

**The Australian response to Institutional
Child Abuse**





The Australian response to Institutional Child Abuse – a snapshot of the common law, the findings of The Royal Commission into Institutional Responses to Child Sexual Abuse and the State by State legislative response

In recent years there has been heightened awareness in Australia of the number of victims of child sexual abuse, particularly in the institutional context, and the many challenges they historically faced in prosecuting their claims.

In response to growing public concern and the findings and recommendations of a Royal Commission inquiry into institutional responses to child abuse, there has been significant legislative reform across multiple State jurisdictions to remove barriers for commencing abuse claims in the courts and to protect children from sexual and other forms of abuse within the institutional setting.

These changes are designed to make it easier for victims of child abuse to pursue civil compensation or alternatively redress against '*institutions*' charged with their care.

However, the practical implications for the institutions and insurers as a result of these changes are yet to be fully explored.

The Common Law Legal Landscape before the Royal Commission

Many of the sexual abuse cases brought prior to the Royal Commission were brought in the context of seeking leave from the courts to extend the limitation period. A major barrier faced by plaintiffs when attempting to seek compensation from institutions many years after the abuse had occurred was the legislative time limits for injury claims.

Of those cases which were prosecuted, the common law provided some guidance about the duty of care owed by schools and institutions for the criminal conduct of those they engaged. However, the courts in those cases were reluctant to extend the duty of care owed by such institutions beyond established common law principles of an employer's non-delegable duty of care, vicarious liability and legal personality.

Lepore – State Educational Authorities

The 2003 decision of the High Court in *New South Wales v Lepore*¹ provides a logical starting point for this area of law. The appeal considered three cases² involving the alleged sexual assaults of school students by State school teachers at their schools.

It was held that where a teacher employed by a State's education authority intentionally commits a sexual assault on a student at school during school hours, a school's non-delegable duty of care does not generally extend to a duty to protect against the intentional criminal conduct of an employee.

There was no clear majority on the States' vicarious liability for the intentional criminal conduct of its employees.

On one hand, Chief Justice Gleeson stated:

'...it may be that...the school context provides a mere opportunity for the commission of an assault. However, where the teacher-student relationship is invested with a high degree of power and intimacy, the use of that power and intimacy to commit sexual abuse may provide a sufficient connection between the sexual assault and the employment to make it just to treat such contact as occurring in the course of employment...'

However, Justice Callinan saw no connection between criminal sexual abuse arising out of the teacher/student relationship, the teacher's employment, and an institution's vicarious liability, highlighting:

'...negligent, even grossly negligent conduct is one thing, intentional criminal conduct is, and always has been altogether another. In my opinion, deliberate criminal misconduct lies outside, and indeed usually will lie far outside the scope or course of an employed teacher's duty.'

Ellis – Religious Institutions

The 2007 New South Wales Court of Appeal decision of *The Trustees of the Roman Catholic Church for the Diocese of Sydney v Ellis*³ considered the liability of religious institutions for child sexual abuse committed by a member of the clergy, with important (and controversial) ramifications for plaintiffs.

In *Ellis*, the plaintiff had commenced proceedings against three defendants, alleging that he was sexually abused while he was a young altar server in a parish of the Catholic Church. The three defendants were George Pell, then Archbishop of the Catholic Church in Sydney (recently convicted for historic sexual abuse), the Trustees of the Roman Catholic Church, and Reverend Aidan Duggan, the alleged perpetrator.

The allegations against Duggan were dropped when he died, but the plaintiff maintained proceedings against Pell and the Trustees, arguing that they were liable directly, or in a representative capacity, for the actions of Duggan.

1 [2003] HCA 4.

2 *New South Wales v Lepore* [2001] NSWCA 112; *Rich and Samin v State of Queensland* [2001] QCA 295.

3 [2007] NSWCA 117.

The Court held that the plaintiff could not sue Pell as the representative of the Catholic Church for the Diocese of Sydney in its name, because the Church is an unincorporated association with no separate legal identity. Further, it was held that the trustees of the Church, as *'the entity which the Roman Catholic Church in the Archdiocese of Sydney adopted and put forward as the permanent corporate entity or interface between the spiritual and temporal sides of the Church'* could also not be sued – it was found that holding property on behalf of the Church does not support the proposition that the trustees are then subject to all legal claims associated with Church activities. The proceedings were dismissed.

