Summary of Consultation and Recommendations for Civil Litigation Reforms

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Background

On 28 March 2018, the Attorney-General and Minister for Justice approved the release of an Options Paper seeking comments in relation to six civil litigation reforms (civil litigation reforms) recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission). The purpose of the Options Paper was to seek feedback from interested groups on the implementation in the Northern Territory of the civil litigation reforms.

The Options Paper was released on 22 September 2018 with a closing date for submissions on 2 November 2018. Targeted stakeholders were contacted to make them aware of the Options Paper. The issues for consultation fell into two related subject areas: the first being the imposition of certain duties and liabilities on institutions and the second, the identification or nomination by institutions of a proper defendant to meet a claim for damages arising from an action for child sexual abuse. Both subject areas are discussed in further detail below.

In total, 10 submissions were received from the following organisations:

- Australian Lawyers Alliance (ALA);
- Law Society Northern Territory (LSNT);
- North Australian Aboriginal Justice Agency (NAAJA);
- knowmore;
- Bravehearts;
- Central Australian Women's Legal Service (CAWLS);
- CREATE Foundation;
- Darwin Indigenous Men's Service Incorporated (DIMS);
- Northern Territory Department of Education; and
- Northern Territory Department of Tourism and Culture.

Of the 71 targeted stakeholders provided with the Options Paper, only nine of those stakeholders responded. It is noted that no submissions were received from religious or educational institutions, institutions providing services to children, the Insurance Council of Australia, the NT Legal Aid Commission or legal service providers (other than NAAJA).

A short historical note to set the context

The late 1990s and early 2000s were, in Australia and to an extent internationally, a time of 'insurance crisis' with spiralling public liability and professional indemnity insurance premiums and the withdrawal or unavailability of insurance cover from many areas of economic and social activity. In May 2002, a meeting of Ministers from all states and territories agreed to set up a panel chaired by Justice David Ipp to conduct a comprehensive review of the laws of negligence. The result was the 'Ipp Report', published in September 2002.

The first recommendation of the Ipp Report was that there be a single and consistent uniform statute enacted in each jurisdiction concerning duty of care and causation. All states and the Australian Capital Territory (ACT) took up that recommendation, although each enacted separate statutes slightly dissimilar in various respects from those in the other jurisdictions. The Northern Territory elected to not take up and implement this particular recommendation.

To implement the first of the Ipp Report recommendations (together with other recommendations), the other states and the ACT made amendments to existing Wrongs Acts or established standalone Civil Liability Acts. The core provisions from each of those enactments set out statutory formulations concerning precautions against risk, which stipulate the circumstances in which the failure to take precautions against a risk of harm will constitute negligence, and causation, which governs the decision whether negligence caused particular harm. Largely they consist of a statement of the generally accepted common law principles.

This meant that, when the states and the ACT came to implement the civil litigation reforms, they did so in an environment of an already codified common law of negligence and the reforms made need to be understood in that framework.

The Northern Territory acted on other Ipp Report recommendations by enacting the *Personal Injuries (Liabilities & Damages) Act 2003* (PILDA). PILDA is an Act to 'modify the law relating to the entitlement to damages for personal injuries, to clarify principles of contributory negligence, to fix reasonable limits on certain awards of damages for personal injuries, to provide for periodic payments of damages for personal injuries, and for related purposes'. The Northern Territory Wrongs Act equivalent is the *Law Reform (Miscellaneous Provisions) Act 1956,* an Act to 'effect certain reforms in the law' and now contains provisions dealing with contributory negligence.

In order to implement the reforms discussed in this paper, the Northern Territory will need to either enact new legislation or amend existing legislation. If amending existing legislation, it is recommended that the amendments are made to PILDA rather than the *Law Reform (Miscellaneous Provisions) Act* as PILDA is most similar to the Civil Liability Acts of other states and the ACT.

Whichever option is selected, the creation of a statutory duty of care will be at odds with the previous decisions of the Northern Territory Government to not enact a general duty of care, which position was supported by the Northern Territory Law Reform Committee in its report of December 2014 (Report No. 41, 'Tort Law Reform in the Northern Territory'.

Summary of recommendations

Based on the submissions received and a consideration of the reforms made in other states and territories, it is recommended that the Northern Territory accept and implement the civil litigation reforms made by the Royal Commission. Set out below are all of the recommendations made by the Department of the Attorney-General and Justice (the Department) as a result of those considerations.

Recommendation 1: that an approach similar to the reforms brought about by the *Wrongs Amendment (Organisational Child Abuse) Act 2017* (Vic) and the *Civil Liability and Other Legislation Amendment Act 2019* (QLD) be adopted by introducing a statutory duty of care provision which incorporates both a non-delegable element and a reverse onus of proof. The statutory duty of care should incorporate a defence that a relevant institution took 'reasonable precautions' or reasonable steps to prevent the abuse.

Recommendation 2: that the statutory duty of care is consistent with the approach taken in the *Limitation Amendment (Child Abuse) Act 2017* and includes sexual or serious physical abuse and the psychological harm arising as a result of either.

Recommendation 3: that any reforms use a similar definition to that of 'institution' used in the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) with an exclusion for the Northern Territory Government given it is a participant in the National Redress Scheme.

Recommendation 4: that the degree of 'association' between a person and an institution mirror that provided for in the New South Wales and Victorian legislation.

Recommendation 5: that a provision be developed to enable an institution to be found liable for the abuse by one child of another in circumstances where the institution ought to have been aware of the potential for abuse to occur. The provision should provide that the child perpetrator not be named as a defendant to the proceedings or in any pleadings or, if they are to be named, it is done in a de-identified manner. Further any evidence the child perpetrator might give, should be taken in closed court even when the person is now an adult.

Recommendation 6: that an approach be adopted for the imposition of the proposed duty similar to the imposition of vicarious liability in sections 6G to 6H of the *Civil Liability Act 2002* (NSW).

Recommendation 7: that the Victorian and New South Wales provisions are adopted in order to provide a non-exhaustive list of factors for a court to consider to determine what constitutes the taking by an institution of <u>all</u> 'reasonable steps' or 'reasonable precautions'.

Recommendation 8: that, if recommendation 7 is adopted, it is **not** recommended that the Northern Territory develop its own guidelines or industry standards given it has endorsed the National Principles for Child Safe Organisations. Instead it is recommended that any 'reasonable steps' provisions note that mere or cursory adherence to the National Principles for Child Safe Organisations, guidelines or similar documents may not of itself be considered a sufficient reasonable step to defeat a claim.

Recommendation 9: that any provisions do not provide for a graduated definition of 'reasonable steps' according to the type or size of the institution which owes the proposed duty of care. The provisions would confirm that the type or size of the institution may be a

factor that the court take into consideration when determining what a reasonable step might be in the circumstances of the case.

Recommendation 10: that recommendation 94 of the Royal Commission be adopted and legislation provide that where a survivor of institutional child sexual abuse wishes to commence proceedings for damages in respect of child sexual abuse and the institution is associated with a property trust, then unless the institution nominates a 'proper defendant' to sue that has sufficient assets to meet any liability, the property trust will be appointed by a court to be the proper defendant to the litigation. This would mean that any liability of the institution with which the property trust is associated arising from the proceedings can be met from the assets of the trust.

Recommendation 11: that in order to implement recommendation 94, relevant parts of the *Civil Liability and Other Legislation Amendment Act 2019* (QLD) and the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* (WA) are adopted to include provisions for officers of institutions to also be sued and for them to access the assets of the property or other trusts or institutions in order to meet a judgment or settlement of a claim. Further the Western Australian provisions deeming substantially similar institutions or officers as effective successors should be adopted.

Recommendation 12: that the reforms provide, in the absence of a proper defendant consenting to its appointment within a reasonable period of time, a court on application by the plaintiff is able to name it as a proper defendant.

Recommendation 13: that, in the event that a proper defendant consents to being appointed for the purposes of proceedings, there is no need for a limitation to be placed on or any consideration made of the association between it and the defendant. Where there is no consent given by the proper defendant, then the same indicia of control used in the New South Wales, Queensland and Victorian provisions should be adopted.

Recommendation 14: that a proper defendant which is a property trust, whether by court order or otherwise, must provide suitable indemnities and limits on liability to the trustees of the property trust in order to shelter them from personal liability for the outcome of the proceedings.

Recommendation 15: that all types of property trusts will be available for appointment as a proper defendant.

Recommendation 16: that all institutions (secular and religious) will be included in the reforms and must appoint a 'proper defendant' or face having a court appoint one on its behalf.

Recommendation 17: that an open ended definition of 'association' be used to establish the connection between an institution and a property trust to be appointed as a proper defendant.

Recommendation 18: that there is no requirement that every institution working with children incorporate, although it is preferred that a proper defendant be available.

Recommendation 19: that provisions similar to those in the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* (WA) are adopted to enable the naming of relevant successor institutions.

1 Duties and Liabilities of Institutions

In the absence of fault on the part of an institution occasioning a breach of a duty of care it owed to a child, there are two ways in which an institution can be found liable for child abuse:

1. to be found vicariously liable for the actions of employees and agents who have abused a child; or
2. to be found to have breached a non-delegable duty of care to ensure reasonable care was taken to prevent harm to a child over which the institution had a special protective relationship.

The Royal Commission found the problem for survivors who sue institutions (as opposed to the person committing the abuse) is that their claims are generally founded upon the deliberate criminal act of a person. Australian courts have been reluctant, in the absence of fault on the part of the institution, to hold the institution liable to compensate such survivors for harm arising from child sexual abuse caused by the deliberate criminal acts of its members or employees.

