Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

Justice Legislation (Organisational Liability for Child Abuse) Amendment Bill 2019 – Draft legislation

Submission to Tasmanian Department of Justice

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

The ALA office is located on the land of the Gadigal of the Eora Nation.

[1] www.lawyersalliance.com.au.

Introduction

1. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the draft *Justice Legislation (Organisational Liability for Child Abuse) Amendment Bill 2019* (TAS) ('the draft bill'), which was drafted to implement a number of recommendations from the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission).

2. The ALA is generally supportive of the draft bill and considers that there is much to be commended in the proposed legislation.

The definition of child abuse

3. The ALA considers that the definition of child abuse at s49L is commendable. It is identical to the definition contained in the *Civil Liability Amendment (Organisational Child Abuse Liability) Act* 2018 (NSW) ('the NSW legislation') and is similar to the Victorian legislation.

Non-delegable duties

4. Section 49F says an organisation is responsible for a child if it exercises care, supervision or authority in respect of the child. It remains responsible even if it delegates care, supervision or authority.

5. The Royal Commission recommended non-delegable duties. However, in *State of NSW v Lepore* (2003) 212 CLR 511, only one of the seven members of the court thought this an appropriate remedy and several members of the majority noted that in certain circumstances, non-delegable duties are delegable. Most members of the majority were of the view that vicarious liability was a more appropriate remedy.

6. The leading English case on non-delegable duties is *Woodland v Essex County Council* [2013] UKSC 66 but in *Armes v Nottinghamshire County Council* [2017] UKSC 60, the Supreme Court considered vicarious liability a more appropriate remedy to those abused in foster care against the County Council which appointed the foster parents.

7. In any event, the provision in respect of non-delegable duty is prospective only under s5, so it provides no remedy to existing victims. The Royal Commission found that on average it took 22 years from last abuse to first reporting, so that whatever (limited) use this provision is, it will not assist victims for a very long time in most cases.

Negligence and associated individuals

8. Section 49G makes volunteers and priests and others, who are not strictly employees, the same as employees for the purposes of claims in negligence. That would be commendable were it not for the fact that s5 renders this and the associated s49H prospective only. For the reasons set out above, this is of no assistance to existing victims or to most future victims for a very long time.

9. Section 49H reverses the onus of proof. Again, this provision is prospective only and, accordingly, is of no comfort to existing victims nor even, for the reasons set out above, to prospective victims for a long period. In any event, it is of very limited assistance. There is an immense difference in power and finances between victims and the institutions they may wish to sue in negligence. Records are often not kept or go missing. Legal aid is generally unavailable to victims. All an institution need do is adduce some evidence that it had some sort of system in place for there to be an effective reversal of the evidentiary onus. The legal onus may remain on the defendant but the evidentiary onus readily shifts to the plaintiff. The institution can then use its resources to draw out the proceedings and drive a very hard bargain. Reversal of onus accordingly is of very limited assistance to victims.

Vicarious liability

10. Section 49I makes those in employment-like situations (including volunteers and priests) effectively employees for the purposes of vicarious liability. That is commendable, or it would be if the provision was not purely prospective under s5.

11. It is not clear in Australia that vicarious liability is restricted to employees. It is true that such a suggestion can be inferred from one element of the *Ellis* defence in *Trustees of the Roman Catholic Church for the Diocese of Sydney and Pell v John Ellis* [2007] NSWCA 117. However, in *Scott v Davis* [2000] HCA 52, Gleeson CJ at [6] said that temporary management can give rise to vicarious liability without employment although Hayne J at [301] said this is so only if the person delegating the task stipulates that he or she will have the right to control the way in which it is performed. In *Catholic Child Welfare Society v Various Claimants* [2012] UKSC 56, Lord Phillips (for the Supreme Court) said that, for vicarious liability, the individual did not have to be an employee but merely acting for the organisation. That case confirmed a series of earlier decisions, including *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256; *JGE v The English Province of Our Lady of Charity*

and the Trustees of the Portsmouth Roman Catholic Diocesan Trust [2011] EWHC 2871 (QB). This approach was affirmed most recently in *Armes (Appellant) v Nottinghamshire County Council (Respondent)* [2017] UKSC 60, where the County Council was held vicariously liable for foster parents. A similar view has been taken in Canada: *John Doe v Bennett* [2004] 1 SCR 436 at 446 and *EB v Order of the Oblates of Mary Immaculate in the Province of British Columbia* [2005] 3 SCR 45. Most recently and in a non-employee/non-sexual abuse case, vicarious liability applied in *Cox (Respondent) v Ministry of Justice (Appellant)* [2016] UKSC 10.

12. The *Prince Alfred College v ADC* [2016] HCA 37 decision at [81] refers to vicarious liability for employees but that was in the context of a case involving an undoubted employee. It did not determine whether and in what circumstances vicarious liability applied beyond employees. It is distinctly possible that the old High Court decision in *Deatons Pty Ltd v* Flew (1949) 79 CLR 370, where it was said the employer would have been liable for the conduct of the person in charge of the bar but not for the barmaid who glassed a patron, would get a very different reception today. It is relevant that in *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11, an employer was found liable for an assault by an employee on a customer in vicarious liability. Lord Toulson (with whom Lord Newberger, Lady Hale, Lord Dyson and Lord Reed agreed) poured scorn on the High Court decision in *Deatons Pty Ltd v Flew* by saying:

> "…it surely cannot be right that the measure of the company's responsibility should depend on whether she was the head barmaid or an assistant. The customer would have no knowledge of what were the exact limits of her responsibility."