This decision has become known as the *'Ellis defence'* – the inability to sue unincorporated associations for compensation for personal injuries sustained as a result of child sexual abuse. This case became a significant barrier to victims of child sexual abuse from seeking compensation directly from the religious institutions for the acts of its members.

Prince Alfred – A clarification (of sorts) on institutional vicarious liability

The High Court's decision of *Prince Alfred College Inc v ADC*⁴ in 2016 considered the liability of a private school for abuse committed by its employees against students.

The case involved a student and boarder at Prince Alfred College who alleged that in 1962, he was sexually abused on multiple occasions by the housemaster of the College, Bain. In 2007, Bain was criminally convicted of two counts of indecent assault against the plaintiff, and counts involving other boarders at the College. In 2008, the plaintiff brought proceedings in the Supreme Court of South Australia, alleging that the College was liable in damages to him on three alternative bases:

- that it had breached the non-delegable duty it owed him; or
- that it was liable in negligence for breaching the duty it owed to him by failing to make proper and adequate inquiries into Bain's suitability for employment at the College; or
- that it was vicariously liable for the wrongful acts of its employee.

The plaintiff's claim was dismissed at first instance as it was considered that the plaintiff could not satisfy the legislative requirements at the time to extend his limitation period. Even if he could, Justice Vanstone did not consider the College to be in breach of its non-delegable duty of care, or in the alternative, the College was not vicariously liable for Bain's criminal conduct.

On appeal, the Full Court of the Supreme Court of South Australia held that an extension of the limitation period should be granted and that the College was vicariously liable for the acts of its housemaster, where the offending was engaged in during the ostensible performance of the housemaster's role.

The College sought special leave to appeal to the High Court, on the issue of the College's vicarious liability for Bain's proven criminal acts. The High Court acknowledged the uncertainty surrounding the approach to be taken in cases of sexual abuse against children in educational, care, or residential facilities, acknowledging that the earlier High Court case of *Lepore* provided little guidance in the area.

The High Court unanimously allowed the College's appeal, finding that the claim was statute-barred under the limitation legislation.⁵ It reasoned that by the time the case was taken to trial, several key witnesses had died and evidence had been lost. The financial settlement between the parties, the length of time, and the loss of key evidence were factors which precluded the possibility of a fair trial.

However, the High Court provided a useful analysis of when a finding of a school's vicarious liability for the acts of its employees might arise. A key statement in the majority's joint judgment was that the fact that the wrongful act in question is a criminal offence does not preclude the finding of vicarious liability, and conversely, the fact that the employment affords an opportunity for the commission of the wrongful act is not of itself a sufficient reason to attract vicarious liability. The appropriate approach to take in these cases is to consider any special role that the employer has assigned to the employee, and the position the employee is placed with respect to the victim.

⁴ [2016] HCA 37 (**Prince Alfred**).

⁵ *Limitation of Actions Act 1936* (SA) s 48.

Particular features such as authority, power, trust, control, and the ability to achieve intimacy with the victim are all factors to be weighed and considered. Where the employee takes advantage of their position with the victim, it may be that the wrongful act should be regarded as committed in the course of employment, and render the employer vicariously liable for that act.

Ultimately, the Court refrained from making a finding on the College's vicarious liability, deeming it inappropriate having regard to the problems arising from the state of the evidence and the prejudiced position in which the College was placed.

Prince Alfred provided the basis for finding a school vicariously liable for the criminal acts of its employees if the employment itself provided both the opportunity and occasion for the commission of the acts.

The Royal Commission into Institutional Responses to Child Sexual Abuse - Recommendations of the Final Redress and Civil Litigation Report

In 2013 a Royal Commission was established to inquire into institutional responses to child sexual abuse.⁶ Shortly following *Prince Alfred*, the Royal Commission into Institutional Responses to Child Sexual Abuse released an interim report in 2015, and its final report in December 2017, the culmination of a five year inquiry into institutional responses to child sexual abuse.

