In January 2013, the Australian Government announced a Royal Commission into Institutional Responses to Child Sexual Abuse in Australia. As Sharanjit Paddam explains, this wide-ranging Royal Commission may impact liability insurers that have insured institutions in the last 40 years. This article explores the implications for insurers and how potential exposures to claims might be estimated.
It would have been hard to avoid the news headlines on the Royal Commission into Institutional Responses to Child Sexual Abuse over the last year. With prominent members of churches and other institutions being examined in public hearings, the revelations have been shocking to many and all too familiar to others. The Royal Commission’s work has only just begun, but already there have been 13,000 calls, 3,309 victims have come forward and more than 1,000 people are waiting to tell their stories. Thirteen public hearings have been held over 96 days with 219 witnesses and many more hearings are planned.1

The work of the Royal Commission could lead to substantial liabilities for liability insurers that have insured institutions in the last 40 years. This article explores the aims of the Royal Commission, the potential impact on insurers and how insurers might estimate their exposures to claims.

THE ROYAL COMMISSION

In January 2013, the Australian Government announced a Royal Commission into Institutional Responses to Child Sexual Abuse in Australia. This wide-ranging Royal Commission is investigating the sexual abuse of children in both religious and non-religious public and private institutions in Australia since 1970.

The purpose2 of the Royal Commission is to:

► minimise the risk of child sexual abuse in the future by providing recommendations on policy, laws, administrative practices and structural reforms
► provide victims with a forum through which they can talk about the abuse they suffered and gain acknowledgement that such abuse should not have occurred.

Although the Royal Commission does not intend to address matters of individual compensation or criminal prosecution, there has been a special police unit formed to prosecute any perpetrators identified during the inquiry. As of 31 May 2014, the Royal Commission had referred over 160 allegations to the police, as well as noting that a number of participants indicated they would make an independent report to the police.

The Commission provided an interim report on 30 June 2014, which discussed the work to date, but made no recommendations. The final report is due at the end of 2015. However, the response from victims has been overwhelming and the Royal Commission has asked for an extension to 15 December 2017 as well as additional funding to continue its work.

Similar previous inquiries

The Royal Commission follows a similar Victorian Parliamentary Committee investigation into the handling of child abuse in religious organisations, which began in June 2012 and reported on 30 September 2013.

In Ireland, during 1999 to 2009, the Ryan Commission into Child Abuse in Irish Institutions for Children led to the establishment of the Residential Institutions Redress Board to provide compensation to claimants. To 31 December 2013 there have been 16,151 cases processed, with an average award of €62,496 funded by the Irish Government with contributions from religious organisations and their insurers.3

Potential impact on insurers

The Royal Commission has already identified allegations in over 1,000 institutions, although it does not expect to investigate all of them. These investigations may give rise to increased financial compensation and care and support costs payable by churches, charitable organisations, private schools, sports clubs and other organisations involving children. In turn, this may result in additional claims against insurers that provided liability cover to such institutions, although, as will be discussed in detail below, there are significant obstacles for successful claims, including statutes of limitations. Where no insurance exists, the institutions may have to pay compensation from their own assets. The relevant state or Commonwealth governments would face any claims brought against public institutions.

The Commission has brought together victims of abuse who are now able to form class actions against institutions that the Royal Commission concludes had insufficient or inappropriate responses to allegations of abuse. Litigation funders have already indicated that they are researching the potential of funding such class actions. This could trigger substantial liability claims for specific failures by individual institutions. Prior claims might be reactivated where the Royal Commission uncovers additional evidence of abuse, or opens up additional avenues for compensation of victims.

Access to justice

In December 2013, the Royal Commission released an issues paper examining the scope of justice for victims, including the question of financial compensation. The Commission has invited submissions on whether current civil litigation provides an effective form of redress or whether alternatives, such as a redress scheme similar to that established in Ireland, are required.

