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RESPONSE TO THE ROYAL COMMISSION'S CONSULTATION PAPER ON REDRESS AND CIVIL LITIGATION

Introduction

Catholic Church Insurance (CCI) welcomes the opportunity to comment on the Royal Commission's Consultation Paper on Redress and Civil Litigation and acknowledges the breadth and complexity of the matters which the Royal Commission is seeking to address.

We commend the Royal Commission on the high quality of the paper.

As background, CCI is owned by all Catholic dioceses and many religious institutes of Australia. The organisation has been responding to the insurance needs of the Catholic Church for more than 100 years.

CCI is a diversified general insurer, registered and supervised by the Australian Prudential Regulation Authority (APRA) in the same manner as other licenced insurers.

Since the early 1990s, CCI has recognised claims arising from the sexual abuse of children by members of entities of the Catholic Church as legitimate claims within the terms and conditions of policies which CCI has historically provided. While indemnity is not available in every claim circumstance, the company has settled many claims assessed with the Church's established protocols for managing sexual abuse matters.

While recognising the significant difficulties in doing so, CCI supports the establishment of a national redress scheme to meet the financial and other needs of those people in our community who have been harmed by this terrible scourge.

However, with the benefit of more than 20 years' experience in this difficult and complex area, we wish to comment on some aspects of the consultation paper, from an insurance perspective. We have deliberately restricted those comments to subject matters about which, we believe, we have some expertise or, at least, experience which might assist the Royal Commission.

Assessment of Monetary payment (Chapter 6.4, page 147)

CCI notes the possible tables/matrix proposed at page 147 of the Consultation Paper, based on assessing the severity of abuse, severity of impact and distinctive institutional factors.

In its assessment of sexual abuse claims, CCI focusses largely on the impact and effects of that abuse. Experience and psychiatric/psychological learning suggest strongly that some victims can suffer grievously from abuse of comparatively modest severity, and vice versa. CCI suggests that monetary payments should primarily reflect the impact and consequences of the abuse.

Under the heading of "Assessment of monetary payments" (section 6.4), a proposal is made for a possible matrix of criteria for this assessment. The Royal Commission has suggested an allocation to three headings, the last of which is 'distinctive institutional factors', which, it is suggested, could exacerbate the impact of institutional child sexual abuse.

While in the subsequent commentary, there seems to be no reference to this constituting any form of punitive damages, CCI is nonetheless concerned about the consideration of the factors which might contribute to 'distinctive institutional factors'.

Any suggestion that some form of 'punishment' of the institution or its members is included under this heading would render any insurance cover inoperative for that section, leaving the institution financially exposed. While it might not be intentional in drafting the Redress Scheme, it is not difficult to imagine a monetary amount being attributed to this section where, for example, evidence is presented that the institution moved an offender to another children's facility, after knowledge of his propensity to offend is obtained.

CCI proposes that the assessment of the monetary payment should be entirely compensatory in nature, and should not risk being categorised in such a way as to transgress into other areas.

Re-opening old settlements (Chapter 6.5, page 159)

The issue of the treatment of past monetary payments will be one of the most challenging aspects of the Royal Commission's work.

Historically, our experience has been that the insurance industry has been slow / reluctant to acknowledge that a claim of the sexual abuse of a child should be covered by a standard 'occurrence-based' public liability policy. Many Catholic institutions have sought to bring claims against insurers, other than CCI, with very little success.

The establishment of a legitimate claim against most insurers *in the first instance* is difficult and generally, it is beyond the capacity of Catholic and other non-government institutions.

It is likely then that insurance protection for determinations made on re-opened old settlements will not be available, leaving many non-government institutions vulnerable to settlements.

In cases where insurers have indemnified policyholders in the original settlements, those insurers are likely to not provide any additional contribution where the original legal liability has been extinguished by an apparently valid settlement. An obligation on an insurer to make a further settlement can only be created through a legal liability to do so, hence triggering the standard form public liability policy. Of course, that legal liability can only be created through either common law or statute.