The 17 volume report recommended the complete overhaul of the way institutions, the church, and the State, Territory and Federal Governments view and approach institutional child sexual abuse, after holding private sessions with thousands of people who had been sexually abused as children in institutions.

Three key barriers to civil litigation were identified – limitation periods, a lack of statutory duty owed by institutions, and the *Ellis* defence.

A key recommendation urged the State and Territory governments to introduce legislation to remove any limitation period applying to a claim for damages brought by a person on the basis of sexual abuse of the person as a child in an institutional context. These limitation periods were to be removed with retrospective effect, regardless of whether the claim would have been subject to a limitation period in the past.

Another significant recommendation was the push for States and territories to introduce legislation to impose a non-delegable duty on certain institutions for institutional child sexual abuse, despite the deliberate criminal acts of the offender associated with the institution. In addition to the imposition of a non-delegable duty, the Commissioner recommended that legislation be introduced to render institutions liable for child sexual abuse by persons associated with the institution, unless the institution could prove that it took reasonable steps to prevent the abuse. These new statutory duties and reversal of proof provisions were recommended to apply prospectively.

Another recommendation was that individuals should be able to commence proceedings against a property trust, if a proper defendant to litigation with sufficient assets to meet any liability is not nominated by the institution.

It was recommended that the definition of '*institution*' be wide enough to cover residential facilities for children (including residential out of home care facilities and juvenile detention centres), day and boarding schools, early childhood education and care services, preschool programs, disability services, health services, any other facility operated for profit that provides services for children, and any facilities or services operated by religious organisations. It was proposed that institutions should bear responsibility not just for employees but for '*Persons associated with an institution*' in order to cover a wide range of individuals, including volunteers and religious members.

These recommendations, where implemented, would seek to address some of the barriers which had been faced by the plaintiffs in *Ellis* and *Prince Alfred*.

⁶ *Terms of Reference* of the Governor-General of the Commonwealth of Australia, dated 11 January 2013.

Statutory reforms

Redress

The *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* provides the Commonwealth framework for the National Redress Scheme, a 10 year beneficial scheme designed to provide support to people who experience child sexual abuse.

The Scheme acknowledges children who have been sexually abused in Australian institutions and seeks to:

- hold ‘participating institutions’⁷ accountable for the abuse; and
- help people who have experienced institutional child sexual abuse access counselling and psychological services, a direct personal response and statutory compensation.

A participating institution is one which has agreed to participate in the scheme.⁸

The key intent of the Scheme is to provide a simplified alternative to litigation in the courts in respect of institutional child sexual abuse cases. As such, an applicant for redress must choose between seeking redress under the Scheme or making a civil claim. Once an applicant receives redress pursuant to the scheme, they can no longer make a civil claim for that abuse and must release the institution from all liability for any sexual abuse and related non-sexual abuse. Redress compensation is capped at \$150,000.

All State and Territory governments as well as the Commonwealth have joined the Scheme and legislation is in place in all States and territories to enable non-government institutions to join the Scheme. Many other non-government institutions have committed to joining the Scheme, including the Catholic Church, the Anglican Church, the Uniting Church, the Salvation Army, the YMCA and Scouts Australia.

Since its introduction, there has been some criticism of the Scheme not achieving its objective of providing justice to child sexual abuse survivors and being overly bureaucratic, poorly administered and slow to process claims.⁹

A government committee review¹⁰ has made further recommendations for the improvement of the Scheme with the aim to ‘do no further harm’ to the survivors of sexual abuse including:

- maintaining pressure for all relevant institutions to join the Scheme as soon as practicable;
- increasing the Scheme capped payment to survivors from \$150,000 to \$200,000;
- allowing non-citizens and non-permanent residents to access redress where all other eligibility criteria are met;
- survivors in gaol or those sentenced to imprisonment for five years or more be allowed to apply for, and receive, redress; and
- timely and regular updates to survivors on the progress of their applications.

