

14 April 2015

The Hon Justice Peter McClelland AM
Royal Commission into Institutional Responses to Child Sexual Abuse
GPO Box 5283
Sydney NSW 2001
Australia

Dear Justice McClelland,

SUPPLEMENTARY SUBMISSION ON REDRESS AND CIVIL LITIGATION ISSUES

The Law Council of Australia is pleased to provide the following supplementary submission to the Royal Commission into Institutional Responses to Child Sexual Abuse. This supplementary submission covers issues that have arisen from the Royal Commission's public hearings, including the Law Council's appearance on 27 March 2015 where Commissioner Murray raised a question about the extension of duties for institutions. Additionally, this supplementary submission also details existing rules of conduct, common law and legislation applying to legal practitioners which may impact on matters involving survivors of child sexual abuse.

Extension of duties to individuals in institutions

During the Law Council's appearance on 27 March 2015, Commissioner Murray asked the following question:

In Corporations Law, it was found that a general duty [to take reasonable care]...was inadequate and specific onus and obligations were placed on directors in their individual capacity to exercise care in their functions. Is it your view that there is any class of institution in which that equivalent extension should be applied to individuals, or do you think the reasonable duty of care should just apply generally to the institution?

In answering this question the Law Council has consulted its specialist Committees and some of its Constituent Bodies. The following comments incorporate this feedback, specifically comments from the Business Law Section's Corporations Law Committee.

Members of the governing body and senior executive officers of the institutions that the Royal Commission has in mind may be subject to an equitable duty owed to the institution to exercise due care and diligence, which may be reinforced by contractual duties in the case of executive officers. In this respect their duties, at a conceptual level, would be substantially similar to the general law and contractual duties of company officers.

The general law duty of care and diligence is enforceable only by the institution to which it is owed, subject to an exception to the proper plaintiff rule in *Foss v Harbottle* (1843) 67 ER 189, which allows members of the institution, in limited circumstances, to take derivative proceedings to assert the institution's right to complain of breach of duty.

The statutory duty of care and diligence of company directors and officers has evolved from legislation introduced by amendment to the *Companies Act 1958* (Vic). Nowadays the main significance of having a statutory duty of care and diligence (currently s180 of the *Corporations Act 2001* (Cth)), existing in parallel with the general law and contractual duties, relates to remedies. The statutory duty of care and diligence is a civil penalty provision, enforceable only by Australian Securities and Investment Commission (ASIC) (which may seek a range of remedies) or by the company (which may seek a compensation order).

At the suit of ASIC, the court may make a declaration of contravention, a pecuniary penalty order a compensation order, and a disqualification order. In comparison, the general law duties lead only to an order, at the suit of the company, for equitable compensation or contractual damages.

ASIC has used its power to take proceedings, and in particular the prospect of disqualification orders against directors who breach their statutory duty of care and diligence, as a regulatory tool to establish and enforce standards of good corporate governance, such as in the *James Hardie* and *Centro* cases.

The statutory duty of care and diligence may be enforced by the company seeking a compensation order. Enforcement of the statutory or general law duties by the company is unlikely if the alleged wrongdoers are in control of the company. However, the *Corporations Act 2001* (Cth) allows members of a company to take derivative proceedings to assert the company's rights, in wider circumstances than under the general law governing derivative proceedings.

The directors and officers of institutions that have been formed as companies under the *Corporations Act 2001* (Cth) or its predecessors are subject to s180 and the civil penalty regime, and the jurisdiction of ASIC. That is not the case unless the institution has been formed under companies legislation, although sometimes the legislation under which a body has been formed contains its own statutory duty of care and diligence.