The civil litigation issues paper considers:

► the existence of an incorporated body that can be sued (in 2007 the NSW Court of Appeal4 found that the Roman Catholic Church could not be held legally liable for abuse cases because the Church doesn’t exist as a legal entity and is also not liable for its priests or their actions)
► assets, including insurance, from which damages could be paid
► whether institutions are liable for the criminal conduct of their employees
► whether regulators are liable for failures of oversight or regulations
► limitation periods and extensions of such periods
► the requirements for bringing a class action
► the existence of relevant records
► the way in which damages are assessed
► the cost of litigation and access to legal services.

“These changes, designed to improve access to compensation for victims, could have a significant impact on the liability of insurers, particularly if the requirements for bringing a class action are reduced.”
The Royal Commission is reviewing civil litigation in all states and territories, and expects to produce a report in mid-2015 recommending changes to civil litigation to improve access to justice for victims. Such recommendations might include making institutions vicariously liable for the actions of their staff, requiring institutions to incorporate and hold insurance, removing limitation periods for claims involving child abuse, and even moving towards an inquisitorial rather than an adversarial legal system.5

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The redress scheme issues paper considers the scope, eligibility and funding arrangements for a redress scheme, including whether it should replace civil litigation, or run in conjunction. Any redress scheme would also have a significant impact on the liability of insurers. Ordinarily, insurance policies would not respond to redress payments. However, insurers could be asked to contribute to the funding of a redress scheme in return for extinguishing their liability to institutions for such claims. Such a contribution would be difficult to estimate due to the widely varying exposures and policy conditions of each insurer, which have also changed over time. Many mergers have occurred and some insurers have gone out of business. Nonetheless, these will be difficult questions for institutions and insurers to resolve and some insurers may agree to a commercial settlement, as such an arrangement would substantially reduce the uncertainty of past claims, as well as bring positive publicity from assisting victims.

CLAIMS TRENDS

Anecdotally, there are indications that the Royal Commission and Victorian investigations have already given rise to an increase in notifications to insurers. However, it is difficult to determine the impact, as any insurance claims arising from these incidents are likely to be settled outside court and not reported publicly. Without pre-empting the Royal Commission’s conclusions, it is also difficult to predict what avenues for financial compensation will be open to victims. If civil litigation is to continue, then there will no doubt be legal questions on the liability of individual institutions, whether or not insurance policies respond, aggregation of claims, allocation of liability to different insurers, and many other issues. Even where a claim is established against an institution, the relevant insurer may not be identifiable, or still operating. Consequently, assessing the exposure of individual insurers is at best problematic, and in a lot of cases almost impossible. However, there are potential approaches that may assist insurers to assess their likely range of exposure.

ESTIMATING LIABILITY

Exposure-based methods to establish the value of the liability consist of the following broad steps:

- establishing the potential exposure based on policy records or market estimates
- estimating the prevalence of abuse and the number of victims
- estimating the proportion of victims reporting abuse, and the impact of insurance coverage and limitation periods
- estimating the resulting numbers of insurance claims and their associated size
- quantifying the resulting amounts of liability. (See Figure 1)

Each of these steps is problematic and in many cases it may be better to consider a range of likely values rather than trying to establish a single best estimate of the relevant factor. For example, the number of policies may not be known with any certainty, but an estimate could be derived based on market share. Insurers keep policy data such as the occupational category of each insured. While these records may not always have been kept, for a major liability insurer these occupational codings might go back some decades. Another method may be to examine the percentage of policy numbers and premium volume for the occupations most at risk for as many years back as the records allow; then extrapolate the trends further back in time. By combining the range of likely values for each factor in each stage of the process, a range can be established for the overall liability.

Exposure

The first stage of the process – identifying affected policyholders, and the number of children exposed, or the number of potential offenders – will depend critically on the quality of any historical information available. In many cases, these records may not exist at all.

Part of the Royal Commission’s work has been to establish a record of institutions, perpetrators and victims. The Royal Commission has stated that where necessary it will share information relevant to law enforcement and any children presently at risk.

