) That the breach resulted in the child suffering loss and damage.*

***If the recommendations were adopted**: The child would only need to prove:*

*(a) That the abuse occurred*

*(b) That the foster parent was 'associated' with the agency.*

*In order to avoid liability, the foster care agency would be required to prove that it had taken 'reasonable steps' to prevent the abuse.*




**How could I limit my organisation's potential liability?**

A complete defence would be available to all institutions that can show that they took 'reasonable steps' to prevent abuse from occurring, regardless of whether the steps were actually effective in preventing abuse.

The Royal Commission has not defined what would be 'reasonable'. It is likely that what a court considers to be 'reasonable' would vary depending on various factors, including the size and nature of the institution.

**Would the change apply to past abuse?**

No. The Royal Commission has recommended that the change be applied prospectively.