The Business Law Section Corporations Committee advised in response to Commissioner Murray's question:

- (1) individuals who are members of the governing body or senior executive officers of an institution, whether or not the institution has been formed under companies legislation, may already have an equitable duty of care and diligence, and in the case of executive officers a contractual duty of care, owed to the institution;
- (2) however, the cost of litigation may make it unlikely that the general law duty will be enforced by the institution or in a derivative action by members of the institution, and outsiders who are victims of officer negligence do not have the standing to sue officers directly;
- (3) in the case of an institution not formed under companies legislation, members of the governing body and senior executive officers may be subject to a statutory duty of care and diligence according to the legislation (if any) under which the

institution has been formed, although the efficacy of such statutory provisions will depend upon whether there is an active regulator and effective regulation, and it is unlikely that any such legislation would give victims of officer negligence the standing to sue officers directly;

- (4) legislation to apply a statutory duty of care and diligence to all members of the governing body and senior executive officers of non-company institutions would be effective only if adequate arrangements were made for regulatory oversight of the legislation by an adequately funded regulator who is given effective regulatory tools, an outcome that may be difficult to achieve for constitutional reasons, even if there is political will to provide funding for such a regulator; and
- (5) legislation to give any victim of officer negligence relating to child sexual abuse the standing to sue that officer directly would be inconsistent with the general theory of liability of corporate officers and would create unacceptable governance problems for affected institutions.

Application of a solicitor's duties in sexual assault cases involving children

The Law Council also takes this opportunity to provide comment on the application of a lawyer's duties in sexual assault cases involving children. One of the emerging themes from submissions and evidence provided by institutions, survivor groups and the Commissioners has been the special role that lawyer's play.

Legal practitioners are bound by rules of professional conduct. The *Australian Solicitors Conduct Rules 2011* ("ASCR") serve several purposes, including;

- as a standard of conduct in disciplinary proceedings for solicitors; and
- to assist solicitors to act ethically and in accordance with the principles of professional conduct established by the common law and legislation.

There are certain circumstances where the *ASCR* might come into play, including where the client is a victim, the client is an offender who indicates they are a victim (for example at sentencing in mitigation) or where the client as a victim may be faced with related issues, such as drugs/alcohol abuse, mental health problems or homelessness.

The *ASCR* state that the paramount duty for a lawyer is to the court and the administration of justice:

"3.1 A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty"

Other fundamental ethical duties for a solicitor include:

"4.1 A solicitor must also

4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client;

4.1.2 be honest and courteous in all dealings in the course of legal practice;

4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible;

4.1.4 avoid any compromise to their integrity and professional independence; and

4.1.5 comply with these Rules and the law.”

Further, where the common law and/or legislation in any jurisdiction prescribe a higher standard than that of the ASCR, a solicitor is required by the ASCR to comply with the higher standard. Alternatively, if the ASCR sets a higher standard than the common law and/or legislation then it is the ASCR that needs to be observed.

The circumstances of cases may potentially give rise to a multiplicity of ethical challenges. Sexual assault cases could be expected to invoke the responsible use of court processes and privilege. For example:

“21.2 A solicitor must take care to ensure that decisions by the solicitor to make allegations or suggestions under privilege against any person:

21.2.1 are reasonably justified by the material then available to the solicitor;

21.2.2 are appropriate for the robust advancement of the client’s case on its merits; and

21.2.3 are not made principally in order to harass or embarrass a person.

...

21.8 Without limiting the generality of Rule 21.2, in proceedings in which an allegation of sexual assault, indecent assault or the commission of an act of indecency is made and in which the alleged victim gives evidence:

21.8.1 a solicitor must not ask that witness a question or pursue a line of questioning of that witness which is intended:

(i) to mislead or confuse the witness; or

(ii) to be unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; and

21.8.2 a solicitor must take into account any particular vulnerability of the witness in the manner and tone of the questions that the solicitor asks.”

Other related duties for solicitors in the disclosure of sexual abuse of children

Rules regarding confidentiality restrict the disclosure of information provided by the client and acquired by the solicitor to any person who is not an employee of the solicitor’s law practice or a person engaged by the law practice to deliver or administer legal services. The exceptions include:

9.2 A solicitor may disclose confidential information if:

9.2.1 the client expressly or impliedly authorises disclosure;

9.2.2 the solicitor is permitted or is compelled by law to disclose;

9.2.3 the solicitor discloses the information in a confidential setting, for the sole purpose of obtaining advice in connection with the solicitor's legal or ethical obligations;

9.2.4 the solicitor discloses the information for the sole purpose of avoiding the probable commission of a serious criminal offence;

9.2.5 the solicitor discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person; or

9.2.6 the information is disclosed to the insurer of the solicitor, law practice or associated entity.