13. In *Prince Alfred College Inc v* ADC [2016] HCA 37 at [81], the High Court said:

> "… the relevant approach is to consider any special role that the employer has assigned to the employee and the position in which the employee is thereby placed 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."

14. Accordingly, vicarious liability for sexual assault (despite its criminal nature) is now deemed to be, and has always been, the common law in Australia. Yet the remedy proposed in very similar terms to those used in the High Court for vicarious liability is only prospective. This opens up the argument that the legislation intended to cover the field and take away an existing remedy in vicarious liability at common law for past victims. New South Wales

avoided this argument with legislation, which the Tasmanian draft appears to follow, by also adding s6H(3) in the *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018* (NSW). This section expressly preserves the common law.

15. The vicarious liability provision proposed for Tasmania is expressly prospective and without a saving provision may be argued to take away the existing common law retrospective vicarious liability rights. This may extend even to rights as against employees, let alone possible rights against those in employment-like circumstances. This is a major flaw in the draft Tasmanian legislation.

16. Of course, the best remedy – in addition to preserving the common law – is to make the provisions relating to vicarious liability expressly retrospective. This would accord with the undertaking given by the Archbishops of Melbourne and Sydney as announced by the Hon. Justice Peter McClellan AM on 15 July 2015 that it is the:

> "… agreed position of every bishop and every leader of a religious congregation in Australia that we will not be seeking to protect our assets by avoiding responsibility in these matters …."

and that:

> "… anyone suing should be told who is the appropriate person to sue and ensure that they are indemnified or insured so that people will get their damages and get their settlements."

17. Clearly, the Catholic Church intended by this statement to accept vicarious liability retrospectively in respect of clergy and volunteers. The Tasmanian Parliament should do no less. At the very least, it should not take away existing common law remedies under the *Prince Alfred College* decision and in accordance with *Scott v Davis*.

Fixing the *Ellis* defence

18. The *Ellis* defence had three elements. The first was that an unincorporated association cannot be sued at common law if it does not have an ascertainable membership. This is proposed to be remedied by adopting the NSW legislative provisions which allow the organisation 120 days to nominate a defendant and in lieu thereof, permitting after that time an application to the court for a defendant to be appointed. This will work but is slow and expensive.

19. The Western Australian provision is simpler and quicker. The ALA suggests that ss49L, 49M, 49N and 49O should be changed to follow the Western Australian example. Under the C*ivil Liability Legislation Amended (Child Sexual Abuse Actions) Act 2018* (WA), s15B permits a victim to sue a current senior office holder who is given appropriate personal protection but in respect of whom the organisation is liable to be sued. There is no delay and no requirement for an application to the court. This provision is clearly a superior solution.

20. The second limb of the *Ellis* defence was that although until 2007 it had been the accepted practice to sue the trustees who hold the assets of the Church but do not operate any of its activities (a position which the Church accepts and continues in UK), this was inappropriate because the trustees were not responsible for the activities being conducted, whether in Catholic schools, churches or other institutions. The remedy proposed is similar to that in NSW in making trust moneys available and appears to be appropriate.

21. The third element of the Ellis defence was the proposition that because priests are not strictly employees, there can be no vicarious liability. It is worth noting that in the NSW Parliament, the Attorney General (AG) undertook to remove the Ellis defence and said in his Second Reading Speech:

> "… it means that no matter when the abuse occurred survivors will now be able to sue a proper defendant with sufficient assets to satisfy a claim."

22. Unfortunately, and while the changes in relation to whom to sue and the availability of assets were made retrospective, the provision for vicarious liability in respect of those in employment-like positions (priests and volunteers) is only prospective. Accordingly, the NSW legislation does not match the expressed intentions of the NSW AG. The Tasmanian Parliament should not make the same mistake.

Overturning previous settlements

23. The ALA supports the provision in the draft bill that enables courts to overturn previous settlements where it is in the interests of justice to do so. This follows legislation in Queensland and Western Australian and the announcement of legislation to follow in Victoria. We commend this approach given that many paltry settlements were inflicted because of limitation periods and other problems.

Conclusion

24. The ALA welcomes the opportunity to have input into the draft *Justice Legislation (Organisational Liability for Child Abuse) Amendment Bill 2019* (TAS). The ALA recommends that the legislation should:

    1. **make vicarious liability expressly retrospective;**

    2. **make the extension to those in employment-like positions, such as volunteers and priests, retrospective;**

    3. **in addition (or at the worst, in the alternative), expressly preserve the common law; and**

    4. **simplify the provision for identifying and suing a defendant in an unincorporated association.**

25. The ALA would be available to provide further assistance to the Tasmanian Department of Justice in further consideration of this legislation.

Yours Sincerely,

Fabiano Cangelosi,

Tasmania President & State Director, Australian Lawyers Alliance