The distinction must be made between the establishment of the legal liability of an institution and the obligation by that institution's insurer to provide indemnity. The former does not necessarily create the latter. There may be circumstances in which indemnity will be unavailable to some institutions where legal liability is not established from an insurance perspective. In our experience, the most common example of this situation comes from the issue of 'prior knowledge'.

Redress Scheme Processes (Chapter 7, page 161)

CCI supports the view that, for a Redress Scheme to operate efficiently and affordably, there should be no option to pursue civil litigation in addition to participating in the Redress Scheme (page 173 of the Consultation Paper). CCI firmly believes that a Deed of Release which extinguishes the underlying legal liability must be required under the Redress Scheme process.

CCI offers the observation from an insurance perspective that it most unlikely that any insurer would agree to indemnify their insured against such a payment unless the underlying legal liability was extinguished, so that the claim can be definitively dealt with and there remains no need for an on-going reserve to be maintained by the insurer in respect of that claim. Put another way, it is not reasonable, feasible nor practical to expect an Insurer to fund a settlement process (involving the payment of a significant sum) without achieving finality. Insurers generally would find the concept of allowing a claimant to first recover a significant amount from the Redress Scheme and then run a second (civil) claim based on the same underlying facts quite contrary to the fundamental principles of insurance and, most likely, would not support their insured clients in that process.

Historically, the principal concern with deeds of release has related to confidentiality clauses, contained therein. The Royal Commission will be aware that institutions of the Catholic Church have long since abandoned, or at least modified, the use of confidentiality clauses and this has been supported by CCI.

Key redress scheme processes (Chapter 7.2, page 174)

CCI invites the consideration of the Royal Commission into the question of managing the legal costs incurred by victims through their lawyers in participating in the Redress Scheme, and notes the suggestion that, if a Deed of Release is required, the scheme should fund, at a fixed price, a legal consultation for the applicant before the applicant decides whether or not to accept the offer of redress and sign the Deed of Release. CCI would support such an approach.

No further legal costs should be met under the Redress Scheme. In addition, however, the Royal Commission might also consider an appropriate process to protect victims against significant irrecoverable legal costs being incurred during the Redress Scheme process, which victims might then have to fund out of any award.

Examples of possible approaches can be found in the processes for the Queensland Personal Injuries Proceeding Act and the New South Wales Dust Diseases Tribunal. Possibilities for consideration include:-

a) A stipulation that legal costs of advising a victim though the Redress Scheme process may not exceed a fixed percentage (say 10%) of the total award, and

b) Other Schemes have set up an appropriate agency, and required disclosure to that agency of the legal costs paid by a victim from the award. This has the added benefit of enabling statistics to be created and evaluated, to determine the ultimate effectiveness of the scheme.

Standard of proof (Chapter 7, page 170)

In CCI's experience, one of the greatest difficulties which policyholders face in the general insurance market is the level of proof that the alleged abuse did, in fact, occur. Other than CCI, general insurers have been reluctant to acknowledge that claims for historic sexual abuse are legitimate claims against standard public liability policies.

In determining what standard of proof to apply in any Redress Scheme, the Royal Commission needs to be cognisant of the need, where possible, to preserve insurance coverage which will hinge on the "rules" of the standard of proof.

It is CCI's view that a "plausibility test" will be insufficient to satisfy insurers on the establishment of legal liability and hence, the application of indemnity under normal public liability policies. We believe the *"balance of probabilities"* test would be an absolute minimum requirement for indemnity to be available.

In the absence of an adequate standard of proof, it is likely insurers will deny indemnity leaving policyholders unprotected for settlements made within the Redress Scheme and few, if any, avenues of appeal against that decision.

While the two redress schemes introduced by the Catholic Church in 1996/97 *(Towards Healing* and *the Melbourne Response)* are sufficiently 'rigorous' for CCI in terms of their investigative and assessment processes, such would not be the case in the general insurance industry. CCI has been able to satisfy its own requirements for the proper management of legitimate claims only through a thorough review and ongoing understanding of these processes.

In the promotion of a Redress Scheme, we acknowledge the tension between the level of evidentiary material and the proposed caps within the scheme.