There are two approaches to establishing the number of victims of abuse for each institution: either quantify the number of children exposed, estimate the prevalence of abuse and deduce the potential number of abused children; or quantify the number of adults working in the institution, estimate the offender rate and average number of victims per offender, and deduce the potential number of abused children.

Prevalence rates

To estimate offender and victim rates requires detailed research into statistics on child abuse. The report Child Sexual Assault: Facts and Statistics6 by the charity Bravehearts contains statistics on child sexual abuse from a variety of references and studies. Care must be taken as such statistics are necessarily speculative and the methods applied and sample populations differ widely, and may not be relevant to the particular institutions concerned. The Australian Bureau of Statistics’ survey Personal Safety, Australia 20127 is perhaps the most useful and, distressingly, estimates that 12 per cent of girls and 4.5 per cent of boys have experienced sexual abuse. However, it only considers people aged over 15 years and excludes people living in remote areas or in non-private residences, such as institutions, and so these estimates may well be understated.

Through its own research and publications, the Commission is already providing insights into the nature and prevalence of child sexual abuse in institutions. Appendix C of Volume 1 of the Royal Commission’s interim report contains statistics based on the private sessions it has conducted. For instance, the interim report notes that:

- 90 per cent of perpetrators were male
- on average, female victims were nine years old and male victims 10 years old when the abuse started
- on average, it took victims 22 years to disclose the abuse, men longer than women
- 95 per cent of survivors had previously disclosed their abuse and five per cent reported their abuse for the first time to the Royal Commission.

“... assessing the exposure of individual insurers is at best problematic, and in a lot of cases almost impossible.”
The Royal Commission has already completed 21 research projects and is scoping more than 30 additional projects. Two future research projects are on the "prevalence and incidence of child sexual abuse in institutions in Australia", which are likely to provide further useful information.

**Reporting**
Most victims of sexual abuse do not disclose their abuse to authorities, nor do they take legal action against their offenders. It is here the Royal Commission may have the greatest impact in increasing reporting rates and the willingness of victims to seek redress from offenders and the institutions where the abuse occurred.

Historical statistics derived in a similar way to prevalence rates will need to be adjusted to allow for the impact of the Royal Commission, and this may best be analysed using a scenario approach. For example, the liability could be estimated separately for the following scenarios: no change from historical patterns, a five per cent increase in reporting, a 10 per cent increase in reporting, and so on.

**FIG 1. Estimating potential liability for insurers**

<table>
<thead>
<tr>
<th>Exposure</th>
<th>Prevalence</th>
<th>Reporting</th>
<th>Claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Market share/occupational coding</td>
<td>- Offender rate</td>
<td>- Reporting rate</td>
<td>- Numbers of claims</td>
</tr>
<tr>
<td>- Number of potential offenders</td>
<td>- Victim rate</td>
<td>- Insurance coverage and limitations</td>
<td>- Size of claims</td>
</tr>
<tr>
<td>- Number of children</td>
<td>- Numbers of victims of abuse</td>
<td></td>
<td>- Liability</td>
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As noted previously, five per cent of victims approaching the Royal Commission had previously not disclosed their abuse, which suggests a scenario of a five per cent reporting increase. However, this likely understates the potential increase in reporting, as victims who have not previously disclosed their abuse may take longer to come forward to the Royal Commission. Further, the Royal Commission does not have the power to award any compensation, and the prospect of compensation may further increase the reporting rate.

**Claims**

Common policy exclusions against illegal or dishonest conduct and specific exclusions against molestation mean that insurers are unlikely to indemnify perpetrators of sexual abuse for the consequences of their conduct. However, where a perpetrator was employed by an institution, a claim could be brought against the institution under certain circumstances.

To establish a claim against the institution, a victim would have to show that the institution was sufficiently aware of the potential risk and failed to act appropriately, or acted inappropriately. By specifically investigating institutional responses, the Royal Commission could well establish that institutions failed to respond appropriately. By bringing together victims of the same perpetrator, the Royal Commission could also establish that an institution should have known about the risk of abuse because of previous allegations and hence establish a duty of care for the institution. By legally establishing such a duty of care, claimants could then argue that the institution failed to act appropriately.

