

Between the Lines

2 July 2018

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Further barriers removed for victims of child sexual abuse

In April 2016 this publication reported on the removal in NSW of limitation periods for child sexual abuse claims. In November 2016 we discussed the influential High Court decision of *Prince Alfred College Incorporated v ADC* [2016] HCA 37. The latest refinements to this area of law are the **1 July 2018** proclamation of the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Bill 2017* (Western Australia) and the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Victoria) .

Western Australia

Part 2 of the Bill amends the Western Australian *Civil Liability Act*. The amendments include provisions that grant claimants access to the assets (including trust assets) of unincorporated associations and permit claimants to sue certain persons or bodies where otherwise there might be no valid legal entity to sue (to overcome the “Ellis Defence”).

Part 4 of the Bill amends the Western Australian *Limitations Act*. A new section 6A is inserted into that Act, which as per the NSW legislation removes limitation periods for child sexual abuse actions. Like the NSW legislation it specifically preserves a Court’s right to dismiss or permanently stay an action where the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible. It also contains a mechanism allowing plaintiffs to commence proceedings on previously barred causes of action **and previously settled causes of action**.

The Courts in applying those provisions “*may, if satisfied that it is just and reasonable to do so*” set aside previous judgments (that a claim is statute barred) or settlement agreements and grant a claimant leave to commence fresh proceedings. In the case of settlement agreements, the Court “*may, if satisfied that it is just and reasonable to do so, take into account any amount paid under an agreement*”, to the extent that the amount related to child sexual abuse. If a settlement agreement only partially related to child sexual abuse, the Court is to apportion the amount to deduct, or adopt a figure of 50% if the agreement does not disclose the extent to which the settlement amount related to child sexual abuse.

Victoria

Having been the first Australian jurisdiction to remove limitation periods for child sexual abuse claims, on 1 July 2018 the Victorian legislation commenced to overcome the Ellis defence. Non-government organisations (NGO) if subject to a child abuse claim are to nominate a legal entity to be sued. If no, or no valid defendant is nominated, the Court can appoint an entity or trust of appropriate means, the assets of which will be available to the claimant. Insurance policies covering the NGO are deemed to cover the nominated defendant.

Our summary of the child sexual abuse civil litigation regime in each State and Territory is below (as at 2 July 2018):

State	Limitation Period Removed?	Can re-open settled cases?	Abolished Ellis Defence?
ACT	Yes	No	No, but under consideration
NSW	Yes	No	Not yet, but announced
NT	Yes	Yes, if the settlement related to limitation period	No
QLD	Yes	Yes	No, but under consideration
SA	No, but a Bill is currently before the Parliament	No	No
TAS	No, but a Bill has passed the Parliament	No	No
VIC	Yes	No	Yes
WA	Yes	Yes	Yes

Summary

The Western Australian and Victorian legislative changes are further steps toward the States and Territories removing barriers to litigation for victims of child sexual abuse. Gradually and with some exceptions, the States and Territories are moving towards alignment with the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.

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