

just redemptive outcomes®



CORNEY & LIND
LAWYERS

Responding to child sexual abuse claims Redress and Civil Litigation update

Alistair Macpherson, Managing Director

CMA Conference 2019

just redemptive outcomes®



CORNEY & LIND
LAWYERS

Introduction

Corney & Lind Lawyers Pty Ltd

➤ Mid size Brisbane-based law firm – 18 lawyers + 30 staff

➤ Our focus areas

Schools & Education

Not for Profit & Charity

Commercial

Employment & Discrimination

Personal Injury

Commercial & Construction Litigation

Migration & Visas

Family Law

Criminal & Traffic

Estate & Elder Law

➤ Our lawyers travel to you if needed

➤ Specialist lawyers committed to delivering “*just redemptive outcomes®*” with care and integrity



Summary

- Commonwealth Redress Scheme for survivors of Institutional Child Sexual Abuse
 - *How are claims assessed?*
 - *What will it cost us?*
 - *What about the risk of false claims?*
 - *Should my organisation/church join?*
 - *What is the Review Report saying?*

- Civil Liability Changes
 - *Statute of Limitation and Stay Applications*
 - *Nominating a Proper Defendant*
 - *Assessing civil liability for retrospective claims*
 - *Assessing civil liability for prospective claims*



Overview of Redress Scheme

- *National Redress Scheme for Institutional Child Sexual Abuse Act 2017* – came into effect 1 July 2018
- Three elements of Redress to eligible survivors:
 - (a) monetary payment of **up to** \$150,000
 - (b) access to counselling and psychological services
 - (c) facilitation of a direct personal response
- Operate for a period of 10 years from 1 July 2018
- Objectives – Recognise the wrong; Alleviate the impact; Provide justice for survivors
- Covers sexual abuse and any related non-sexual abuse
- Institution must have “opted in” AND be *primarily* or *equally* responsible for the abuse



Eligibility for Redress

- Commonwealth Redress Scheme Operator makes decisions as representative of the Government
- A survivor must be both **entitled** and **eligible** to redress
- Section 12(2) of the Act – when is a person entitled?
 - (2) A person is **entitled** to redress under the scheme if:
 - (a) the person applies for redress under section 19; and
 - (b) the Operator considers that there is a reasonable likelihood that the person is eligible for redress under the scheme (see section 13 for eligibility)
 - (c) the Operator approves the application under section 29; and
 - (d) the Operator makes an offer of redress to the person under section 39; and
 - (e) the person accepts the offer in accordance with section 42.



Eligibility for Redress

➤ Section 13(1) – when is a person eligible?

*(1) A person is **eligible** for redress under the scheme if:*

(a) the person was sexually abused; and

(b) the sexual abuse is within the scope of the scheme (see section 14); and

(c) the sexual abuse is of a kind for which the maximum amount of redress payment that could be payable to the person (as worked out under the assessment framework) would be more than nil; and

(d) one or more participating institutions are responsible for the abuse (see section 15); and

(e) the person is an Australian citizen or a permanent resident (within the meaning of the Australian Citizenship Act 2007) at the time the person applies for redress.

➤ “sexual abuse” of a person - act that exposes the child to sexual processes beyond the child’s understanding or contrary to accepted community standards

➤ Non-sexual abuse is an aggravating factor when assessing severity

➤ Can extend to overseas abuse, if applicant has become a citizen or Permanent Resident

➤ Section 14: a participating institution must be primarily or equally responsible



When is an institution responsible?

➤ Section 15 – *primarily or equally* responsible for abuse

(a) An institution will be **primarily responsible** abuse of a person if the institution is *solely or primarily responsible* for the abuse having contact with the person.

(b) An institution will be **equally responsible** for abuse of a person if the institution *and* one or more institutions are approximately equal responsible for the abuser having contact with the person, and no institution is primarily responsible for the abuse.



When is an institution responsible?

➤ Burden of Proof

➤ *“Reasonable Likelihood”* – the chance of a person being eligible is real, is not fanciful or remote, and is more than merely plausible”

Contrast:

➤- Criminal Law – Beyond Reasonable Doubt

➤- Civil Proceedings – Balance of Probabilities (higher standard of proof and different test for liability; compensation is higher (general damages, past and future economic loss etc)



When is an institution responsible?