The Royal Commission's civil litigation reforms recommended that governments legislate to impose a prospective non-delegable duty of care on institutions for child sexual abuse, even where it occurred as a result of a deliberate criminal act of a person associated with the institution. The Royal Commission limited the range of institutions to which this duty ought to apply to:

1. residential facilities for children, including residential out-of-home care facilities and juvenile detention centres but not including foster care or kinship care;
2. day and boarding schools and early childhood education and care services, including long day care, family day care, outside school hours services and preschool programs;
3. disability services for children;
4. health services for children;
5. any other facility operated for profit which provides services for children 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; and
6. any facilities or services operated or provided by religious organisations, including activities or services provided by religious leaders, officers or personnel of religious institutions but not including foster care or kinship care.

Independent of whether a government choses to impose the duty, the Royal Commission's civil litigation reforms recommended that governments should prospectively make all institutions liable for child sexual abuse by any person associated with the institution, unless the institution is able to prove that it took reasonable steps to prevent the abuse from occurring. This presumption of liability is referred to as a 'reverse onus' of proof.

The Royal Commission recommended that for both the duty and the presumption of liability, the 'persons associated' with the institution should include the institution's officers, office holders, employees, agents, volunteers and contractors. For religious institutions, persons associated with the institution would also include religious leaders, officers and personnel of the religious institution.

In order to test parts of the civil litigation reform concepts with the community, the Options Paper put forward the recommended approach of the Department to adopt a similar scheme to that provided for in amendments to Victorian legislation. That is, to introduce a statutory duty of care provision which incorporates a non-delegable element **and** a reverse onus of proof (the Proposed Duty). As noted above, that scheme exists in a regulatory environment where the common law tort of negligence has already been codified. Relevant parts of the Victorian and other legislation are extracted in this paper.

1 What are your views on adopting a statutory duty of care that incorporates a non-delegable element and a reverse onus provision, as opposed to the two distinct duties recommended by the Royal Commission?

There was overall support for adopting both elements in one duty as opposed to two distinct duties. This was the position of the majority of submitters including NAAJA, CAWLS, Bravehearts, knowmore and DIMS.

The LSNT supported the Proposed Duty but it preferred the New South Wales approach which provides not only for a non-delegable duty but also extends the provisions to include vicarious liability. The *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018* (NSW) (NSW Act), inserted a new Part 1B into the *Civil Liability Act 2002* (NSW), which imposes a statutory duty of care on organisations that exercise care, supervision or authority over children to prevent abuse being perpetrated by individuals associated with an organisation.

The LSNT suggests that the NSW Act codifies the common law approach to vicarious liability of organisations for child abuse perpetrated by employees but also extends it to non-employees whose relationship with an organisation is ‘akin to employment’.

The Australian Lawyers Alliance (ALA) strongly prefers the principle of statutory vicarious liability over a statutory non-delegable duty of care. The ALA argues that all changes should apply retrospectively and not simply prospectively. The ALA argues that coupled with a ‘close connection’ test, vicarious liability is the preferred obligation to impose and of more benefit to a claimant. As to the reverse onus of proof, the ALA argues that even reversing the onus of proof would be inadequate as an institution might be able to establish that it had acted reasonably by a denial of knowledge of the events or having an unenforced policy thus shifting the evidentiary onus back to the claimant.

Department’s comment: There is broad support for adopting a statutory duty of care with both a non-delegable element and a reverse onus presumption of liability. There is support from the LSNT and the ALA for vicarious liability elements to also be included.

Vicarious liability is the legal liability of one person for the actions of an employee, despite the first person being free from fault. Vicarious liability is strict. In the Department’s view, such liability remains limited by the fact that employers can only be held vicariously liable for the actions of ‘employees and agents’. As a result, there is still a barrier to a claim being maintained against priests, volunteers and contractors. The ‘course of employment’ test would also give rise to difficulties in cases where the abuse occurred out of hours or away from institutional premises which is the New South Wales approach.

Both Western Australia and the ACT have created a cause of action for child abuse but not included any presumptions of liability. In Western Australia, the cause of action is created in the *Limitation Act 2005* (WA). In the ACT the duty was initially inserted in 2016 as section 21C of the *Limitation Act 1985* (ACT) and provided there would be no limitation period on a

cause of action that substantially arises from sexual abuse to which the person was subjected when the person was a child in an institutional context. Section 21C was then amended in 2017 to remove the 'institutional' requirement for claims for child sex abuse. The ACT now allows all claims of child abuse how so ever arising to be brought and heard on their merits.

In 2018, Queensland introduced what is now the *Civil Liability and Other Legislation Amendment Act* 2019 (QLD) which creates a duty of care to take all reasonable steps to prevent the serious physical or sexual abuse of a child, with a presumption of liability unless all reasonable steps were taken. Victoria by the *Wrongs Amendment (Organisational Child Abuse) Act 2017* (Vic) introduced into the *Wrongs Act 1958* (Vic) a duty of care provision with a presumption that it has been breached unless reasonable precautions are taken to prevent the abuse. New South Wales has the most prescriptive scheme where the NSW Act amended the *Civil Liability Act 2002* (NSW) to create a duty of care to take reasonable precautions to prevent child abuse. The plaintiff must establish that an individual associated with the organisation perpetrated the child abuse and then the organisation is presumed to have breached its duty unless it established that it took reasonable precautions to prevent the child abuse.

Recommendation 1: that an approach similar to the *Wrongs Amendment (Organisational Child Abuse) Act 2017* (Vic) and *Civil Liability and Other Legislation Amendment Act* 2019 (QLD) be adopted by introducing a statutory duty of care provision which incorporates both a non-delegable element and a reverse onus of proof. The statutory duty of care should incorporate a defence that a relevant institution took 'reasonable precautions' or 'reasonable steps' to prevent the abuse.

2 What are your views on the proposal to extend the Proposed Duty to related physical and psychological abuse?

The Royal Commission recommended that governments legislate for a Proposed Duty only for instances of child sexual abuse. Submissions overwhelmingly favoured *extending* the Proposed Duty to include physical and psychological abuse.

Many of the submissions discussed or referred to the *Wrongs Act 1958* (Vic) relevant parts of which were also set out in the Options Paper. That legislation defines *abuse* as physical abuse or sexual abuse. *Sexual abuse* is defined to mean sexual assault or other sexual misconduct. *Physical abuse* is defined in the negative to not include an act or omission committed in circumstances that constitute a lawful justification or excuse to the tort of battery, or any other lawful exercise of force. The *Wrongs Act 1958* (Vic) then imposes a duty to prevent the abuse of a child.

The ALA notes that the preferred model, based on the Victorian approach to the Proposed Duty, would exclude psychological abuse connected with physical or sexual abuse. The ALA notes that liability of organisations under the NSW Act are rather in respect of child abuse (sexual or physical) but without mention of associated psychological abuse perpetrated.

The New South Wales definition is found in section 6F(5) of the *Civil Liability Act 2002* (NSW) as follows:

> "*child abuse*", of a child, means sexual abuse or physical abuse of the child but does not include an act that is lawful at the time it takes place.

knowmore advocated for a definition that at a minimum was consistent with that taken in the amendments to the *Limitation Act 1981* in which 'child abuse' means any of sexual abuse, serious physical abuse or psychological abuse that arises from either (see section 5A of the *Limitation Act 1981*).

Department's comment: The Options Paper noted that there appears to be no sound policy reason to provide a more favourable position to survivors of sexual abuse, as serious physical abuse can cause similar injury to the person and often the two types of abuse co-occur. Psychological abuse arising from sexual or serious physical abuse is also generally inseparable from the physical offending, and is consistent with the approach taken by the Northern Territory in the *Limitation Amendment (Child Abuse) Act 2017*.

New South Wales, the ACT, Queensland and Victoria have included either sexual abuse or physical abuse in their reforms. Western Australia has limited its reforms to only address sexual abuse.

It will be a matter of the application of the general law to determine whether psychological harm arising from the abuse is or is not a sequela of the other injuries caused.

Recommendation 2: that the statutory duty of care is consistent with the approach taken in the *Limitation Amendment (Child Abuse) Act 2017* and include sexual or serious physical abuse and the psychological harm arising as a result of either.

3. What financial or associated impacts would the Proposed Duty have on Territory institutions, such as the cost and availability of insurance and the ability to provide services to children?

Not all submitters provided responses on this issue.

The LSNT commented that imposing higher standards on institutions will likely result in higher insurance premiums. It says the government may 'cushion' some of the cost burden through the funding it provides to the Non-Governmental Organisation sector, presumably to assist with increased insurance premiums.

NAAJA make a similar comment to the LSNT that 'With respect to managing the financial impact related to recent, or future claims, if the costs of insurance schemes increase because of any NT reforms, then the NT should invest public funds to help balance any related consequences of any reform impact'. NAAJA suggest that such investments might include increased regulation to ensure levels of abuse decrease in the same manner as work place health and safety laws so resources, interventions, training, compliance and reporting requirements, inspections and other practices to make a more robust system.

CAWLS said any financial implications need to be carefully assessed in relation to volunteer and not-for-profit organisations.

Bravehearts have advocated for insurance premiums to be charged for such organisations to be dependent on audits to ensure the organisation can demonstrate that it is compliant with child protection and risk management practices, appropriate and regularly refreshed training in relation to child protection, and adherence to mandatory reporting.

Department's comment: The comments and issues about costs which may arise as a result of this reform indicate that a regulatory impact statement may need to be prepared and considered through the ordinary processes. Such costs would not be imposed by government but rather would arise from increases in insurance premiums to be paid by institutions providing care and child related services. There may also be a requirement imposed for the provision of such insurance for the insured to meet and comply with other reporting, auditing and monitoring regimes. How an underwriter sets its premium and manages its risk by way of audits or similar mechanisms is not a matter for legislation or government policy, or if it was to be it would not be at the state or territory level.