Removal of time limitation periods

Following the interim Redress and Civil Litigation Report by the Royal Commission into Institutional Responses to Child Sexual Abuse in September 2015, the Victorian and New South Wales governments were quick to enact legislation to remove limitation periods on civil claims for child sexual and serious physical abuse.

Victoria introduced the *Limitation of Actions Amendment (Child Abuse) Act 2015*¹¹ which both removed limitation periods for claims relating to the sexual or physical abuse of a child, and extended the definition of abuse to cover psychological abuse that is related to the sexual or physical abuse. The amendments operate retrospectively.

7 *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) s 13(1)(d).

8 *Ibid* s 115(3).

9 Grace Ormsby, ‘National redress scheme failing victims: report’ 24 April 2019 *Lawyers Weekly* <https://www.lawyersweekly.com.au/politics/25515-national-redress-scheme-failing-victims-report>.

10 Joint Select Committee on oversight of the implementation of redress related recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse, Commonwealth Parliament, *Getting the National Redress Scheme right: An Overdue Step towards Justice*, dated 2 April 2019.

11 Amending the *Limitation of Actions Act 1958* (Vic).

New South Wales similarly passed the *Limitation Amendment (Child Abuse) Act 2016*¹² which removed time limitations for victims who suffered sexual or serious physical abuse when they were under the age of 18. The amendments were also to operate retrospectively.

Queensland passed the *Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill 2016*¹³ shortly thereafter which also removed the civil statutory time limit of three years from reaching 18 years of age for victims of sexual abuse – whether they had been abused in institutions or not.

These amending Acts make clear that nothing in the amendments would affect the court's inherent, implied or statutory jurisdiction. The court retains the power to summarily dismiss or permanently stay proceedings where the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible, as discussed in *Prince Alfred*.¹⁴



Victoria

In 2013 the '*Betrayal of Trust: Handling of Child Abuse by Religious and Other Non-Government Organisations*'¹⁵ was tabled in Parliament and identified some key legal barriers victims of child sexual abuse experience when contemplating issuing legal proceedings against a religious or non – government organisation, namely:

- establishing that an organisation has a legal duty to take reasonable care to prevent child abuse by its members; and
- identifying a legal relationship between the perpetrator and the entity, and convincing courts that organisations should be subject to vicarious liability.¹⁶

As a result of the Betrayal of Trust Report, Victoria was the first jurisdiction to introduce the *Wrongs Amendment (Organisational Child Abuse) Act 2017 (Vic)*¹⁷ that amends the *Wrongs Act 1958 (Vic)*¹⁸ and:

- defines '*relevant organisation*' as an entity (other than a State) 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;¹⁹
- defines '*abuse*' to mean physical or sexual abuse, '*sexual abuse*' means sexual assault or other sexual misconduct, and '*individual associated with a relevant organisation*' includes, but is not limited to, an individual who is an officer, office holder, employee, owner, volunteer or contractor, minister of religion, a religious leader, an officer or a member of personnel of the religious organisation, of the relevant organisation;²⁰
- imposes a statutory duty on organisations to take care that in all the circumstances of the case is reasonable to prevent the abuse of a child by an individual associated with the organisation while the child is under the care, supervision or authority of that organisation;²¹
- where there is proof abuse has occurred and committed by an individual associated with the relevant organisation, the organisation is presumed to have breached the duty of care unless it proves, on the balance of probabilities, that it took reasonable precautions to prevent the abuse in question;²²
- includes some non-exhaustive factors a court can consider when determining whether an organisation took '*reasonable precautions*' to prevent the abuse including for example, the nature of the organisation, the resources reasonably available to the organisation, the relationship between the organisation and the child, the potential delegation of the care, supervision or authority over a child to another organisation, and the role of the individual who committed the abuse, or the role in the organisation of the perpetrator of the abuse;²³ and
- contains a '*caveat*', similar to the common law as discussed in *Prince Alfred* – the duty of care will not apply to the abuse of a child committed by an individual in circumstances wholly unrelated to that individual's association with the relevant organisation.²⁴

12 Amending the *Limitation Act 1969* (NSW).

13 Amending the *Civil Proceedings Act 2011* (Qld), the *Limitation of Actions Act 1974* (Qld), the *Personal Injuries Proceedings Act 2002* (Qld) and the *Personal Injuries Proceedings Regulation 2014* (Qld).