Again, the Royal Commission's consideration must include the extent to which insurers can be confident that the process delivers an outcome which satisfies some minimum standards for the application of insurance policies. An additional complexity is that minimum standards will vary from insurer to insurer and in many cases, it will come to a question of how much determination an individual insured institution will have to pursue matters against insurers.

The Royal Commission should ensure its minimum standards are adequate for insurers, in the absence of which there is likely to be a significant financial burden on policyholders in meeting those settlements themselves.

Civil Litigation (Chapter 10, page 196)

CCI's primary submission is that the Redress Scheme processes should require a Deed of Release, achieving finality, and avoiding the possibility of subsequent litigation. If that is accepted, the comments which follow become redundant.

If (contrary to this submission), the scheme is set up on a basis which allows a victim to first participate in the Redress Scheme and then proceed to civil litigation, CCI expresses its strong reservations about the affordability and sustainability of such an outcome. Already, the proposed cost of the Redress Scheme alone is a substantial sum, posing considerable funding challenges to both government and non-government institutions. If, above this, there is an overlay of additional cost of civil litigation (with substantially reduced defences available), the total cost would, with respect, become entirely unsustainable. Ultimately, a greater financial burden than anticipated might be borne by the funder of last resort.

The Consultation Paper embodies various suggestions for substantial change to the current civil liability regime in relation to the important legal control mechanisms of limitation periods and the duty of institutions. Neither of these is in any proper sense of the words a "technical defence". Rather, they are substantive legal issues which have been developed with care over decades through Australian jurisprudence, with a view to achieving an effective balance between the rights and interests of plaintiffs and defendants.

The Royal Commission should consider whether an unintended consequence of the broadening of the legal liability of institutions is the availability and affordability of insurance protection to those institutions due to a significant escalation of risk factors.

If changes are to be made to the civil litigation system, CCI suggests that insurers generally would then support the proposition that such changes to the law should only apply prospectively (i.e. only in respect of incidents of abuse that occurred after the alteration to the law takes effect). A retrospective change in the civil law would, with respect, be contrary to fundamental principle and could operate unfairly and unsustainably.

CCI notes the suggestion (Chapter 10.4 page 224) that a new corporate entity might be established by particular institutions as a "nominal defendant", which could then be sued by the victims of sexual abuse. CCI cautions about this approach and suggests that there is an insurance risk in such a process.

A "nominal defendant" corporation which is incorporated many years after the relevant insurance policy was established, would, in all likelihood, not be entitled to indemnity under a typical public liability policy. Accordingly, the relevant insurer would not be obliged (or entitled) to indemnify that "nominal defendant" against any claim. Certainly, there could be no "legal liability" resting upon that subsequently incorporated entity for sexual abuse committed by a perpetrator years or decades earlier.

Further, the cost of obtaining insurance cover for the nominal defendant in the future might be prohibitively expensive, if indeed cover was available in the commercial insurance market at all. While cover might be available on a 'claims-made' basis, we suggest the retroactive date of such a policy would be sufficiently restrictive to exclude historic claims.

Reinsurance Implications

Many insurers rely on the financial support of reinsurers to continue to underwrite their liability business. Several proposed reforms (for example, limitations regime, plausibility test, civil litigation, etc.) are likely to threaten that reinsurance support, whereby insurers might be forced to withdraw from certain sections of the market, particularly those institutions with heavy exposure to the management of children.

Conclusion

CCI respectfully submits this paper to the Royal Commission for its consideration. The company is keen to see changes made to the manner in which matters involving compensation paid to survivors of sexual abuse are dealt with.

The Royal Commission has heard much criticism of the Church's protocols for the management of allegations of the sexual abuse of children. These arrangements were introduced as genuine alternatives to civil litigation to minimise the further damage to victims of abuse in an atmosphere of compassion and fairness. We encourage the Royal Commission to pursue these principles in the construction of any redress scheme it recommends.

We acknowledge the difficult task confronting the Royal Commission and, as previously, we remain committed to assisting the Commission in any way it wishes.

Catholic Church Insurance Ltd
6 March 2015