As to the investment of public funds, it would as a matter of policy be considered inappropriate to provide financial assistance to institutions that have previously failed in the discharge of a duty of care. Certainly there would be a place for education about the change in the duty to assist with compliance but shifting the cost of insurance premiums back to government does not seem appropriate.

Given the comparatively small population in the NT, it is likely that most businesses offering a service to care for children place their insurance with national providers. Given the changes already made in New South Wales, Victoria, Western Australia and the ACT, it may be that relevant premiums have already been increased. If so, the impact on premiums for NT businesses may have already been felt.

Recommendation: No matters immediately arise.

4. Are there any organisations to which the Proposed Duty should not apply? If so, why?

NAAJA, knowmore and CAWLS in their submissions support applying the Proposed Duty to the institutions identified by the Royal Commission (listed under the heading '1. Duties and Liabilities of Institutions' above).

Bravehearts and the ALA argue that the duty should be applied more broadly than is suggested by the Royal Commission. They both say the duty should be extended to any organisation that provides services to, or works with children, has a duty to ensure, as far as practicable, the safety and wellbeing of those children and young people who they have contact with such as community based, non-government, not-for-profit and volunteer organisations.

As the ALA points out, while supporting its version of vicarious liability, that the obligation should be imposed on all organisations whether incorporated or unincorporated, which operate for profit or are not-for profit and which provide services exclusively to children or to children in addition to adults.

DIMS say the duty should not apply to institutions that do not provide children's services. The LSNT says the duty should apply to all institutions (without further qualification or comment).

Department's comment: As a matter of logic, the Proposed Duty will not adversely affect institutions that do not provide services (broadly described) to and for children which might lead to child sexual abuse occurring. For example, a clothing retailer, car sales yard or charter boat company. In that respect there is no difficulty in applying the Proposed Duty to all institutions without limitation as many will never be at risk of breach.

Having said that, the Proposed Duty is one based on the close relationship between the institution and the child such that a duty of care may arise. It would be appropriate to limit the scope of the Proposed Duty to those institutions who do provide services to children, including 'not-for-profit', charitable and volunteer organisations as well as organisations that administer foster or kinship care services (which were specifically excluded by the Royal Commission).

An 'institution' has a particular and unusual definition under the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) namely 'any body, entity, group of persons or organisation (whether or not incorporated), but does not include a family or an individual'. Other parts of the legislation are designed to capture institutions that are or were **part** of a participating territory as a 'Territory institution' so that each and every department and agency of the Northern Territory is an institution for the purposes of the Redress Scheme. Given the particular definition, it is recommended that it be used in these reforms. Further given that if a person is made and accepts an offer of redress from the Redress Scheme, they release the institution from any civil liability, this would be a consistent approach.

A range of limitations are used by other states and territories to determine those to whom the duty will apply. In New South Wales, reforms limit the organisations to those responsible for a child by exercising the care, supervision or authority over the child. In Western Australia, reforms limit the duty to institutions that exercise care, supervision or authority over children, whether as part of its primary functions or activities or otherwise. In Queensland, reforms limit the duty to institutions while the child is under its care, supervision, control or authority. In Victoria, reforms impose the duty on organisations organised for some end, purpose or work that exercises care, supervision or authority over children whether as part of its primary functions or activities or otherwise. In the ACT, the *Limitation Act 1985* definition of institution includes those that provide activities, facilities, programs or services of any kind through which adults have contact with children including through their families (section 21C).

The ACT reforms apply only to unincorporated bodies regardless of whether the body has a written constitution, fixed membership or any other particular attribute. In Victoria the amendments apply to relevant organisations which are entities (other than the State) which are either capable in law of being sued or if not capable in law of being sued nominates an associated legal person (see discussion about 'proper defendant' in Part 2), the holder of a statutory office, a department or administrative office or body corporate established for public purposes. The Queensland reforms would apply to an institution which means an entity, includes a public sector unit but does not include a family. The Western Australian reforms apply to 'an entity (other than the Crown), organised for some purpose or work'. The New South Wales amendments apply to an organisation whether incorporated or not and includes a public sector body, but not the State.

Given the Northern Territory fully participates in the National Redress Scheme, there is a sound policy basis to exclude it from liability for breaches of the proposed duty.

Many submitters discussed how reforms might impact organisations that are 'not-for-profit' or staffed by volunteers. The term 'not-for-profit' is often misleading as it does not in fact mean that the organisation is itself impecunious or does not have assets. An institution may have an income from grants or otherwise of over $1 000 000 per annum, employ full-time staff, and yet is a 'not-for-profit' or 'charitable' organisation as either it generates no profit or any profit is directed to the objects and purposes of the organisation rather than being distributed to its members. It can mean that for some institutions there are no cash reserves

or assets from which it might meet a judgment. For others there may be reserves or assets to call upon. For these reasons, and certainly when considering how best to ensure a defendant has resources to meet a judgment, it should be used cautiously or in moderation.

Recommendation 3: that any reforms use a similar definition to that of ‘institution’ used in the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) with an exclusion for the Northern Territory Government given it is a participant in the National Redress Scheme.

5. Should there be any limitation on who may be considered an associate of an institution?

Overall submitters were supportive of the position that an associate be made liable, but there were different views expressed. Some submitters said that in order to determine the liability of an associate there should be a ‘reasonableness’ test of one type or another.

NAAJA suggests that there should be a ‘reasonable connection’ in order for a person or organisation to be considered an associate of an institution. NAAJA acknowledges that this may not cover all people with even a remote connection to an institution, but would provide clarity to enable people with oversight in institutions to understand and exercise their responsibilities.

The LSNT says that there should be a limitation on who might be considered an associate however suggests that the definition of ‘association’ not be prescriptively set by legislation. It submits that the scope of ‘association’ or who may be considered an associate could be based on a ‘reasonable person’ test. It says: ‘Would a reasonable person assume that the person was part of, or associated with, an institution?’ They support the recognition of liability absent an employment relationship and support the New South Wales position that an organisation must prevent ‘an individual associated with the organisation’ from abusing a child or (from the vicarious liability provisions) ‘an individual who is akin to an employee’.

The balance of the submitters set out support for the express recommendation of the Royal Commission that ‘persons associated with’ should include the institution’s officers, office holders, employees, agents, volunteers and contractors, religious leaders, officers and personnel of a religious organisation but did not suggest any limitations on who might be otherwise considered.

The ALA prefers the use of the vicarious liability test, but concedes for greater certainty that the Royal Commission recommendations for associated persons be used.

Department’s comment: The *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) includes a definition of an associate of a participating institution (section 133) which rests on the associate consenting or agreeing to be part of the relevant participating group. When an offer of redress is accepted they agree to release the institutions and officials from civil liability.

In New South Wales, the amendments refer to an individual being associated with an organisation if they are an office holder, officer, employee, owner, volunteer or contactor and includes religious leaders, member of the personnel of the organisation or as prescribed by regulation. The amendments provide that an individual is not associated with an organisation solely because the organisation wholly or partly funds or regulates another organisation.

The Victorian amendments are similar to New South Wales. Although expressed as including 'but not limited to' the list of positions and persons, they also include a provision to note when there will not be an association.

The Queensland amendments set out definitions for both 'associated trust' (which will be discussed in the later section on the 'proper defendant') and 'associated with' which is very similar to the New South Wales amendments. The Queensland definition of institution does include an entity that 'gives an opportunity for a person to have contact with a child'.

The Western Australian amendments refer to 'a person associated with an institution' in the imposition of the duty but do not otherwise limit or define the term.

The ACT amendments to the *Limitation Act 1958* (ACT) provide a definition of 'officials' with a catchall at paragraph (d) of any other person who would on reasonable grounds be considered an official of the institution.

While the New South Wales and Victorian amendments provide when an individual is not associated with an organisation, none deal with when someone holds themselves out as an associate but in fact is not.

The 'reasonable person test' as proposed by LSNT has only been adopted by the ACT.

Recommendation 4: that the degree of 'association' between a person and an institution mirror that provided for in the New South Wales and Victorian legislation.

6. Should liability extend to acts of abuse committed by children under the care, control or supervision of institutions? Why or why not?

Bravehearts and knowmore support extending liability to acts of abuse committed by children under the care, control or supervision of institutions. Bravehearts says: 'If a child or young person has been harmed by a peer, unless the organisation can show that it had no knowledge of the harm occurring and that it had in place appropriate safeguards, policies and procedures for preventing and responding to harm, then organisational liability should be extended to such matters.' LSNT supports extending the liability on the basis that institutions have a positive duty to effectively manage children with complex behaviours.

DIMS does not support this as, in its view, it is too difficult to police the relationships between children.

NAAJA implicitly agrees that liability should be extended, however NAAJA argues that acts of abuse committed by children should sit outside the ordinary legal framework which deals with abuse committed by adults against children. NAAJA says doing so would mirror the established practice in youth justice courts to treat children differently in recognition of their inexperience, immaturity and stage of brain development. NAAJA fears that any liability incurred by an institution for the abuse perpetrated by a child within its care, control or supervision may lead to that child being stigmatised.

Department's comment: The comments from NAAJA are important. There may be scope for ensuring that cases involving acts of abuse committed by children are determined in de-identified sittings and closed court rooms. It is important to emphasise that the issue is liability of the institution for abuse committed by children under their care, control or supervision, not the child itself. Where an institution shows it had policies or protocols in place for detecting, dealing with or mitigating children with complex behaviours, that would provide a defence to any liability under the Proposed Duty.