14 *Moubarak by his tutor Coorey v Holt* [2019] NSWCA 102.

15 Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations*, (November 2013) (**Betrayal of Trust Report**).

16 Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations*, (November 2013), XXXIX-XLI.

17 *Wrongs Amendment (Organisational Child Abuse) Act 2017* (Vic) (**Amending Act**).

18 *Wrongs Act 1958* (Vic) (**Wrongs Act**).

19 Amending Act s 88.

20 *Ibid* s 90.

21 *Ibid* s 91(2).

22 *Ibid* s 91(3).

23 *Ibid* s 91(3).

24 *Ibid* s 91(7).

As at the date of this publication there is no judicial guidance on how the courts will determine whether an organisation took 'reasonable precautions' in all the circumstances of the case to prevent the abuse of a child by an individual associated with the organisation while the child is under the care, supervision or authority of the organisation. However, the second reading speech does contain a non-exhaustive list of factors which provide guidance to the courts when considering whether an organisation took 'reasonable precautions' to prevent abuse from occurring.²⁵

The Amending Act also introduced a provision that if an entity is not capable in law of being sued, it may nominate, with consent, another entity to be sued. If a nomination occurs, the nominating entity is to be taken to be the relevant organisation at the time of the abuse and any liability incurred by the entity is taken to have been incurred by the nominated legal person on, and from, the date of the abuse.²⁶

In addition to the Amending Act and in order to address the Royal Commission's recommendations for identifying a proper defendant, the Victorian parliament passed the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018*.²⁷ The *Legal Identity Act* allows child abuse victims to sue an organisational defendant in respect of unincorporated organisations that use trusts to conduct their activities.²⁸ If a plaintiff wishes to commence a claim against an unincorporated association, who later fails to nominate a proper defendant with sufficient assets to the claim, the plaintiff may seek an order from the court that the claim is to proceed against the trustees of an associated trust of the unincorporated organisation.²⁹



New South Wales

Late last year, New South Wales embarked on the civil litigation recommendations made by the Royal Commission by passing the *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018*.³⁰ The Act amends the *Civil Liability Act 2002 (NSW)*³¹ and aims to reform the three significant legal areas as identified by the Royal Commission, in order to provide 'clear pathways to justice for survivors of child abuse in institutional settings'.³²

The Act, passed on 17 October 2018, provides that an organisation is responsible for a child if it (or any part of it) exercises care, supervision or authority over the child (or purports to do so, or is obliged by law to do so). The organisation will still be liable even if it delegates the exercise of the care, supervision or authority of the child to another organisation. If this delegation occurs, both organisations will be responsible for the child.³³ The new statutory duty of care extends to taking reasonable precautions to prevent an individual associated with the organisation from perpetrating child abuse of the child, in connection with the organisation's responsibility for the child.³⁴

The Act also reverses the onus of proof. The organisation will be presumed to have breached its duty if the plaintiff establishes that an individual associated with the organisation perpetrated the abuse in connection with the organisation's responsibility for the child, unless it can prove that it took reasonable steps to prevent the abuse.³⁵ The second reading speech for the Bill emphasised that the organisation must prove that reasonable precautions were taken to prevent the child abuse in question, not just abuse generally.³⁶

25 Victoria, *Parliamentary Debates (Hansard)*, Legislative Assembly, 23 November 2016, 4537, Martin Pakula, Attorney General.

26 *Wrongs Act 1958 (Vic)* s 92.

27 *Legal Identity of Defendants (Organisational Child Abuse) Act 2018 (Vic)* (**Legal Identity Act**).

28 *Ibid* s 1.

29 *Ibid* s 4, 7(1), 8.

30 *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018 (NSW)* (**the Act**).

31 Inserting Part 1B – Child Abuse – Liability of Organisations.

32 New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 September 2018 (Mark Speakman).

33 *Civil Liability Act 2002 (NSW)* s 6D.

34 *Ibid* s 6F(2).

35 *Ibid* s 6F(3).

