

Comments on the Civil Liability (Institutional Child Abuse Liability) Amendment Bill 2021

Submission to the South Australian Attorney-General

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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.

¹www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to comment on the revised Civil Liability (Institutional Child Abuse Liability) Amendment Bill 2021.

Definitions

2. The definition of “child abuse” includes sexual abuse, serious physical abuse and associated psychological abuse. That is consistent with NSW and only marginally different to Victoria which omitted the word “serious”. In practice it makes no difference.
3. The definition of “akin to an employee” is appropriate.
4. Section 50C(1) brings in associated persons and vicarious liability accordingly. Section 50F reverses the onus of proof in relation to claims in negligence. This is an improvement, but not a major one. Well-funded and powerful institutions have an appalling history of not keeping records of abuse by employees and those in employment like positions and such records as may have been kept seem to disappear. To deal with the onus of proof the institution need only call some evidence that there was a system in place at the time for avoiding abuse. That system may have been relatively informal. That may be sufficient to discharge the onus.

Vicarious liability

5. Section 50G makes institutions vicariously liable for child sexual abuse. It applies the test in *Prince Alfred College Inc v ADC* [2016] HCA 37 at [81] and accords with the approach in UK in *Armes (Appellant) v Nottinghamshire County Council (Respondent)* [2017] UKSC 60.
6. The question is whether this provision is retrospective in effect. If it is not, then the common law (which is expressly preserved) offers a better remedy than the legislation. Indeed, it is arguable that if *Armes* is the common law in Australia, then the Bill adds nothing at all. Accordingly, it is of critical importance that the legislation be retrospective in effect. The Royal Commission found that the average time from last abuse to first reporting is of the order of 21 years. It follows that if the legislation is not wholly retrospective, it will be a very long time before many victims obtain justice. The ALA strongly urges that all the provisions including vicarious liability be retrospective in effect in the circumstances.

Part 7B – Child abuse – setting aside settlements

7. Part 7B gives a broad power to set aside child abuse settlements where it is "just and reasonable to do so". Amongst the matters which the Court make consider (it is a non-exclusive list) is whether negotiations were affected by an imbalance of power. The legislation is consistent with most other jurisdictions and is entirely appropriate.

Conclusion

8. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the draft legislation. The ALA is available to assist with the further drafting of the Bill if required.



Sarah Vinall

SA President

Australian Lawyers Alliance