The New South Wales and Victorian amendments are the most comprehensive and would seem to exclude this category. While the circumstances of a non-adult abusing a child are not excluded, the non-adult would need to be in a position to have care, supervision or authority over the child being abused. The general implication or association would be that the associated individual would be an adult. The ACT amendments may be the most amendable as a 'child abuse claim' does not refer to an associated person nor any degrees of authority or control. However the definition of institutional context refers to adults having contact with children. The Queensland amendments may be broad enough to include an abuse claim that occurs while the abused child is under the care, supervision, control or authority of the institution read with the definition of institution which 'gives an opportunity for a person to have contact with a child'. In Western Australia, the person is to be the holder of an office of authority in the institution founded on the responsibility of the office holder for the institution generally. In the ACT, there would be seemingly no limitation as the intent is to enable child sexual abuse claims no matter the context and no matter the time taken to disclose, to be heard on their merits.

Recommendation 5: that a provision be developed to enable an institution to be found liable for the abuse by one child of another in circumstances where the institution ought to have been aware of the potential for abuse to occur. The provision should provide that the child perpetrator not be named as a defendant to the proceedings or in any pleadings, or if they are to be named it is done in a de-identified manner. Further any evidence the child perpetrator might give, should be taken in closed court even when the person is now an adult.

7. How closely associated should an institution and a perpetrator need to be to result in potential liability? For example, should an institution be liable for abuse committed by an employee or volunteer in their own home, against a child met through the institution?

The degree of association between a perpetrator and an institution (in order to result in institutional liability) may be easier to establish with an employee, or relationships sufficiently analogous to employment, than abuse committed by a one-off volunteer at a local charity event.

The Options Paper had set out three issues which had been identified in a 2017 New South Wales consultation paper namely:

- adopting a test to determine whether the child would reasonably have assumed that the person was part of, or associated with, the institution at the time of the abuse;
- limiting liability to the actions of persons which are *under the control or authority* of the institution;
- adopting a similar test to the one adopted by the United Kingdom and Canadian courts – that is, whether the relationship is *sufficiently analogous* or *akin* to employment.

Most of the submissions addressed the degree of association between employees, or employment-like relationships, to an institution in addressing this question. No submitter favoured limiting liability to only persons under the control or authority of an institution.

knowmore supports a 'non-exhaustive' definition of association. Bravehearts advocates that if the contact with the victim is or was facilitated by or through an organisation or institution, the institution has a responsibility and duty of care to ensure that proper safeguards are in place and that policy, process and procedures are followed.

NAAJA says attention ought to be focused on the role and practices of an institution rather than the time and place the abuse occurred.

The LSNT notes that the common law in Wales, England and Canada gives rise to vicarious liability where the 'close connection' test is met, even if the act in question is a criminal offence. A 2018 decision in the United Kingdom found the close connection test was satisfied and the employer vicariously liable for the tortious acts committed by an employee at home, where the employer created the conditions allowing the conduct to occur (*Wm Morrisons Supermarkets Plc v Various Claimants* [2018] EWCA Civ 2339). The LSNT regards the location of the offending as an irrelevant test in determining liability. It advocates for a positive duty to prevent grooming and adopting a test similar to the New South Wales amendment where there is liability if the perpetrator is in a position akin to an employee.

The ALA is supportive of the test adopted by the United Kingdom and Canadian courts.

The New South Wales consultation paper reported that:

> 'In the United Kingdom, an institution will be liable for sexual abuse if the action is 'so closely connected' with the perpetrator's employment that it is 'fair and just' to hold the institution liable: *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at [28]. In Canada, there must be a 'significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires': *Bazley v Curry* [1999] 2 SCR 534. However, a more stringent test is applied in cases against NGOs (there must be a 'material increase in the risk of harm occurring in the sense that the employment significantly contributed to the occurrence of the harm.'): *Jacobi v Griffiths* [1999] 2 SCR 570 (emphasis added).'
>
> …
>
> 'In the United Kingdom and Canada, liability extends beyond employees to people who have relationships which are 'sufficiently analogous' or 'akin' to employment (*Woodland v Essex County Council* [2013] UKSC 66 (23 October 2013). In Canada, the test is whether the relationship is 'sufficiently close as to make a claim for vicarious liability appropriate' (*KLB v British Columbia* [2003] SCC 51 (2 October 2003))

Department's comment: The NSW Act imposes vicarious liability on organisations for child abuse perpetrated by an employee where the employee performs a role which supplies the occasion for the perpetration of child abuse and the employee takes advantage of that occasion to commit child abuse. A court must look at whether the employee had authority, power or control over the child; the trust of the child or the ability to achieve intimacy with the child in determining if the institution supplied the occasion for the employee to commit the abuse.

Under section 6G of the NSW Act, an employee of an organisation includes an individual who is akin to an employee of an organisation, with qualifications to who may be considered 'akin to an employee' under section 6G(3).

The Queensland amendments include, in the reasonable steps to be considered to determine whether liability would be ousted, the position in which the institution placed the person in relation to the child, including the extent to which the position gave the person authority, power or control over the child or an ability to achieve intimacy with the child or gain the child's trust.

Recommendation 6: that an approach be adopted for the imposition of the proposed duty similar to the imposition of vicarious liability in sections 6G to 6H of the *Civil Liability Act 2002* (NSW).

8. What would be the benefit and/or implications of defining the term 'reasonable steps' in legislation?

Most of the submissions that engaged with the question of whether 'reasonable steps' should be defined in legislation did not support this option. The ALA did not comment on this directly as its preferred position is vicarious liability utilising the close connection test.

The LSNT does not support defining 'reasonable steps' in legislation. It says what is 'reasonable' would depend on the circumstances of each case. It advocates for a more stringent test to require an institution to 'take all reasonable' steps.

CAWLS preferred the development of a non-exhaustive list of reasonable steps with more detailed guidelines/standards to be developed and graduated according to the type of service provided and to take into account the evolving nature of this area of law and the diversity of organisations that such standards would apply to. DIMS supported some steps being developed and defined. Bravehearts supports defining 'reasonable steps' as it would provide guidance and set minimum expectations for organisations.

knowmore favours the Victorian and New South Wales approach of providing a non-exhaustive list of factors in determining 'reasonable steps' to provide guidance without limiting the capacity of courts to consider appropriate factors in each specific case. What amounts to reasonable steps will then be informed by the existing law of negligence in the circumstances of the particular case.

While NAAJA says that defining 'reasonable steps' would ensure important factors are considered when determining whether or not an action is question was 'reasonable', it prefers the Victorian approach of providing instead for a non-exhaustive list of factors that may affect what constitutes 'reasonable steps' or 'reasonable precautions'.

Department's comment: Both the Victorian and New South Wales amendments use the term 'reasonable precautions', but do not define the term, instead providing a non-exhaustive list of factors that may affect what constitutes 'reasonable precautions'. It must be remembered that, unlike the Northern Territory, the codification of the common law of negligence in Victoria and New South Wales means those factors may be provided elsewhere in the *Civil Liability Act 2002* (NSW) or *Wrongs Act 1958 (Vic*).

In the Victorian context, the Second Reading Speech for the Wrongs Amendment (Organisation Child Abuse) Bill 2017 stated that: 'The interpretive guidance given by the bill is non-exhaustive, ensuring that the courts are able to consider any other appropriate factors on a case-by-case-basis.'

As the Options Paper noted: 'This seems appropriate given the substantial variation in size, structure and activities of organisations that would be captured by the proposed legislation.'

The Queensland amendments contain a non-exhaustive list of reasonable steps that might be taken to prevent abuse.

The ACT has provisions in the *Civil Law (Wrongs) Act 2002* (ACT) as does Western Australia in the *Civil Liability Act 2002* (WA) for general precautions against risk and in relation to liability for negligence that are not prescriptive and refer to tests of reasonableness balanced with probability or likely seriousness of harm.

Recommendation 7: that the Victorian and New South Wales provisions are adopted in order to provide a non-exhaustive list of factors for a court to consider to determine what constitutes the taking by an institution of <u>all</u> ‘reasonable steps’ or ‘reasonable precautions’.

9. If the recommendation is adopted, would it be useful to develop guidelines or industry standards about what is considered to be ‘reasonable’?

There was general support for the development of guidelines or industry standards with the emphasis being on the government investing in the development, promulgation and training in the use of the guidelines.

The LSNT supports the development of guidelines or industry standards to describe what ‘reasonable steps’ might include. However, it cautions that adherence to guidelines or standards alone ought not constitute a reasonable step or a means to avoid liability rather than to protect children.

Bravehearts support the development of codes of practice and the provision of training to instil a child-safe culture in all organisations. CAWLS takes a similar position.

NAAJA supports the development of industry standards to assist in the determination of what is considered ‘reasonable’. NAAJA suggests that the development of any guidelines should be accompanied by a training element, making it compulsory for organisations providing services to children to undertake regular, structured training on child safety.

Department’s comment: If the Northern Territory is to develop or adopt guidelines or industry standards about what is considered to be ‘reasonable’ or the taking of reasonable steps or reasonable precautions, it should be made clear in both the guidelines or legislation that mere or cursory adherence to guidelines may not alone be considered a ‘reasonable step’.

Given the National Principles for Child Safe Organisations (National Principles) were initiated by Community Services Ministers across Australia and developed by the National Children’s Commissioner through a national consultation process, there is no need for the Northern Territory to develop its own principles or guidelines. The National Principles give effect to recommendations of the Royal Commission relating to the child safe standards. They provide a nationally consistent approach to cultivating organisational cultures that foster child safety and wellbeing across all sectors in Australia. To allow flexibility in implementation and in recognition of the variety of institutions that might adopt them, they set out at a high level ten elements that are fundamental for making an institution safe for children.