36 New South Wales, *Parliamentary Debates*, Legislative Council, 17 October 2018 (Scott Farlow).

In determining the reasonableness of any precautions taken, the court may take into account:

- the nature of the organisation;
- the resources reasonably available to the organisation;
- the relationship between the organisation and the child;
- whether the organisation has delegated in whole or in part the exercise of care, supervision or authority over a child to another organisation;
- the role of the individual within the organisation of the individual who committed the abuse;
- the level of control the organisation held over the individual who committed the abuse;
- whether the organisation complied with any applicable child safety standards;
- any matter prescribed by the regulations; and
- any other matter the court considers relevant.³⁷

The Act also inserts Division 3, establishing vicarious liability of organisations. An organisation will be vicariously liable for child abuse committed by an employee of the organisation if the organisation placed the employee into a role that supplies the occasion for the perpetration of the abuse, and the employee takes advantage of that occasion to perpetrate the abuse.³⁸

No doubt mirroring the majority in *Prince Alfred*, when considering whether the performance of the employee's role placed them in the position to commit the abuse, the court can consider the following:

- the perpetrator's authority, power or control over the child;
- the trust of the child in the perpetrator; and
- the perpetrator's ability to achieve intimacy with the child.³⁹

The section is stressed to be in addition to the common law principles of vicarious liability.

The Act also takes a step further to define *employee* as including an individual who is *akin* to an *employee*. This will capture individuals who are carrying out activities as an integral part of the activities carried on by the organisation, doing so for the benefit of the organisation. An individual will not be *akin* to an *employee* if the activities are being carried out for a recognisably independent business of the individual, or the activities carried on by the individual are the activities of the authorised carer carried on in the individual's capacity as an authorised carer.⁴⁰

Key definitions⁴¹ include:

- *organisation* means any organisation, whether incorporated or not, and includes a public sector body but does not include the State.
- *individual associated with an organisation* includes, but is not limited to, an individual who is:
 - » An office holder, employee, owner, volunteer or contractor;
 - » A religious leader (such as a priest or minister) or member of the personnel of the organisation;
 - » An individual designated under the *Children and Young Persons (Care and Protection) Act 1998* as an authorised carer; or
 - » An individual belonging to a class of individuals prescribed by the regulations.

An individual is not associated with an organisation solely because the organisation wholly or partly funds or regulates another organisation.⁴²

³⁷ *Civil Liability Act 2002* (NSW) s 6F(4).

³⁸ *Ibid* s 6H(1).

³⁹ *Ibid* s 6H(2).

⁴⁰ *Ibid* s 6G.

⁴¹ *Ibid* s 6A.

⁴² *Ibid* s 6E.

Finally, the Act permits child abuse proceedings to be commenced or continued against an unincorporated organisation in the name of the organisation.⁴³ The unincorporated association may, with the consent of another entity, appoint the entity as a proper defendant for the organisation at any time.⁴⁴ If child abuse proceedings are commenced against an unincorporated organisation and no suitable proper defendant has been appointed by the end of 120 days, the court may appoint an associated trust of the organisation, or former associated trust of the organisation.⁴⁵ Once the proper defendant had been appointed, the defendant is taken to be the defendant in the child abuse proceedings, and anything done by the unincorporated organisation is taken to have been done by the defendant.⁴⁶

No doubt these provisions were inserted with *Ellis* in mind.

The new statutory duty of care and the vicarious liability provisions apply only in respect of child abuse perpetrated after the commencement the Act.⁴⁷ The provisions relating to unincorporated organisations extend to child abuse that occurred before the commencement of that section.⁴⁸



Queensland

Following the Southern States and public support for legislative reform, the Queensland Parliament has recently proposed changes to State legislation which if passed will impact the conduct of claims against institutions for child abuse (including sexual abuse).