- Circumstances relevant to determining responsibility (not determinative or exhaustive):
 - (i) whether the Institution was responsible for the day-to-day care or custody;
 - (ii) whether the Institution was the legal guardian of the person;
 - (iii) whether the institution is responsible for placing the person into the institution;
 - (iv) Whether the abuser was an official of the Institution; and
 - (v) Whether the abuse occurred:
 - (i) on the Institution's premises;
 - (ii) where activities of the Institution took place;
 - (iii) in connection with the activities of the Institution.
- “Official” – person who is or has been an officer, employee, volunteer or agent of the Institution
 - Broader than vicarious liability
- “Child on Child abuse” – not within the scope of the Scheme unless it involves physical contact or penetration (Rule 6) and Institution responsible



When is an institution responsible?

Requirement for only one application

- Applications for redress are *limited to only one claim* per survivors
- Survivors may address multiple incidents of abuse across multiple institutions in one application
- Only one payment received under the Scheme (but payment may be higher if multiple abuse over multiple institutions)

Internal Review

- Reviews of decision are limited to internal review
- Only available to applicants
- Affirm, vary or substitute the original decision
- No right to seek a merits/judicial review



Power to Request Information

- The Operator *must* request the institution give any information that may be relevant if the applicant has:
 - (a) specifically identified the institution; or
 - (b) the Operator may have reasonable grounds to believe that a participating institution is responsible.
- The Operator *may* request information from an institution if the Operator has reasonable grounds that a participating institution has relevant information
- Request for information must be made by written notice and must include:
 - (a) The nature of the information;
 - (b) How the institution is to give the information;
 - (c) The **Production Period**; and
 - (d) That the notice is given under section 24.
- Production period varies depending on urgency.
- If the institution does not provide information, the Operator may progress the application and make a determination



Institutions and Participating Groups

➤ Participating Lone Institution

➤ Participating Groups

- Two or more participating institutions join together
- A participating group must have a **representative** for the group (e.g. A Denominational Entity)
- Joint and several liability for the *representative* (essentially underwrite all claims)
- Participating Institutions are only liable for claims relating to their activities (not relating to other members of the Group)
- **Caution: For a new institution join, or an institution to leave, a Participating Group, all other institutions in the Group must agree**



Offer of Redress

- Remains open for acceptance for 6 months
- Counselling payment (maximum of \$5000, depending on type of abuse)
- Payment for Legal Advice
- Redress Payment:
 - Depends on severity of sexual abuse and related non-sexual abuse
 - Maximum of \$150,000
 - Previous payments to person taken into account (indexed)
 - Anticipated average payment will be \$50,000 - \$100,000, with additional \$50,000 for extreme circumstances
 - Calculated in accordance with Abuse Assessment Framework
- Institution and Officials (including other institutions in the Participating Group) released and discharged from further liability
- No release for the Abuser or other Institutions
- Offer can be declined (and civil litigation pursued)



Direct Personal Response

- At request of the survivor
- Institution must take reasonable steps to give a direct personal response as soon as practicable
- Kind, method and place of delivery (i.e. face to face, in writing) to be agreed with the survivor
- Includes:
 - An apology or statement of acknowledgement/regret
 - An acknowledgement of the impact of the abuse
 - An assurance of the steps taken to prevent abuse occurring again
 - An opportunity to meet with a senior official
- Survivor should be given a choice of representatives (gender, cultural diversity)
- Would need to be delivered by a trained person
- Need a complaints process for dealing with complaints
- Once given, no need to provide again
- Institution must provide reporting to the Scheme each financial year



Persons not eligible

- Person sentenced to imprisonment for 5 years or longer
- Designed to protect Scheme from fraud
- Operator can make an exception, if satisfied that it would:
 - Not bring the Scheme into disrepute; or
 - Adversely affect public confidence or support for the Scheme
- Decision made following submissions made by the relevant Attorney General



Impact on those accused of Sexual Abuse?