As of February 2019, the National Principles have been endorsed by members of the Council of Australian Governments, including the Prime Minister and state and territory First Ministers. The National Office for Child Safety (National Office) is leading national coordination and implementation of the National Principles, working with states and territories, and the non-government sector to make organisations across Australia safe for children.

At present the National Principles are not mandatory and all governments are responsible for giving effect to the National Principles and determining compliance arrangements in their respective jurisdictions. The National Office will continue to work with all governments and the non-government sector to promote and support the implementation of the National Principles. There is no lead agency in the Northern Territory managing the implementation of the principles; each agency is responsible for implementation in their agencies and funded services.

The National Office has been coordinating the development of a range of national resources and practical tools to inform organisations, parents and carers about the National Principles and support implementation across all sectors. Practical tools and resources have been developed by the Office of the National Children's Commissioner and can be accessed on the Australian Human Rights Commission's Child Safe Organisations website. The National Office will continue to add to these resources over time.

Recommendation 8: If recommendation 7 is adopted, it is **not** recommended that the Northern Territory develop its own guidelines or industry standards, given it has endorsed the National Principles for Child Safe Organisations. Instead it is recommended that any 'reasonable steps' provisions note that mere or cursory adherence to the National Principles for Child Safe Organisations, guidelines or similar documents may not of itself be considered a sufficient reasonable step to defeat a claim.

10. Would it be reasonable for a definition of reasonable steps to be graduated according to the type of service provided? If so, on what basis?

Consistent with its position to not define 'reasonable steps' discussed above, the LSNT also does not support a graduated definition of 'reasonable steps' according to the type of service provided. The LSNT is concerned that an inflexible definition of 'reasonable steps' may lead to unjust outcomes. NAAJA, knowmore and Bravehearts do not support a graduated definition of reasonable steps. The ALA did not address this issue directly.

CAWLS was the only submitter who indicated any support for graduated definitions.

Department's comment: No other state or territory have adopted the use of specific graduated definitions based on the type of service provided or the size of the institution.

As noted above, the ACT has provisions in the *Civil Law (Wrongs) Act 2002* (ACT) as does Western Australia in the *Civil Liability Act 2002* (WA) for precautions against risk, both general and in relation to liability for negligence that are not prescriptive and refer to tests of reasonableness balanced with probability or likely seriousness of harm. For example in the ACT, the court must consider (amongst other relevant things) (a) the probability that the harm would happen if precautions were not taken, (b) the likely seriousness of the harm, (c) the burden of taking precautions to avoid the risk of harm and (d) the social utility of the activity creating the risk of harm. A factor that the Court might consider would be the annual income of the institution and the cost of putting certain processes or procedures in place, for example always having two staff members with a child. The courts will implicitly consider the size and capacity of institutions. There is little benefit in prescribing a graduated process which may be inflexible in application.

Recommendation 9: that any provisions do not provide for a graduated definition of 'reasonable steps' according to the type or size of the institution which owes the proposed duty of care. The provisions would confirm that the type or size of the institution may be a factor that the court take into consideration when determining what a reasonable step might be in the circumstances of the case.

11. How could it be ensured that 'reasonable steps' were actually effective to improve the safety of children?

A range of measures were discussed by submitters as to how these reforms could be assessed.

CAWLS supports the provision of training by government to ensure compliance. Bravehearts says a code of practice and an overseeing body may be needed to monitor organisations to ensure they are taking all necessary steps and to ensure that the 'reasonable steps' are actually effective in improving the safety of children. knowmore suggests that entities such as the National Office of Child Safety and the National Centre for Excellence will be able to play a significant role in guiding best practice and in monitoring and reporting on the safety of children.

NAAJA recommends that the government could engage with a research body to determine the effectiveness of the legislation when it does come into effect. The scope of research can be broad, however, the key focus should be assessing the 'reasonable steps' of institutions as a result of legislative reform. This will assist in developing an evidence-based approach.'

Department's comment: As discussed under question 9 above, the National Office should be responsible for the development of adequate documents and resources over time, together with undertaking research to determine the adequacy or otherwise. In November 2016, the Australian Government ceased the development of the Civil Society National Centre for Excellence. The intended role for the National Centre for Excellence was to strengthen and develop civil society organisations operating independently of government. It was to help build the capacity of civil society organisations by, for example, supporting collaboration, education and training and advocacy, and working to reduce reporting requirements and red tape. It is not clear how this would assist in the determining of effectiveness of steps. It is important to ensure that steps are effective and that there is a national uniform approach.

Recommendation: No action required.

2 Identifying a Proper Defendant

The Royal Commission recognised that one of the major impediments to a successful outcome to a claim for damages by survivors of institutional child sexual abuse is being able to identify a legal entity which is both capable of being sued, and that holds sufficient assets to meet that liability. The reasons for this include, particularly in the case of religious institutions, that assets are generally held in a property trust, and while a survivor may also have the option of claiming directly against the perpetrator, that person may have no, or insufficient, assets to meet a claim.

The leading Australian case on the issue of the identification of the 'proper defendant' is *Trustees of the Roman Catholic Church v Ellis and Anor* [2007] NSWCA 117. In that case, the claimant sought to sue the Trustees of the Roman Catholic Church for abuse perpetrated by an assistant priest. The New South Wales Court of Appeal held that the Catholic Archdiocese of Sydney was an unincorporated association and as such could not be sued. The other legal entity which could be sued and which had assets, namely the Trustees of the Roman Catholic Church for the Archdiocese of Sydney, could not be held liable as it was not associated with the management or oversight of religious personnel or the conduct of religious business within the church.

Recognising that the majority of claims by survivors of institutional child sexual abuse are made against religious institutions, and that such institutions are generally 'associated' with a property trust, the Royal Commission recommended [94] that unless such an institution nominates a 'proper defendant' to be sued that has sufficient assets to meet any liability arising from the proceedings:

1. 'the property trust is a proper defendant to the litigation; [and]
2. any liability of the institution with which the property trust is associated that arises from the proceedings can be met from the assets of the trust.'

A legal person includes anybody capable of being sued and is not simply confined to an individual. Other tests talk about legal personality, which means much the same thing.

In order to test parts of these concepts with the community, the Options Paper put forward the Department's recommended approach to adopt a similar approach to that taken by other States in order to implement this recommendation to identify and appoint a proper defendant.

The following thirteen questions were posed in the Options Paper to test community responses to the process to identify and appoint a proper defendant.

12. Should the Royal Commission's 'proper defendant' recommendation be adopted?

There was support from many submitters to adopt the recommendation that a proper defendant be appointed. Some went on to respond to other issues in detail, others did not.

The LSNT suggests that if a nomination is not made by the responsible institution then a permissible alternative should be to sue the trustees of any associated trust. The LSNT says this reform should apply retrospectively as does the New South Wales scheme.

The ALA suggests, rather than having a nomination process, that all aspects and arms of the institution, whether incorporated or unincorporated be made liable through its assets, investments, income and insurance to meet any claims under a ‘close connection’ test. The ALA further says that an insurer should not be allowed to say that the institution and its proper defendant is not the person indemnified under the policy. The ALA further suggests that where a proper defendant is not nominated, the most senior person or head of the institution should be deemed the proper defendant and all assets and insurance rendered liable to meet the damages claim.

NAAJA went on to discuss recommendation 95 which is that governments should review funding arrangements and if funding is given to an unincorporated body, that body should be required to maintain insurance to cover such liability.

Department’s comment: There is broad support for this recommendation being adopted with further refinements as discussed in the following questions. Since the paper was approved for release, other states and the ACT have made or proposed legislative changes.

An insurer (underwriter) should not be able to avoid making a payment to a proper defendant which consents to the appointment or is appointed by a court. Insurance contracts are regulated by the Commonwealth, not states or territories. An insurance contract, or the benefit of it, is property and so an asset, and the benefit of that contract should follow the agreement of the parties or the order of a Court and be available to the proper defendant.

Section 12 of the Victorian *Legal Identity of Defendants (Organisation Child Abuse) Act 2018* provides that indemnity under a policy will extend to a proper defendant. Similar equivalent provisions are section 60(a) and 60(g) of the NSW Act.

The Victorian amendments provide that if an entity is not capable in law of being sued it may nominate, with the consent of the nominee, a legal person as the appropriate defendant to proceedings.

The New South Wales amendments aim to enable child abuse proceeding to be brought against unincorporated organisations. They provide that proceedings may be commenced or continued against an unincorporated organisation as if the organisation had legal personality. The unincorporated organisation may, with the consent of an entity, appoint the entity as a proper defendant if it is able to be sued and has sufficient assets to satisfy any judgment or order that may arise out of the child abuse proceedings. If no suitable proper defendant is appointed within 120 days of proceedings being commenced, the plaintiff may ask that the court appoint the trustees of an associated trust or formerly associated trust.

The Queensland amendments provide for only limited scenarios including allowing proceedings to be started and continued against an incorporated institution that was unincorporated when the abuse occurred, the current office holder of an unincorporated institution, and an unincorporated institution which nominates an appropriate defendant. So far as nominating a proper defendant goes, the institution may nominate a person with the person’s consent to be the appropriate defendant or, if there is no nomination made within 120 days of commencement of proceedings, a court may on request by the claimant order that the trustee of an associated trust is appointed by the court.

The Western Australian amendments provide for a child sexual abuse claim to be commenced against a current office holder of an unincorporated institution and an incorporated institution that was unincorporated at the time of abuse. The Western Australian amendments then provide that the person or institution may satisfy a liability out of assets held by or for the office or the institution including assets of a trust (whether

charitable or not) and that certain personal assets of an office holder will be excluded from use to satisfy such a liability. The Western Australian amendments go on to provide for the deeming of substantially similar institutions or officers as effectively successors in liability for the claim.

