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Duty of Institutions – Discussion Paper

Thank you for the opportunity to provide a submission as part of the WA Department of Justice's discussion paper on the Royal Commission into Institutional Responses to Child Sexual Abuse recommendations on the Duty of Institutions (the Royal Commission).

The Insurance Council of Australia (ICA) is the representative body of the general insurance industry in Australia¹. ICA members provide a range of general insurance products including public liability insurance for institutions involved with the care and supervision of children.

The ICA has previously provided a number of submissions to the Royal Commission and to other state and territory departments regarding the civil liability reform recommendations of the Royal Commission.

These submissions highlighted the impact some of these recommendations, if implemented, would have on insurance availability and affordability for institutions and organisations who are involved in supervision and care of children, particularly those that are smaller or less resourced.

It is within this context of insurance affordability and availability that the ICA now provides our feedback to issues raised in the discussion paper.

Insurance availability and affordability

The ICA acknowledges the policy reasons behind the Royal Commission's recommendations now being considered by the WA Government, including reforms to address the difficulties faced by survivors of abuse in accessing compensation. However, we also wish to highlight the impact some recommendations, if implemented, would have on insurance availability and

¹ The Insurance Council of Australia is the representative body of the general insurance industry in Australia. Our members represent approximately 95 percent of total premium income written by private sector general insurers. Insurance Council members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance).

affordability for institutions and organisations who are involved in supervision and care of children.

As outlined in our submission to the Royal Commission of 9 March, 2015, any reforms to liability settings that expand the circumstances in which an institution can be found liable for abuse, such as a non-delegable statutory duty or a reverse onus of proof, will increase the underwriting risk for insurers who provide liability insurance in this sector of the market. This is likely to impact the affordability and availability of insurance for these institutions, especially those that are smaller or less resourced.

Organisations involved with the supervision and care of children and insurance risk

In considering the insurance availability and affordability impact likely to flow from the implementation of the Royal Commission's recommended changes to civil liability settings, the ICA wishes to highlight that organisations that are involved in the care and supervision of children are already subject to a more onerous standard of care compared to other organisations or entities.

Consequently these organisations are, from an insurance perspective, already a high underwriting risk. This is reflected in the cost of public liability insurance premiums for these institutions as well as any additional extra insurance an institution may take out to cover child sexual abuse.

In relation to insurance availability, the insurance market for underwriting liability insurance for child sexual abuse in Australia is not large nor expanding. Not all insurers are prepared to offer this insurance. Those that do offer this type of insurance to institutions often do so very selectively.

It is within this context that changes to liability settings should be carefully considered.

Changes to Civil Litigation - non-delegable duty of care; reverse onus of proof.

The introduction of a non-delegable duty of care and/or a reverse onus of proof would impact the cost and the availability of insurance premiums for organisations who are involved in the care and supervision of children and to which these amendments would apply.

This is because these changes would make it easier for survivors of abuse to obtain compensation from organisations. This would consequently increase the insurance underwriting risk for these institutions, which may see an increase in their insurance premiums and/or a reluctance by insurers to offer insurance to institutions.

Our members advise that the introduction of a non-delegable duty of care or a reverse onus of proof may particularly impact smaller organisations in regard to their ability to access affordable insurance for child abuse risk.

Liability for the actions of all persons ‘associated with an institution’

We note the Department of Justice also seeks feedback in regard to whether an institution’s liability to be extended more broadly to persons ‘associated with an institution’ as per the Royal Commission’s recommendation 92.

The broader the scope of people to which an institution may be vicariously liable the greater the impact on insurance affordability and availability due to the increased scope of potential claims that would be caught under revised liability settings. Therefore extending an institution’s liability for the actions of the broad class of ‘all persons associated with an institution’ will have a more significant insurance risk / underwriting impact compared to a more narrowly defined group, particularly if this reform was introduced in conjunction with a new non-delegable duty of care.

Prospective Application of any new duties / obligations of institutions

In relation to the application of the recommended liability reforms of the Royal Commission outlined in the discussion paper, the ICA submits that should WA decide to implement new duties and obligations on institutions that these should apply prospectively, not retrospectively.

As outlined in the ICA’s submission to the Royal Commission, retrospective application of liability reforms create significant challenges for insurers in relation to prudential management. If a significant number of claims are made against an insurer as a result of legislative adjustment, this could have a substantial impact on the capital position of an insurer, that, having priced policies and reserved funds based on existing liability exposure under the law at the time the policy was underwritten, finds itself having both not reserved for a liability or under-priced the underwriting risk. This effect would also flow through to the reinsurers of these insurers.

Given these potential prudential impacts, any changes to liability settings / reform should be prospective only.

Mechanisms to support affordability and availability of insurance cover

The ICA strongly supports measures that promote and lead to direct risk mitigation that reduce the likelihood of abuse occurring. The adoption of child-safety policies and frameworks such as those outlined in the Royal Commission’s ‘Creating Child Safe Institutions’ information publication can have an impact in reducing risk.

However, it is the experience of some insurers that smaller, less resourced organisations have more difficulty implementing these types of risk mitigation. It is these organisations that may be particularly exposed to difficulties obtaining insurance should the Royal Commission’s recommended changes to civil liability settings be implemented.

Therefore, programs that educate and provide support for smaller, less resourced organisations could be undertaken to help create safer environments for children that directly reduce risk and lead to reduced likelihood of abuse occurring.

This direct risk mitigation approach, as opposed to purely legislative responses that focus on increasing the risk of liability exposure, can have a beneficial impact on insurance affordability and availability by helping to reduce the likelihood of abuse occurring, and should also be considered by the WA Government as part of their current review of the Royal Commission's recommendations.

The ICA would be happy to discuss this submission and the review with you further.

If you have any questions please contact Tom Lunn, Senior Policy Advisor, Consumer Outcomes via email tlunn@insurancecouncil.com.au, or phone (02) 9253 5122.

Yours sincerely



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