- No release from civil liability
- A determination has effect only for the purposes of the Scheme. However a Determination is not a finding of law or fact
 - Note in Act (section 36): “The determination is an administrative decision hat is made by the Operator on the basis of whether the Operator considers there to be a reasonable likelihood that the person is eligible for redress. It is not a judicial decision made by a court in civil or criminal proceedings on the basis of a higher standard of proof”
- Following documents are not admissible in civil proceedings:
 - An application for redress (or documents created to accompany the application)
 - An document created to respond to the Operator’s Request for Information
- Information Sharing provisions – between the Scheme and Law Enforcement Bodies



Advantages

- Right the wrong
- Closure for victims – Direct Personal Response, Counselling and Redress Payment
- Independent decision maker removes allegation of bias
- Discharge and Release from civil liability (if offer is accepted)
- Amount awarded to survivors under the scheme significantly lower than damages awarded by a Court
- Significant reputational risks for institutions who do not opt-in



Concerns

- Claimants can reject offer and commence civil litigation (Anecdotal indication is that NWNF Lawyers are recommending civil litigation for stronger claims, and Redress for weaker claims)
- Difficult to estimate potential liability under the Scheme
- Institutions not afforded a right to appeal
- Lower evidentiary basis (*reasonable likelihood*)
- Insurers may not cover liability under the Scheme
- Liability can extend to child on child sexual abuse (but Responsibility of Institution remains)
- Representative jointly and severally liable for members of participating group



Joint Select Committee Report

Getting the National Redress Scheme Right: An Overdue Step Towards Justice (April 2019)

29 Recommendations

- Any amendments to the Scheme be on the principle of “do no further harm to the survivor”
- Governments place pressure on institutions to join as soon as practicable
- Consider suspending tax concessions of any charity that refuses to participate
- Relevant government become the funder of last resort for defunct institutions
- Extend eligibility to include all non citizens and non permanent residents
- Remove the exemptions relating to prisoners, with exclusions by individual exception and set with a high threshold to protect the scheme from disrepute



Joint Select Committee Report

Getting the National Redress Scheme Right: An Overdue Step Towards Justice (April 2019)

- A new assessment matrix that moves away from the type of abuse as determinative of the impact on the survivor (with re-assessment of all approved claimants)
- Government to explain why the maximum was set at \$150,000 rather than \$200,000
- Minimum payments of \$10,000 (where the claimant is receiving less because of prior payments)
- Increased amounts for counselling to last the survivor's lifetime
- Legislative amendments to ensure that any review of a claim does not result in a lower compensation payment



Statute of Limitations

1. Abolishing the statute of limitations

- Generally, three year time-limit for civil proceedings (or for children, three years from the time the child turns 18 years of age).
- ALL States have removed the statutory limitation period for commencing a claim arising from child sexual abuse.
 - Queensland, Western Australia and ACT – limited to *sexual abuse* only. Other states – claim can include associated physical or emotional abuse.
- Court retains discretionary power to summarily dismiss or permanently stay proceedings if the lapse of time has a burdensome effect on the Defendant *to the extent that a fair trial is not possible*.



Statute of Limitations

Connellan v Murphy (Connellan) [2017] VSCA 116

- Plaintiff initiated proceedings against the Defendant, alleging that he, his brother and another male named “Eugene” sexually assaulted her in approximately 1967/1968.
- She was approximately 13 years old at the time. The alleged perpetrators were approximately the same age.
- She claimed that she stayed with the Defendant’s family for a short period (approximately a week) after her father died and the assaults occurred during this time.
- While the alleged perpetrators are still living and available to give evidence, the only potential witnesses who were adults at the time are deceased and the locations involved are significantly altered. The claims made by the Plaintiff were vague and occasionally inconsistent and unable to be tested due to the 50 year lapse in time.



Statute of Limitations

Connellan v Murphy (Connellan) [2017] VSCA 116

“In determining whether a proceeding should be stayed as an abuse of process, the authorities to which we have already referred disclose the following propositions:

1. In order to justify the grant of a stay, a defendant bears a **heavy onus**. A stay is ordinarily only granted in exceptional circumstances, because it effectively brings to an end litigation without adjudication.
2. The categories of abuse are not closed.
3. In particular, the concept of an abuse of process is not confined to cases in which, if the action were to proceed, the defendant would not receive a fair trial.
4. The fundamental test is whether in the circumstance, the proceeding would be manifestly unfair to the defendant or would otherwise **bring the administration of justice into disrepute** among right-thinking people.



Statute of Limitations

In the estate of Judd; Ex parte Knight (Estate of Judd) [2018] NSWSC 462

Garling J, “not satisfied that any hearing of these proceedings would be manifestly unfair to the Estate or would otherwise bring the administration of justice into disrepute among right-thinking people” for the following reasons:

1. The claimant in each case was alive, in reasonably good health and able to be fully cross-examined and challenged on his account of the events and all the surrounding circumstances;
2. The credibility of each of the claimants is able to be challenged having regard to their criminal histories or other material reasonably available about their conduct and reputations;
3. Previous histories given to medical practitioners and other historical documents can be examined for consistency and challenged if appropriate;
4. Buildings in which the events are said to have occurred are still in existence and descriptions given by any claimant of features of the relevant house can be readily checked.