The ACT amendments provide that a child abuse claim may be brought against an unincorporated body, which may with the consent of a nominee nominate an entity that is capable of being sued as the defendant for the unincorporated body. If no nomination is made within 120 days of proceedings being commenced, the plaintiff may apply to have a related trust appointed as the defendant. A related trust is a trust controlled by the unincorporated body which the body uses to conduct the body's activities with a list of indicia of control.

Recommendation 95 (discussed by NAAJA in its response to this question and other submitters in other question responses) concerned with incorporated bodies receiving government funding and was referred to the Department of the Chief Minister for further consideration and action. The NT Government's general policy is that it does not enter into funding arrangements with unincorporated bodies, and funding agreements are generally tailored for incorporated entities. There are some exceptions to this arrangement, however generally the NT would not seek to enter into funding arrangements directly or indirectly with unincorporated associations due to the range of issues (recovery of funds, reporting, liability, etc.) that may arise.

Recommendation 10: that recommendation 94 of the Royal Commission be adopted and legislation provide that where a survivor of institutional child sexual abuse wishes to commence proceedings for damages in respect of child sexual abuse and the institution is associated with a property trust, then unless the institution nominates a 'proper defendant' to sue that has sufficient assets to meet any liability, the property trust will be appointed by a court to be the proper defendant to the litigation. This would mean that any liability of the institution with which the property trust is associated arising from the proceedings can be met from the assets of the trust.

13. How would the proposed reforms impact your organisation?

There were very limited responses to this question, perhaps due to the representative nature of the submitters.

The LSNT said it would not be impacted by the reforms, and did not go on to comment as to how the reforms might impact its members or consumers of legal services. NAAJA noted that such reforms which would improve access to justice for victims of abuse may result in increased approaches to it for legal services. Depending on demand that may result in a call by NAAJA for additional funding for its services.

The Department of Education notes that as the implications of the reforms extend beyond the government system and into school councils and boards, non-government schooling sectors and early childhood services, there may be a demand for the Department of Education to provide additional support to those institutions to explain the changes and assist with implementation.

Department's comment: On balance it may be that this question was too tightly drafted. Given the limited number of submissions received, it cannot be assumed that there will be no impact on relevant industries as a result of these reforms.

Recommendation: No matters immediately arise.

14. Should a different model / approach be adopted? If so, what should it look like?

As noted above in the response to Question 12, the ALA suggests, rather than having a nomination process, that all aspects and arms of the institution, whether incorporated or unincorporated, be made liable through its assets, investments, income and insurance to meet any claims under a 'close connection' test. The ALA further says that an insurer should not be allowed to say that the proper defendant is not the person or body indemnified under a relevant policy of insurance. The ALA further suggests that where a proper defendant is not nominated, the most senior person or head of the institution should be deemed the proper defendant and all assets and insurance rendered liable to meet the damages claim.

The LSNT suggests that if a nomination is not made then a permissible alternative should be to sue the trustees of the associated trust. The LSNT supports the adoption of elements of the New South Wales amendments which allow the court to appoint a proper defendant in certain circumstances.

knowmore suggests a provision similar to that contained in the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* (WA) to specifically address the continuity of organisations, in order to link historical institutions to current entities, would be of assistance to deal with factual situations relating to the transition of institutions from the control of one entity to another. knowmore noted that the Bill then introduced by the Queensland Government (on 15 November 2018) contains similar continuity provisions – now section 33P of the *Civil Liability and Other Legislation Amendment Act 2019* (QLD).

Department's comment: The Options Paper had set out some detail of the Western Australian Bill introduced in November 2017. That legislation is now in force, namely the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* (WA), as are the ACT amendments. The Western Australian amendments do provide for different tests for continuity to be applied. It is important to note that even though a company may have been deregistered, it is possible to have it re-instated so long as outstanding fees are paid. Further, this process is not necessary in order to access a policy of insurance that responds to a claim. Section 601AG of the *Corporations Act 2001* (Cth) provides that, so long as a policy of insurance applied at the time, the fact of deregistration will not prevent a person recovering under the policy.

As discussed above, the Western Australian amendments, unlike the reforms in New South Wales, Victoria and Queensland, provide for a child sexual abuse claim to be commenced against current office holders providing that the person may satisfy a liability out of assets held by or for the office or the institution including assets of a trust (whether charitable or not) and that certain personal assets of an office holder will be excluded from use to satisfy such a liability.

The Western Australian amendments go on to provide for the deeming of substantially similar institutions or officers as effective successors in liability for the claims. In Western Australia, the test is that the institution or office is substantially the same as it was when the cause of action accrued. That might include that it is substantially the same as it was at the relevant time if the class or type of member and the primary purposes or work of the institution are substantially the same, which will be the case even if the name of the institution changed, the organisational structure of the institution changed, the institution became incorporated, the geographic area in which the members of the institution carried out the purposes or work of the institution changed.

There is a sound policy basis for the inclusion of office holders as proper defendants as those to bear the defence of a claim and be the one to seek access to records and assets to meet the claim. It is an intermediary step that may avoid stress and delay in identifying an institution to be the proper defendant.

There is also a sound policy basis for including in the reforms a process by which the nomination of a defendant can be ordered by a court. Also there is a sound basis to include provisions for the continuity of organisations.

Recommendation 11: that in order to implement recommendation 94, relevant parts of the *Civil Liability and Other Legislation Amendment Act 2019* (QLD) and the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* (WA) are adopted to include provisions for officers of institutions to also be sued and for them to access the assets of the property or other trusts or institutions in order to meet a judgment or settlement of a claim. Further the Western Australian provisions deeming substantially similar institutions or officers as effective successors should be adopted.

15. Should the consent of the nominee be required before it can be named a proper defendant?

knowmore supports a requirement that the nominee consent to being named as a proper defendant and points to the New South Wales and Victorian legislation which it says both provide for consent to be given.

The LSNT would support the proposition that the consent of the nominee is required before it can be named a proper defendant so long as there is a further safeguard, such as allowing for the appointment of a proper defendant by a court regardless of consent. It points to the Western Australian model as a preferred response.

NAAJA takes the view that no, there is no need for the consent of the nominee to be obtained. Bravehearts and CAWLS support the recommendation (which does not require consent to be given). Bravehearts goes on to support a requirement that organisations be incorporated or be required to have an incorporated proper defendant.

Due to the structure of its submission, the ALA does not respond to this point, but their comments and suggestions generally would tend to indicate that for the ALA consent would not be required before appointing a proper defendant.

Department's comment: The Victorian amendments to the *Wrongs Act 1958* do not provide for a plaintiff to ask a court to appoint an appropriate defendant to proceedings. The Victorian *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* defines an NGO as a non-government organisation that is an unincorporated organisation regardless of whether the body has a written constitution, fixed membership or any other particular attribute. The *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* enables a plaintiff, if the NGO fails to nominate a proper defendant within 120 days to apply to the court for one to be appointed. There is no need for consent.

The New South Wales amendments provide that if no suitable proper defendant is appointed within 120 days of proceedings being commenced the plaintiff may ask that the court appoint the trustees of an associated trust or formerly associated trust. There is no need for consent.

The Queensland amendments provide that if there is no nomination made within 120 days of commencement of proceedings, a court may on request by the claimant order that the trustee of an associated trust is appointed by the court. There is no need for consent.

The ACT amendments provide that if no nomination is made within 120 days of proceedings being commenced, the plaintiff may apply to have a related trust appointed as the defendant. There is no need for consent.

The Western Australian amendments alone do not provide for a court to appoint a proper defendant in the same manner as Victoria, New South Wales, the ACT and Queensland. Rather the Western Australian scheme provides for the making of regulations that a specified current institution is the relevant successor of a specified earlier institution. There is no need for consent.

Recommendation 12: that the reforms provide in the absence of a proper defendant consenting to its appointment within a reasonable period of time, a court on application by the plaintiff is able to name it as a proper defendant.

16. Should nomination (to be a proper defendant) be limited by the nature of the association between the institution and the nominee?

knowmore submitted that the provisions around nomination of a proper defendant should not be overly prescriptive, suggesting that deeming provisions to appoint in any event, will incentivise institutions to consider who a proper defendant should be. The LSNT says there should not be a limit placed on the association between the institution and the nominee, when consent is involved. However, the LSNT says that if a nominee is appointed by a court as a proper defendant, in that case, 'a court should be satisfied of a *sufficient nexus*.'

While it does not specifically address the question, the ALA suggests, rather than having a nomination process, that all 'aspects and arms' of the body, whether incorporated or unincorporated be made liable through its assets, investments, income and insurance to meet any claims under a 'close connection' test. Presumably the ALA would argue that a 'close connection' test be used.

NAAJA submits that nomination should not be limited by the nature of the association between the institution and the nominee. NAAJA cites Victorian legislation which places no restriction around the nomination of proper defendants.

NAAJA says: 'Neither section 7 of the *Legal Identity of Defendants (Organisational Child Abuse) 2018* (Vic), nor section 92 of the *Wrongs Act 1958* (Vic) places any limitations on the nature of the association between an institution and a nominee.'

Department's comment: There is a point of difference to note here – that the test for association for direct liability for a claim by way of control over an employee or volunteer has a different nuance to one for the financial linkages between organisations. They are very similar, yet the outcome is different.