All proposed changes are intended to apply retrospectively and are designed to provide fair access to child abuse survivors who wish to pursue civil claims for abuse and consequent psychiatric injury that occurred within Queensland institutions.⁴⁹

On 31 October 2018, the *Civil Liability (Institutional Child Abuse) Amendment Bill 2018* was introduced. The Bill proposes to amend the *Civil Liability Act 2003*, the *Limitation of Actions Act 1974* and the *Personal Injuries Proceedings Act 2002* to introduce a statutory duty for institutions to ensure that a child under the institution's care, supervision, control or authority does not suffer abuse perpetrated by an official of the institution.⁵⁰

Child abuse means sexual abuse and serious physical abuse.⁵¹ Serious physical abuse is not further defined in the Bill but the explanatory notes provide that consistent with the amendments adopted in the Southern States the definition of child abuse should be consistent with the National Apology delivered by the Federal Government and Federal Opposition in October 2018, where the Federal Parliament unanimously acknowledged *all* forms of child abuse.

Institutions are defined as entities that have children in its care or that provide activities, facilities or programs or services of any kind that allow persons the opportunity to have contact with a child. Here it is irrelevant whether the entity no longer exists, or whether or not it was incorporated.⁵²

43 *Civil Liability Act 2002* (NSW) s 6K(1).

44 *Ibid* s 6L(1).

45 *Ibid* s 6N.

46 *Ibid* s 6O.

47 *Ibid* ss 43, 44.

48 *Ibid* s 45.

49 Queensland Government Media Statement by Attorney-General and Minister for Justice The Honourable Yvette D'Ath, '*Better access to justice for child sexual abuse survivors*', dated 15 November 2018.

50 *Civil Liability (Institutional Child Abuse) Amendment Bill 2018* (Qld) cl 3, s 49D entitled '*Duty of Care of Institutions*', sub-s (1).

51 *Ibid* cl 3, s49C entitled '*Definitions for part*'.

52 *Ibid*.

The explanatory notes clarify that an institution for the purposes of this Bill is defined by function (access to children) rather than structure. That is, the function of having a child in its care, supervision or authority or a function that provides (or provided) activities, facilities, programs or services of any kind giving a person an opportunity to have contact with a child.

This definition is wide enough to cover residential facilities for children, day and boarding schools, early childhood education and care services, preschool programs, disability services, health services, any other facility operated for profit that provides services for children, and any facilities or play group services operated by religious organisations.

An institution may escape liability if it can prove that it took reasonable precautions and exercised due diligence to prevent the relevant child from suffering the abuse.⁵³ In considering whether the institution exercised diligence and took reasonable precautions, the court may look at what resources were available to the institution, the relationship between the child and institution, whether the institution had delegated the care, supervision or authority over the child to another entity, and the role of the official that perpetrated the abuse.⁵⁴

If an institution is not capable in law of being sued, or is not in a financial position to meet a current or future claim, the institution must nominate a proper defendant who is capable in law of being sued, which is related to, or has an association with the institution and has the financial capacity to meet the damages claim.⁵⁵

The intent of this proposal is to capture unincorporated institutions and incorporated institutions which intentionally hold their assets in a trust to avoid exposure to litigation.

The Bill also provides that if the institution fails to nominate an appropriate defendant, a person (a trustee) who holds trust property on trust for an institution, or otherwise benefits from property held on trust, then the trustee may be considered responsible in law for any liability arising out of a breach of the institution's duty of care regardless of whether the breach occurred before or after the person became a trustee.⁵⁶

Where a trustee of an institution is joined as a defendant to the proceedings, the trustee will only be liable to the value of the trust property.

These proposed changes will require institutions to ensure that care is taken by all persons associated with the institution, to prevent institutional child abuse and it looks to cast a wide net to secure compensation for victims from institutions, and if not from the institutions themselves, then from nominated defendants or trustees.

The Bill has been referred to the Legal Affairs and Community Safety Committee. The Committee is scheduled to issue their report on the Bill at the end of April 2019.

Implications for institutions and insurers

This is an emerging and developing area of exposure and risk for institutions and their insurers.

The immediate affect of recent legislative changes will enable victims of child sexual and physical abuse to commence claims for abuse and consequent injury which might have occurred years or even decades in the past. In addition to being able to pursue perpetrators of the abuse, victims will now also be able to seek compensation for historical abuse from those '*institutions*' the perpetrators were '*associated*' with.