On appeal



Statute of Limitations

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

- Permanent stay of proceedings ordered on appeal to NSW Court of Appeal.
- Niece brought a claim in relation to allegations of sexual assault by her uncle in 1973-1974 when she was 12 years of age.
- Defendant was alive but in advanced stages of dementia – medical reports confirmed that the Defendant no longer comprehended English (not being his first language), was unable to walk independently and could not respond to questions or instructions – doctor therefore concluded that he was unable to be interviewed.
- The Defendant was never confronted about the abuse allegations before his dementia diagnosis.

“The power to stay a claim is exceptional and should only be exercised in extraordinary cases. But that is this case. Mr Moubarak cannot speak, understand or communicate, let alone instruct or give evidence, in circumstances where decades have passed and he has never been confronted with the detail of the allegations. A fair trial is impossible”.



The Proper Defendant

- Historically, plaintiffs have struggled to bring claims against unincorporated associations (tortious liability – rests on the Committee Members of the unincorporated association *at the time the abuse occurred*).
- *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* [2007] NSWCA 117
 - The plaintiff was an altar server at the Bass Hill Parish of the Roman Catholic Church.
 - He alleged that he was sexually abused by the assistant priest at that Parish, Father Aidan Duggan.
 - The plaintiff sued three defendants:
 - Cardinal Pell on behalf of the Roman Catholic Church in the Archdiocese of Sydney (first defendant);
 - The Trustees of the Roman Catholic Church for the Archdiocese of Sydney (second defendant);
 - Father Duggan (third defendant).



The Proper Defendant

- Court of Appeal found that the first and second defendants were not liable.
 - Persons or groups within an unincorporated association can be held personally liable in tort or contract where they have assumed an active or managerial role at the relevant time.
 - The relationship between members of a church such as the Roman Catholic Church and individual officeholders in that church is too far remote to establish agency in contract or vicarious liability in tort.
 - It was arguable that the appointment and licensing of Father Duggan by Cardinal Freeman was sufficient to render that now deceased person directly liable (if negligence can be established in failing to vet the appointee) and vicariously liable for the appointee's torts committed in the course of his engagement as a priest under the control of diocesan authorities.
 - The Trustees had a limited property-focused role: While church trustees have been sued for torts without complaint, this does not mean trustees who hold property on behalf of the church can be rendered subject to all legal claims associated with church activities



The Proper Defendant

➤ Reforms in QLD, NSW & VIC:

- Plaintiff may commence action against Unincorporated Association
- Unincorporated association may nominate a corporate entity to act as the proper Defendant to proceedings;
- If no proper Defendant nominated by the Unincorporated Association within 120 days, the Court may make an order that the claim proceeds against an associated corporate entity or trust.



Basis for Civil Liability

Historical claims are judged based on legal principles as in effect at the time of the abuse

- Vicarious Liability
- Non-Delegable Breach of Duty
- Breach of Duty of Care

Vicarious Liability

- An employer will be vicariously liable for torts committed by employees acting ‘in the course of employment’: *Sweeney v Boylan Nominees Pty Ltd* [2006] HCA 19. A volunteer is not an employee.
- The meaning of “in the course of employment” is not always clear.
“Not everything that an employee does at work, or during working hours, is sufficiently connected with the duties and responsibilities of the employee to be regarded as within the scope of the employment,” per Gleeson CJ in *New South Wales v Lepore* [2003] HCA 4 at [40].
- Sexual abuse often will not be found to have occurred ‘in the course of employment.’
- Volunteers are not employees