The Victorian amendments to the *Wrongs Act 1958* did not set out a test for the 'association' between the institution and the proper defendant but it was addressed in the *Legal Identity of Defendants (Organisational Child Abuse) 2018* (Vic). That Act provides the same indicia of control that the New South Wales and ACT amendments contain, namely that a trust is an associated trust of an institution if:

(a) the institution has, either directly or indirectly, the power to control the application of the income, or the distribution of the property, of the trust; or

(b) the institution has the power to obtain the beneficial enjoyment of the property or income of the trust, with or without the consent of any other entity; or

(c) the institution has, either directly or indirectly, the power to appoint or remove the trustee or trustees of the trust; or

(d) the institution has, either directly or indirectly, the power to appoint or remove beneficiaries of the trust; or

(e) the trustee of the trust is accustomed or under an obligation, whether formal or informal, to act according to the directions, instructions or wishes of the institution; or

(f) the institution has, either directly or indirectly, the power to determine the outcome of any other decisions about the trust's operations; or

(g) a member of the institution or a management member of the institution has, under the trust deed applicable to the trust, a power of a kind referred to in paragraphs (a) to (f).

The Queensland amendments include similar but slightly modified provisions.

The Western Australian reforms have two separate approaches. On the one hand, an institution may satisfy a liability out of assets held by or for the institution, including assets of a trust (whether or not a charitable trust). The institution may realise assets held or a trustee pay an amount by realising trust assets despite any other law, the terms of the trust or another duty.

The second approach is that set out above in question 14 where either (a) some or all of the earlier institution merged into the institution; (b) some or all of the earlier institution merged with 1 or more other entities to form the institution; (c) the institution is the remainder of the earlier institution after some of the earlier institution ceased to be part of the earlier institution; or in the case where there is at least 1 institution interposed, over time, between the institution and the earlier institution — at least 1 of the circumstances in subsection (4) applies to each link in the chain between the institution and the earlier institution namely (a) – (c) with the addition of (d) of being substantially the same at an earlier time. If the relevant minister recommends such a step being taken, the Western Australian Governor may specify a current institution the successor by regulations. However the minister must be satisfied of the connection between the two or the head of the current institution has agreed to the appointment.

The advantage to a process by which regulations are made is that they then apply for all potential claimants. The other models require each plaintiff to go through the same process with potentially the same institutions and same proper defendants.

Similar provisions apply for continuity of offices.

Recommendation 13: that, in the event that a proper defendant consents to being appointed for the purposes of proceedings, there is no need for a limitation to be placed on or any consideration made of the association between it and the defendant. Where there is no consent given by the proper defendant, then the same indicia of control used in the New South Wales, Queensland and Victorian provisions should be adopted.

17. How can victims obtain access to justice where consent of a nominee is not provided to name an alternative proper defendant?

Some submitters did not respond specifically to this question other than to say they were in favour of the reforms.

knowmore said that the reforms should provide that after a notice of claim is served the trustees of the properly identified associated trust or other entity, which will not consent to appointment, should be appointed as the proper defendant for the institution. They give as

an example section 6N of the *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018* (NSW). This would give the potential proper defendant an opportunity to consent before further steps were taken.

The LSNT repeats its preference set out in answer to question 15 above to allow for the appointment of a proper defendant by a court, regardless of consent. NAAJA repeats that it does not consider consent is required.

Department's comment: The idea of a proper defendant is not only to give a victim a legal person to sue, but also to give them access to the deep pockets that may be hidden a step or two away from the perpetrator and the institution which put the perpetrator in contact with the victim.

A practical issue with the suggestion made by knowmore is that if an institution has ceased to exist, it cannot be served with a notice. Some submitters seem to take the view that the mere incorporation of an institution would somehow ensure that impecunious or non-incorporated bodies are able to be sued and to have sufficient assets to meet an award of damages.

The National Redress Scheme now provides a level of access to justice not previously available to many survivors of institutional child sexual abuse. So long as the relevant institution is participating in the Redress Scheme and the applicant is able to satisfy the independent decision maker of a reasonable likelihood that the abuse occurred, an offer of redress may be made. An offer of redress will contain three parts, a monetary payment of up to $150 000; access to counselling and psychological care; and a direct personal response from the institution responsible for the abuse. A direct personal response may be available as part of the outcome of a court case. Certainly sections 11 – 13 of *the Personal Injuries (Liabilities & Damages) Act 2003* provide for the making of an expression of regret without it being construed as an admission of liability.

Otherwise the available models for the identification of an associated trust provide some guidance.

Recommendation: No matters immediately arise.

18. Are there any other controls that you think are necessary?

The considerations in this question overlap with those in questions 15, 16 and 17.

Bravehearts says that all organisations working with or providing services to children should be incorporated. Further it advocates for the appointment or creation of a 'nominal defendant' (similar to that available for third party compulsory motor vehicle insurance schemes) to be the proper defendant when one does not otherwise exist. Bravehearts says that the nominal defendant should be funded by all unincorporated organisations that provide services to children, based on their size and the extent to which they engage with children.

CAWLS suggests that while the incorporation of institutions may enhance the ability of claimants to bring an action this requirement may also hinder the capacity of organisations to provide services to children, particularly for small, volunteer and not-for-profit organisations.

knowmore favours the New South Wales and Victorian legislation that contain provisions to ensure trustees of an associated trust, when appointed as the proper defendant, have the following: an indemnity for costs from the trust; a limit on liability to no more than the value of the trust; and an immunity from suit for breach of trust (for acting in accordance with their obligations as the proper defendant). This provides a balance for the personal obligations that trustees otherwise have when dealing with trust property and fiduciary duties.

knowmore also favours including an anti-avoidance provision of the type set out in section 6N(2)(b) of the *Civil Liability Act 2002* (NSW), to address the situation where an organisation or institution seeks to restructure an associated trust in such a way so as to avoid the trust property being applied to satisfy liability in a child abuse claim.

NAAJA favours the Victorian scheme which defines an associated trust to mean ‘a trust which an NGO uses to conduct the NGO’s activities and which it controls.’

Department’s comment: The Options Paper only gave section 92 of the *Wrongs Act 1958* (Vic) as an example. Since the paper was approved for release, other states and territories have legislated to give effect to the civil litigations reforms.

There is a sound policy basis, in relation to personal or corporate trustees of an ‘associated trust’, to provide that they are given as part of the appointment of the trust as a proper defendant, an indemnity for costs by the trust, a limit on liability to no more than the value of the trust and an immunity from suit from other beneficiaries or regulators for breach of trust (for acting in accordance with their obligations as the proper defendant).

There is also a sound policy basis for an anti-avoidance provision, similar to those found in insolvency legislation (for example uncommercial transactions) to address the situation where an institution might seek to restructure an associated trust so as to avoid trust property being applied in satisfaction of a child abuse claim. Section 60 sets out the effect of appointment including the precision of indemnities and calls under a policy of insurance. Section 6P sets out the effect when trustees of an associated trust are appointed. A relevant example is section 6N(2)(b) of the *Civil Liability Act 2002* (NSW).

Recommendation 14: that a proper defendant which is a property trust, whether by court order or otherwise, must provide suitable indemnities and limits on liability to the trustees of the property trust in order to shelter them from personal liability for the outcome of the proceedings.

19. Should recommendation 94 apply to all property trusts (including private trusts), or to statutory trusts only?

There was support among the submissions from DIMS, Bravehearts, LSNT, knowmore and NAAJA for applying the Royal Commission’s recommendation 94 to all property trusts. The other submitters did not respond. Recommendation 94 is that unless the institution nominates a ‘proper defendant’ to sue that has sufficient assets to meet any liability arising from the proceedings the property trust is a proper defendant to the litigation and any liability of the institution with which the property trust is associated that arises from the proceedings can be met from the assets of the trust.

knowmore submits that not extending recommendation 94 to all property trusts, both statutory and private trusts, which might be associated with an institution, would undermine the purpose of compelling organisations to provide a proper defendant. They support both the Victorian and New South Wales legislation as to how to broadly define an ‘associated trust’. This is set out above in comments under question 16.

NAAJA supports encompassing all property trusts, statutory and private, within the ambit of recommendation 94 in accordance with the Victorian scheme.

The LSNT supports the recommendation applying to all trusts and also to it having a retrospective effect.

Department's comment: In Victoria *the Legal Identity of Defendants (Organisational Child Abuse) 2018* (Vic) simply refers to 'trusts' as do the New South Wales amendments, the Queensland amendments, the ACT amendments and the Western Australian amendments. That is, the legislation does not limit application to only one type of trust.

While there is support, it should be noted that there may be evidentiary difficulties in identifying and evidencing a non-statutory or private trust. The only immediately obvious statutory trusts in the NT are the *Presbyterian Church (Northern Territory) Property Trust Act 1986* and the *Salvation Army (Northern Territory) Property Trust Act 1976*.

Recommendation 15: that all types of property trusts will be available for appointment as a proper defendant.

20. Do the difficulties in identifying a proper defendant arise in respect of non-religious organisations?

A majority of the submitters responded to this question and they all agreed that yes, there will be difficulties for claimants not having proper defendants to proceedings beyond religious organisations.

The LSNT suggests these difficulties may arise in respect of independent schools or other unincorporated organisations providing services without any connection to a religious institution.

Bravehearts gave an example of Fairbridge Foundation, a secular organisation which denied that they ran a school and denied that they had care of its child residents. The Foundation instead nominated a multiplicity of individuals, groups of individuals, and institutions (other than itself) which, it argued had the running of the school and the charge of the children at various times.

knowmore agreed that there was no reason to exempt non-religious organisations but did not want to disclose details for reasons of confidentiality.

Department's comment: There is no sound policy basis to limit the reforms and the processes to identify and appoint associated property trusts to only religious or faith-based institutions.

Recommendation 16: that all institutions (secular and religious) will be included in the reforms and must appoint a 'proper defendant' or face having a court appoint one on its behalf.

21. Should recommendation 94 apply only to religious organisations?

Four of five submitters who responded agreed that recommendation 94 should apply to all organisations. DIMS took the view that it should not, without providing an explanation.