53 *Civil Liability (Institutional Child Abuse) Amendment Bill 2018* (Qld) cl 3, s 49D(3).

54 *Ibid* cl 3, s 49D(4)(a) – (d) inclusive.

55 *Ibid* cl 3, s 49E entitled '*Particular institutions must nominate defendant*'.

56 *Ibid* cl 3, s 49F entitled '*Particular trustees may be liable for breach of institution's duty of care*'.

This is a seismic shift for institutional accountability. This means that in addition to concepts of direct liability and vicarious liability for employees, institutions including churches, schools, charitable organisations, care facilities, day care and preschools, sporting clubs and other organisations charged with the care of children, now owe a very broad statutory duty for the criminal actions of perpetrators merely *'associated with these institutions'* unless they are able to prove they took reasonable precautions to prevent child abuse occurring within their institution. The onus of proof has now been reversed, or soon will be, in most jurisdictions. It now rests with institutions to prove the reasonableness of their response. What the courts might consider as a reasonable response in light of these reforms is yet to be considered and it will be interesting to see how the courts might incorporate existing common law principles of duty of care and reasonableness of response.

Institutions can no longer rely upon common law protection conferred by the lack of legal identity (unincorporated associations). They must now nominate a proper defendant if they are unable to meet the damages claimed and if they fail to do so, no longer will an institution's assets held in trust be protected from liability for compensation.

This removal of the legal protections long afforded to institutions and the expansion of institutional duty of care is likely to have a drastic impact upon how personal injury risk is likely to be underwritten for these entities.

There are also practical implications of the recent statutory reform. There are emerging issues for victims seeking redress under the national scheme. Not all institutions are participating institutions. The application process has been criticised by some personal injury law specialists to be complex and lengthy with the consequent delay argued to be potentially damaging to their clients seeking redress as an alternative to litigation.⁵⁷

Such issues are likely to push victims away from redress and towards litigation. As such, insurers are likely to see an increasing number of notifications for historical abuse claims.

For insurers there is some certainty if claims are processed under redress. Depending on the terms and conditions of the policy held, insurers of participating non-government institutions could treat redress payments as compensation or damages under liability contracts. This would allow non-government institutions to be assisted by insurers to meet their liability for redress under existing insurance contracts.

In terms of defending abuse claims in the civil setting, there are further considerations for institutions and insurers of schools, churches and other institutions, to now bear in mind including:

- The identification of the insurer on risk for the relevant period, if any. For some schools and institutions abuse claims are now surfacing which are several decades old. The likelihood of finding records to confirm who the insurer was at the time of the abuse and whether cover would be available is particularly low. Uninsured claims are likely to be particularly prevalent.
- Liability cover for historical abuse claims will depend upon each policy's terms and conditions. There may be particular circumstances where institutions may find themselves without liability cover. This will have a significant financial impact for an institution and will affect the choice of underwriting cover institutions will be seeking.
- The inherent difficulties in defending historical abuse claims. Key witnesses will be difficult to locate, or in some cases, will be deceased. Personnel records, program and class details, incident reports and complaints and other key correspondence will be difficult to locate and are unlikely to be kept either in hard copy or electronically by institutions beyond a certain period of time. Insurers will have to make sure that such documents related to the allegations pleaded are secured and safely stored for the defence of a claim.
- The reputational factors at stake. Such claims need to be handled with sensitivity and awareness of the many competing issues for both the victims and the schools and institutions involved. These types of highly personal and sensitive cases are more likely than not to largely settle out of court.

In time the new amendments that impose a duty on organisations to prove that they had precautions and systems in place to prevent child abuse occurring, may by its very nature, reduce overall rates of child abuse and lower claims in the future. However, we anticipate that further clarification of the ambit of statutory reform will need to occur in the courts before this occurs and that currently schools, churches and other institutions charged with the care of children, and their insurers, need to be abreast of the developments in this area.

⁵⁷ Grace Ormsby, *'National redress scheme failing victims: report'* 24 April 2019 Lawyers Weekly <https://www.lawyersweekly.com.au/politics/25515-national-redress-scheme-failing-victims-report>.

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