Even where institutions are found liable for sexual abuse, there are also significant hurdles to successful claims against the insurer, including:

- identifying the policy and the relevant insurer at the time
- establishing whether that insurer still operates or if the liability for past claims has been transferred to another entity
- identifying limitation periods which may reduce the liability.

There are differing limitation periods that apply for each jurisdiction in Australia and these can also vary if the claimant was a minor at the time of the alleged incident. Further, some jurisdictions allow extensions of the limitation period, particularly for minors. There has been significant academic discussion surrounding the psychological barriers to victims of abuse commencing claims before the limitation period expires.

Therefore, while it may seem that many abuse claims may be subject to limitation periods, the extent to which this actually occurs is very uncertain. In practice, insurers are likely to enter into commercial settlement for any claims, irrespective of limitation periods.

Further, the Royal Commission is specifically investigating the extent to which limitation periods are reducing access to justice for victims and may recommend changes to existing limitation periods.

Even if the limitation periods can be overcome and a policy can be identified, there may be significant scope of cover issues, which could also be subject to legal dispute:

- if the institution had elected to deal with the allegations in-house, and not referred the matter to their insurer, then issues of prejudice may arise
- policy references to an accident (being an outcome not expected or intended by the insured) may extend cover to an institution, but not to an offender
- occurrence may be undefined or lack clarity regarding aggregation of claims, particularly where the offender is a serial abuser
- potential exclusions such as molestation, professional duty and exemplary damages may apply
- there may be coverage disputes where there is evidence that the institution knew of the abuse and did not take steps to stop it
- some insurers may have only provided very low policy limits.

**Size of claims**

Most abuse claims are settled for relatively small amounts, as often the victim is not motivated to seek a financial reward and would rather settle out of court and receive an acknowledgement and apology for the abuse. Further, economic loss can be extremely difficult to establish in the absence of physical injury. Most court awards arise under exemplary, punitive and aggravated heads of damages, which tend to be much less than those for economic loss.

Past inquiries into abuse at state institutions in Queensland, Western Australia and Tasmania have led to compensation payments to claimants ranging between $7,000 and $80,000 each. The Catholic Archdiocese of Melbourne currently awards up to $75,000 in compensation payments to victims. The Royal Commission has found that the Catholic Church in Australia has paid over $43 million to claimants since 1997, but does not comment on the number of claimants or the average claim amount.

As noted above, the Residential Institutions Redress Board in Ireland has awarded on average €62,496 to each victim. Insurers may pursue quick commercial out-of-court settlements in order to avoid adverse publicity and minimise legal costs. Alternatively, where class actions have been established, there may be substantial legal costs involved.

While the historical average cost of abuse claims may be relatively low, the Royal Commission’s inquiry into the efficacy of civil litigation in providing redress could also lead to an increase in future settlements. The Royal Commission has already established substantial evidence that the impact on victims of child sexual abuse can be lifelong and devastating. This may well have implications for the cost of care and support to victims, and consequently increase the cost of settlements.

To date, the small size of awards, together with potential aggregation issues, has limited the potential compensation and discouraged legal activity. However, should awards increase as a result of the recommendations of the Royal Commission and aggregation issues be resolved in favour of institutions, then this may stimulate legal firms to pursue compensation on behalf of victims. Litigation funding may also stimulate claims activity.

**THE FUTURE**

In many ways, the Royal Commission has so far raised more questions than answers for insurers. However, it is certain that the impact on both institutions and insurers will be substantial. We can only hope that the victims of past abuse are able to rebuild their lives and that in future all children will get the care and protection they rightly deserve.

Notes

2. Ibid.
5. Royal Commission into Institutional Responses to Child Sexual Abuse Interim Report, 30 June 2014.