The LSNT, NAAJA, Bravehearts and knowmore all agreed that it was important that survivors have the same litigation outcomes irrespective of whether the perpetrator was associated with a secular or religious organisation.

Department's comment: There is no sound policy basis to limit these reforms to only religious or faith-based institutions.

Recommendation: recommendation 16 is repeated.

22. What limits, if any, should there be on the association between an institution and an associated trust?

Only a few submitters responded to this question and it is similar in nature to question 16. NAAJA submits that there should be no limitations on the association between an institution and an associated trust to be appointed as a proper defendant.

The LSNT suggests that there should be no limitations other than the general nexus of ownership and/or control: 'Organisations routinely take advantage of different legal structures such as incorporation, trust, etc to manage their affairs, particularly in relation to asset protection and taxation consequences. A family trust that provides services for children is no different in that regard to a religious institution supported by a trust.'

knowmore submits that without extending the obligations to all property trusts, both statutory and private trusts, associated with an institution, would undermine compelling organisations to provide a proper defendant. They support both the Victorian and New South Wales legislation as to how to broadly define 'associated trust'. This detail is set out above in comments to question 16.

Department's comment: In the event of an unwilling institution and proper defendant, a claimant may face similar evidentiary difficulties as do creditors and external company administrators faced with certain uncommercial transactions and other arrangements designed to defeat creditors.

Section 6 of the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic) and section 6N(3) of the *Civil Liability Act 2002* (NSW) may serve as models for a general nexus of ownership and/or control between an organisation and associated trust, including anti-avoidance provisions.

As set out in comments to questions above, it will be a matter for a court to determine with reference to available evidence marshalled by the plaintiff as to whether the proper defendant meets the tests to be appointed. There seems little policy basis to set limits other than those proposed above.

Recommendation 17: that an open ended definition of 'association' be used to establish the connection between an institution and a property trust to be appointed as a proper defendant.

23. Would it be reasonable to require every institution working with children to incorporate, or to have an incorporated 'proper defendant'? What would the impacts of this be?

Most submitters responded to this question.

NAAJA notes that a stipulation that every institution working with children incorporate, or have an incorporated 'proper defendant' would require effort and expense. NAAJA question how a more targeted regime might be established that requires incorporation of a 'proper defendant' in circumstances where an organisation meets a particular risk profile.

The LSNT broadly supports the idea of mandating that institutions which exercise care, control or authority over children be incorporated. It also sees no reason why religious institutions should not be incorporated. It points to the need to ensure that any historic liability could transfer when organisations or agencies change hands or simply transfer accreditations to another agency. The LSNT points out consideration will need to be given to the consequences that ordinarily flow if an incorporated organisation fails to meet its obligations under the *Associations Act 2003* and steps are taken to de-register it.

Bravehearts also supports requiring all institutions that work with children to incorporate.

knowmore makes a distinction between relevant institutions that receive government funding and those which do not. This issue is not relevant for this paper for the reasons set out above about recommendation 95. knowmore supports retaining discretion around imposing incorporation for organisations that do not receive government funding. It says: 'If there are appropriate requirements around the availability of a proper defendant and the existence of a deemed defendant, then there is sufficient incentive for an association to incorporate to provide [for] a proper defendant, or otherwise make one available.'

Bravehearts says that all organisations working with or providing services to children should be incorporated. It takes the view that incorporation would somehow ensure that impecunious or non-incorporated bodies are able to be sued at common law and so not denied access to justice on the basis of the nature of the institution or its financial status.

Department's comment: Requiring relevant institutions to be incorporated will create a regulatory impact on the delivery of services by small, temporary and informal associations that often provide sporting, cultural and other activities in the community. It is not simply the cost of incorporation that would have an impact but the ongoing annual need to provide financial statements and regulatory compliance. If the reforms set out above are implemented, there is no need to have incorporation.

To impose such a requirement would extend beyond recommendation 95 which was that government review its funding arrangements to ensure that funding is only provided to incorporated entities. The NT Government's general policy is that it does not enter into funding arrangements with unincorporated bodies, and funding agreements are generally tailored for incorporated entities. There are some exceptions to this arrangement, however generally the NT would not seek to enter into funding arrangements directly or indirectly with unincorporated associations due to the range of issues (recovery of funds, reporting, liability, etc.) that may arise.

While a requirement for incorporation might go to ensuring there is a proper defendant, it does nothing to assist or ensure that a proper defendant has access to records and evidence with which to answer the claim, and not even the funds necessary to pay a judgment on the

assumption that it will fail to defend itself. That is the point of having a proper defendant approved to the claim.

As noted in earlier discussions, the incorporation of an impecunious institution results in an impecunious corporation. Incorporation may result in a greater longevity for an organisation, but it is no guarantee of financial resources to meet a claim.

While the initial costs of incorporation may not be significant, the ongoing compliance costs to maintain that incorporation can be.

For companies, the costs of incorporation[1] include a fee to ASIC of $495 with an annual ASIC renewal fee of $267. Pre-prepared companies can be purchased (‘shelf companies’) at a cost of between $750 and $1500. The annual renewal process includes the consideration by the directors of the financial statements of the company and the passing of a resolution as to solvency. The preparation of the financial statements can cost between $1 000 to $5 000 depending on the complexity of the business. The financial statements can also be used for taxation purposes. The preparation of an income tax return on an annual basis can also cost between $1 000 to $5 000 depending on the complexity of the business. Corporations of different tiers, based on gross revenue, foreign ownership or charitable status, are required to have financial accounts audited each year. The preparation of an audit report can cost between $4 000 to $6 000. A corporation must hold an annual general meeting each year to appoint directors, approve financial statements and other related matters.

For associations[2], the costs of incorporation are a little less at only $76 and no ongoing renewal fee. Pre-prepared associations are not available for purchase and the legal costs if advice is required or the drafting of a constitution required can be between $1 000 to $2 000. Associations of different tiers, based on gross receipts, gross assets or activity, are required to have financial accounts audited each year. The preparation of an audit report can cost between $4 000 to $6 000. An association must also hold an annual general meeting each year to appoint directors, approve financial statements and other related matters.

It can be seen that the bare costs of complying with annual regulation requirements for a corporation is between $6 500 to $16 500 and for an association $5 000 to $8 000. In addition to these bare costs are the costs of appointing officers, transferring shares or noting membership, updating registers and ensuring that officers are trained to comply with their statutory duties. In addition there are the costs of registering with and complying with the taxation system both Territory and Australian which would be incurred by the organisation in any event.

No other state or territory has legislated for such a reform.

Recommendation 18: that there is no requirement that every institution working with children incorporate, although it is preferred that a proper defendant be available.

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[1] These are for corporations incorporated under the *Corporations Act* (Cth) as at 1 July 2019 for proprietary companies

[2] For associations incorporated under the *Associations Act*

24. Should legislation similar to that proposed by Western Australia be adopted in the Territory? If so, what modifications, if any, would you suggest and why?

The LSNT supports the adoption of provisions, which address the continuity of organisations similar to those in Western Australia, allowing the Governor, on recommendation by the relevant minister, to make regulations naming a current institution as the relevant successor of an earlier institution where there is no current institution that is substantially the same as the institution at the time of the accrual of the cause of action. The NSW Act has a similar provision as to the nomination of a proper defendant only it leaves the role of appointment to the court. LSNT also suggests that being able to commence proceedings in the name of a current office holder would be beneficial and prevent unincorporated institutions defeating the purpose of the proper defendant mechanism by simply refusing to respond to proceedings relying on their inability to be sued.

The ALA supports a provision where, if a proper defendant has not been nominated, the most senior person or head of the institution should be sued and in other circumstances all assets and insurance rendered liable to meet the claim.

Bravehearts advocates for incorporation or a 'nominal defendant' arrangement to be funded by all unincorporated organisations that provide services to children.

knowmore supports continuity of organisations provision similar to those in Western Australia and foreshadows the potential relevance of this issue for the Northern Territory. It says:

> 'The factual setting relating to the transition of institutions from the control of one entity to another can be challenging for survivors and provides uncertainty for our client group, particularly Aboriginal clients, in identifying a proper defendant. knowmore has assisted many Aboriginal clients who were forcibly removed from their families and country and placed in missions, which over time were run by multiple unincorporated care providers and organisations that changed their name over time, such as the Australian Aborigines Mission, an organisation that then changed to the United Aborigines Mission.'
>
> 'The United Aborigines Mission and Aborigines Inland Mission also operated missions in the Northern Territory. We suspect continuity of institutions in identifying a proper defendant will become an important issue in the Northern Territory where historically significant numbers of children were removed. Accordingly, we recommend that the Territory considers the value in adopting similar continuity provisions to those in [Western Australia].'

It should also be noted that Queensland is also seeking to introduce similar continuity of organisation provisions in that jurisdiction (see section 33O of the QLD Act).

Department's comment: There would be an efficiency for groups of survivors if a successor was appointed across the board rather than on an ad hoc basis. Northern Territory should consider adopting provisions for the continuity of institutions, similar to those in Western Australia under that jurisdiction's *Civil Liability Act 2002* (WA), to allow the Administrator, by regulation, to name relevant successor institutions.

For reference see section 33O of *the Civil Liability and Other Legislation Amendment Act 2019* (Qld) and sections 15F and 15G of the *Civil Liability Act 2002* (WA).

Where there was once a corporation involved in the chain with a relevant policy of insurance, it will be important to ensure that the claimant has the ability to apply to access that insurance under section 601AH of the *Corporations Act 2001* (Cth).

Recommendation 19: that provisions similar to those in the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* (WA) are adopted to enable the naming of relevant successor institutions.