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

FACT SHEET 2: IDENTIFYING A DEFENDANT

Purpose of recommendation

Survivors of institutional child sexual abuse are often unable to recover compensation because they cannot identify a defendant to sue. This can be difficult, given that:

- The way an institution is structured may mean that it does not have 'legal personality' and therefore cannot be sued (for example, if the organisation is unincorporated)
- Even if an institution has 'legal personality', it may not be responsible for the actions of the perpetrator of the abuse
- The parts of an institution which can be sued may not have sufficient assets and may not have insurance cover for child abuse.

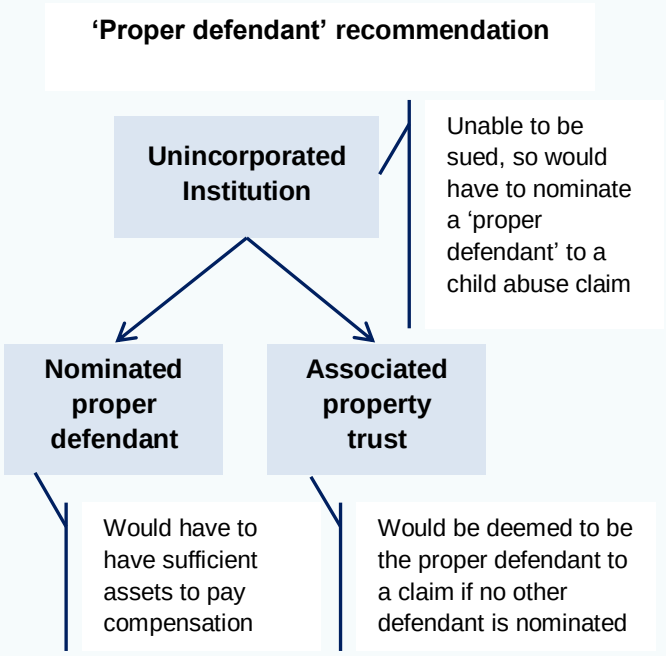
The recommendation

What is the recommendation?

The Royal Commission has recommended that all institutions with an associated property trust should be required to nominate an entity as a 'proper defendant' to claims, with sufficient assets to pay compensation.

If they fail to do so, the 'fall back' option would be to deem any property trust associated with the institution to be the 'proper defendant' to the claim. The assets of the trust would then be used to pay compensation to survivors.

The Commission also recommended that institutions which are responsible for the care of children should only be eligible for government funding if they have obtained insurance cover for child abuse claims.



How would this change the law?

Many not-for-profit institutions and churches are unincorporated, meaning that they have no 'legal personality', and cannot be sued. For example, a 'church' is not a separate legal entity, but is made up of collections of people who have combined together with a common belief.

Another problem for survivors is that the assets of institutions are often bound up in trusts and are

not available for civil claims. Historically, many unincorporated associations (which cannot own property) have created trusts to hold and manage property on behalf of the institution. However, although these trusts may have significant assets, those funds may not be available to pay compensation, because:

(a) trusts have no legal personality, so cannot be sued, and

(b) although the trustees of the trust can be sued, they are generally not liable for child abuse, as they are only responsible for managing assets.

Some unincorporated associations have unjustifiably relied on these legal technicalities to avoid liability in child abuse claims. The Royal Commission's recommendation is aimed to end the use of the defence, to ensure that survivors can seek compensation for the abuse they have suffered.

Example

***Currently**: a survivor of abuse perpetrated by a religious leader may be unable to sue the responsible institution, given that:*

(a) The religious organisation has no legal personality and cannot be sued

(b) Structures within the religious organisation which could be sued may not be responsible for the abuse

(c) Even if the religious organisation was liable, it may not have available assets or insurance cover for criminal conduct such as abuse.

***If the recommendations were adopted**: The religious organisation (an institution with an associated property trust) would be required to nominate a proper defendant for the survivor to sue, with sufficient assets to meet an award for damages. If it failed to do so, the survivor would be entitled to sue the trustees of the property trust.*

Would the requirement to nominate a defendant apply to my organisation?

If your institution has an associated property trust, and is sued for compensation in respect of child abuse, it would be required to nominate a proper defendant to the claim.

The Royal Commission's recommendation applies to all property trusts – not just those created by statute.

The Royal Commission has not provided guidance about how close the 'association' between the trust and institution must be.

These issues will be considered in consultations.

Would the requirement to obtain insurance apply to my organisation?

If your institution (a) provides services to children, and (b) is funded by the government, it will be required to obtain insurance with specific cover for child abuse claims.

Would the change apply to past abuse?

Yes. The Royal Commission recommended that legislative reform should have a retrospective effect, meaning that institutions would need to nominate 'proper defendants' to claims in respect of past abuse.

However, the requirement to obtain insurance cover would only apply to future claims.