Basis for Civil Liability

Prince Alfred College Incorporated v ADC [2016] HCA 37

- The plaintiff was a boarder at Prince Alfred College. He alleged that a housemaster of the boarding house sexually abused him on a number of occasions at the school and elsewhere.
- The plaintiff claimed the College was vicariously liable for the conduct of the housemaster.
- He asserted that the sexual abuse was perpetrated in circumstances where there was a close connection between what was done by the housemaster and what he was employed to do.
- High Court (Majority Decision):
 - *The fact that a wrongful act is a criminal offence does not preclude the possibility of vicarious liability.*
 - *Conversely, the fact that employment affords an opportunity for the commission of a wrongful act is not of itself a sufficient reason to attract vicarious liability.*
 - *The role given to the employee and the nature of the employee's responsibilities may justify the conclusion that the employment not only provided an opportunity but also was the occasion for the commission of the wrongful act.*
 - *It may be sufficient to hold an employer vicariously liable for a criminal act committed by an employee where, in the commission of that act, the employee used or took advantage of the position in which the employment placed the employee vis-à-vis the victim.*
 - *In determining whether the apparent performance of such a role may be said to give the "occasion" for the wrongful act, particular features may be taken into account. They include authority, power, trust, control and the ability to achieve intimacy with the victim.*



Basis for Civil Liability

Non-Delegable Duty of Care

- A non-delegable duty of care is, most broadly, a duty to ensure that a third party takes reasonable care to prevent harm.
- This type of duty arises in circumstances where a person or corporation owes a duty of care and entrusts that duty of care to another.
- For example, an education authority must ensure that the supervision of children is carried out with reasonable care. That is, that the pupil is so supervised that he or she does not suffer harm: *New South Wales v Lepore* [2003] HCA 4.
- It is unclear whether a non-delegable duty can make a person or corporation liable for another's intentional tort.



Basis for Civil Liability

Negligence

- There are three elements in a negligence claim:
 1. The defendant must have owed the claimant who was sexually abused as a child a duty of care.
 2. The defendant must have breached that duty by failing to exercise the care that a reasonable person in the same position would have exercised.
 3. The damage suffered by the claimant was caused by that failure to exercise reasonable care.
 4. The breach of that duty has caused the claimant's damage.
- Claimants can have difficulty meeting each of these elements. There are few decided cases in Australia, and each is decided on the individual circumstances.
- This is particularly the case for historical claims, where evidence is lacking and appreciation of the risk of child abuse (at the time) was much less than today.



Basis for Civil Liability

3. Proposed Changes for Prospective Claims - Duty of Care & Onus of Proof

- Royal Commission recommended introducing a non-delegable duty of care and reversing the onus of proof in historical sexual abuse matters (to apply prospectively **only**).
- *Wrongs Act 1858* (Vic) amendments:
 - **Section 91(2)** – An organisation owes a duty to take the care that in all the circumstances of the case is reasonable to prevent the abuse of a child by an individual association with the organisation whilst the child is under the case, supervision or authority of the organisation (**non-delegable duty**).
 - **Section 91(3)** – the organisation is presumed to have breached the duty of care unless the organisation proves on the balance of probabilities that it took reasonable precautions to prevent the abuse (**reverse onus**).
- Similar amendments have been introduced in NSW, and proposed in QLD. Other States have indicated that they accept the Royal Commission's recommendations, but are yet to action any amendments.



Basis for Civil Liability

3. Duty of Care & Onus of Proof

➤ Civil Liability Act 2002 (NSW), section 6F - Matters the Court may have regard to when determining whether an organisation took reasonable precautions to prevent child abuse:

- 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 in the organisation of the individual who perpetrated the child abuse;
- The level of control the organisation had over the individual who perpetrated the child abuse;
- Whether the organisation has complied with any applicable standards in respect of child safety.
- Any other matters the Court considers relevant.



Successor Entities

4. Liability for Successor Entities

- Historically, plaintiffs have struggled to identify a defendant to claims where organisations have been subject to a merger or acquisition and no longer exist in their previous form.
- Amendments to *Civil Liability Act 2002* (NSW):
 - New Section 6C – “An organisation and any successor of that organisation are... taken to be the same organisation”.
 - ‘Successor’ undefined. No case law yet published to provide judicial interpretation of this term.
- Amendments proposed but not yet passed in Queensland - Section 330 *Civil Liability and Other Legislation Amendment Bill 2018*:
 - *“An institution (the current institution) is taken to be the same institution as the institution that breached its duty (the old institution)... if it is substantially the same as it was when the relevant cause of action accrued, even if: its name has changed; or its organisational structure has changed; or it has become incorporated; or its functions and activities are carried out at a different place.*

just redemptive outcomes®



CORNEY & LIND
LAWYERS

Contact



Name: Alistair Macpherson

Position: Managing Director

Email: alistair.macpherson@corneyandlind.com.au

07 32520011

www.corneyandlind.com.au