Proposed reforms to *Personal Injuries (Liabilities and Damages) Act 2003* (NT)

Submission to the Northern Territory Attorney-General's Department

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Protecting and promoting justice, freedom and the rights of the individual.

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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 ALA welcomes the opportunity to comment on the proposed reforms to the *Personal Injuries (Liabilities and Damages) Act 2003* (NT) ('the Act').

Definitions

2. The ALA submits that the definition of "child abuse" should include sexual abuse, physical abuse and associated psychological abuse. That is consistent with NSW, Victoria and South Australia.

A new non-delegable duty of care

3. The ALA submits that a new non-delegable duty of care may be helpful although it is unlikely to change the position in most cases. All an Institution needs do is adduce some evidence (by way of assertion) that what it did was reasonable at the time in order to shift the evidentiary onus back to the plaintiff.

Codifying and extending the law of vicarious liability of employers

4. The ALA submits that clarifying that activities akin to employment give rise to vicarious liability is appropriate and may be helpful. However, it is important that this change (together with non-delegable duty of care) either be retrospective in effect or the common law be expressly preserved for past cases as in NSW. Otherwise, there is a risk that it might be thought by a Court that these changes are intended to cover the field and if prospective only might well have the effect of reducing the rights which already exist at common law. The matter has yet to go to the High Court of Australia but there have been a number of cases where activities akin to employment have been held to give rise to vicarious liability in Australia although this has not been tested in the High Court. It is quite possible that the High Court might follow the English Supreme Court in *Armes v Nottinghamshire County Council* [2017] UKSC 60 where the Local Government Authority was held liable for abuse by foster parents it appointed but did not employ.

5. There are indications in *Scott v Davies* [2000] HCA 52 at [6] and [301] that employment is not required for vicarious liability in Australia, merely something akin to it.

6. Accordingly, it is critical that the common law be preserved as has expressly been done in NSW and South Australia in introducing similar reforms if these changes are not to be retrospective in effect. That is particularly important because the Royal Commission found that the average time from last abuse to first complaint (after interviewing more than 6000 victims) was 21 years. Accordingly, a change which is only prospective is unlikely to be of much assistance for most victims for a very long time.

Identifying a proper defendant in relation to child abuse claims

7. This reform which is expressly retrospective in the NSW Legislation is valuable and important. It prevents the Roman Catholic Church and some other organisations from asserting that there is no legal entity to sue and that its multi-billion-dollar trusts do not run its operations (including its schools) even though the trusts hold all the assets so that they cannot be sued (the *Ellis* decision). This change is valuable and important and must be retrospective.

The Offender Damages Scheme

8. Any diminution in the damages to be awarded to the those in custody would be unjust and a form of double punishment. That is not to say that the moneys should not be held in a fund whilst a person is in custody (suitable invested of course) so that claims against the person in custody might be met.

9. Given that the abuse leading to compensation may well have been occasioned in Institutions (such as *Don Dale*) it will be manifestly inappropriate for the Territory to be reducing its own liability to its victims by reducing the entitlement to damages.

10. It should be borne in mind that in NSW the *Civil Liability* Act ('*CLA*') limitations on the award of damages do not apply where the claim is against the abuser (See s3B of the NSW *CLA*). That means that an assault by a police officer makes the State of NSW liable vicariously as does sexual abuse by a teacher in a Government school under the common law on vicarious liability. There have been many cases in NSW it has been held that a company is vicariously liable for its employees (for example see *Zoram Enterprises Pty Ltd v Zabow* [2007] NSCA 106 where it was found the intention of the company was the intention of the employer; in *Withyman v NSW* [2013] NSWCA 10, the State of NSW was vicariously liable for abuse by a teacher).

11. That means in NSW there is a 3% discount rate, general damages with interest on past general damages and aggravated and exemplary damages are available and have in a number of these cases been awarded against the employer whether it be the State of NSW or a company. Those rights are important and any reduction in the entitlement to common law damages is wholly inappropriate particularly in abuse cases.

12. Accordingly, double punishment of those in custody should not occur and their common law rights should be preserved against the abuser and that person's employer or where an employment like relationship exists.

Other matters to consider

13. The ALA submits that the Act should also include provision to enable setting aside unjust or inadequate child abuse settlements including consent judgments. This is similar to what had been legislated in NSW.

14. One thing not mentioned in the proposals is restoration of an appropriate discount rate. The discount rate for damages awarded for personal injury should be 3% in accordance with the decision of the High Court in 1981 and the recommendations of the IPP Report. Otherwise, the most severely injured will be unable to invest their money in conservative investments so as to produce a return after tax and inflation to meet their future needs. Their moneys would inevitably run out decades early and they will become a burden on the public health system and Commonwealth and Territory finances. It is noted that a higher discount rate most severely affects the most seriously injured who have moneys awarded for long term needs.

Conclusion

15. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the proposed reforms to the *Personal Injuries (Liabilities and Damages) Act 2003* (NT). The ALA is available to assist with the further drafting of the Bill.

Cathy Spurr
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