Obligations to report by solicitors in cases of sexual abuse of children

Certain circumstances can complicate the interpretation of the ASCR. Where a child who suffered from child sexual abuse reaches his/her majority and that person's conduct brings them into the civil or criminal justice system, whether or not a solicitor will have to disclose their clients' past abuse to the police will depend on if it falls into one of the above categories of disclosure. In the situation where a child is currently suffering sexual abuse, State and Territory laws regarding the mandating of disclosure will apply. These laws were comprehensively outlined in a recent report for the Royal Commission, titled *Mandatory reporting laws for child sexual abuse in Australia: A legislative history*.¹ However, State and Territory legislation does not specifically mention the reporting of child sexual abuse by solicitors through child protection legislation.

New South Wales and Victoria have provisions which cover solicitors reporting obligations where the sexual assault of children is currently being committed. In New South Wales under section 316 of the *Crimes Act 1900* (NSW) if an assault amounted to a serious indictable offence, that is punishable by 5 years or more on indictment, a person is obliged to make a report to the police or another appropriate authority where that information might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender. A serious indictable offence could include the sexual assault of children. Legal practitioners are included as a class of prescribed persons under Regulation 4(a) of the *Crimes Regulations 2010* (NSW). Pursuant to subsection 316(4) of the *Crimes Act 1900* (NSW) the Attorney-General would have to approve of a prosecution against a legal practitioner. Penalties can be up to 5 years imprisonment if a benefit is accepted in concealing the offence or 2 years imprisonment where no benefit is accepted.

In Victoria under section 327 of the *Crimes Act 1958* (VIC) if a person over the age of 18 has information that leads to the person forming a reasonable belief that sexual violence has been committed against a child under the age of 16 by a person over the age of 18, they must disclose that information to the police. Unlike the New South Wales offence informants need not belong to any class of occupation, all persons over the age of 18 bear the obligation to report. Therefore, solicitors are covered by section 327. Penalties for breaching section 327 are a maximum of 3 years imprisonment.

¹ Associate Professor Ben Matthews, *Mandatory reporting laws for child sexual abuse in Australia: A legislative history*, Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, August 2014.

At the Commonwealth level, the *Family Law Act 1975* (Cth) creates a mandatory reporting duty for personnel from the Family Court of Australia, the Federal Circuit Court of Australia and the Family Court of Western Australia to report abuse. This applies to a wide range of court personnel and others, including lawyers independently representing children's interests. Section 67ZA states that when in the course of performing duties or functions, or exercising powers, court personnel have reasonable grounds for suspecting that a child has been abused, or is at risk of being abused, the person must, as soon as practicable, notify a prescribed child welfare authority of his or her suspicion and the basis for the suspicion.

The *ASCR* make important distinctions between disclosures of potential past offences and probable future offences. In relation to offences that may have been committed, a solicitor must not disclose client confidential information about those offences unless such disclosure is compelled or permitted by law - for example, under the various Crimes Acts and *Family Law Act 1975* (Cth) provisions mentioned above. In relation to an offence that is anticipated, solicitors may disclose client confidential information for:

- the sole purpose of avoiding the probable commission of a serious criminal offence (*ASCR* 9.2.4); or
- for the purpose of preventing imminent serious physical harm (*ASCR* 9.2.5).

Further, the primary agents who would interact with children where they are currently suffering sexual abuse are likely to be those categories of reporting officers covered under State and Territory legislation, such as doctors, nurses, welfare officers, psychiatrists, teachers and police officers. Should the Royal Commission recommend the development of a non-adversarial forum for the assessment of compensation for survivors, the Law Council would be willing to refer the issue to its Professional Ethics Committee for consideration as to whether special rules may apply.

The Law Council of Australia appreciates the opportunity to provide this supplementary submission to the Royal Commission and looks forward to further engagement with the Royal Commission as it continues to examine justice for survivors of child sexual abuse within institutions.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Martyn Hagan', written in a cursive style.

Martyn Hagan
SECRETARY-GENERAL