

Better access to justice for child abuse survivors

Factsheet

The NSW Government has changed civil litigation laws to make it easier for survivors of child abuse to seek justice. These reforms respond to recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse.

The Royal Commission heard from survivors and support groups about the difficulties survivors have faced in pursuing civil claims against institutions for child abuse. It made 15 recommendations to improve the capacity of civil litigation systems to provide justice to survivors.

In 2016 the NSW Government implemented eight of these recommendations in two key reforms. The Government removed limitation periods for civil compensation claims for child abuse. It also introduced guiding principles to ensure that NSW Government agencies take a compassionate and consistent approach in responding to civil claims for child abuse.

In October 2018, the NSW Parliament passed legislation to ensure all survivors can sue a proper defendant with sufficient assets to satisfy a child abuse claim. The legislation also establishes two statutory liabilities for child abuse, based on existing common law liabilities.

These reforms follow extensive stakeholder consultation and complete the NSW Government's implementation of the Royal Commission's civil litigation recommendations.

Proper defendant

The Royal Commission identified that one of the key challenges faced by survivors has been identifying a proper defendant to sue. This is because many religious organisations in particular

are unincorporated organisations with no 'legal personality', meaning they cannot be sued.

The new laws allow a survivor to sue an unincorporated organisation, which can nominate a proper defendant to stand in its shoes.

The Royal Commission also made clear that it is just as important to ensure that a legal entity has sufficient assets to meet the claim.

If the unincorporated organisation does not put forward a proper defendant with sufficient assets to satisfy the claim, the court can appoint the trustees of an associated trust as the defendant. The assets of the trust can be used to satisfy the claim.

The proper defendant reform is retrospective and prospective. This means survivors can access a defendant to a civil claim for past or future abuse.

The 'Ellis defence'

Mr Ellis sued the Archbishop of Sydney, the Trustees of the Sydney Archdiocese of the Roman Catholic Church and the alleged abuser (an assistant priest) for child abuse. He was unable to establish a case against:

1. The assistant priest (who died soon after proceedings commenced).
2. The Archbishop, who could not be held liable for the conduct of his predecessor.
3. The trustees, who did not have power to appoint, manage, discipline or remove priests under the trust's establishing statute.

The NSW Court of Appeal found that Mr Ellis's claims against the Archbishop and the trustees would fail because neither were proper defendants to the proceedings. This became known as the 'Ellis defence'.

The proper defendant reform overturns the 'Ellis defence'.

The two statutory liabilities

The legislation reverses the common law onus of proof in relation to organisational liability for child abuse. It also extends common law vicarious liability for child abuse to relationships 'akin to employment'.

The purpose of the two statutory liabilities is to establish more fair and certain avenues for survivors to pursue civil action for child abuse. It is also to encourage institutions to do everything they can to prevent the abuse from occurring in the first place.

The two liabilities are prospective. They apply to child abuse that occurs after the laws commence.

Reverse onus of proof via a statutory duty

Under the new laws, an organisation that exercises care, supervision or authority over children has a statutory duty of care to prevent child abuse perpetrated by individuals associated with the organisation.

An organisation is presumed to have breached that duty if an individual associated with the organisation abused a child in connection with the organisation's responsibility for the child. That presumption is displaced if the organisation proves it took reasonable precautions to prevent the abuse.

The legislation sets out the factors to be taken into account by a court in determining if an organisation took reasonable precautions to prevent the abuse. These factors include the nature of the organisation, the role in the organisation of the individual who perpetrated the child abuse and compliance with applicable child safety standards.

Extending vicarious liability to non-employees

The legislation adopts the common law approach to vicarious liability of organisations for child abuse perpetrated by employees.

It also extends this vicarious liability to cover child abuse perpetrated by non-employees whose relationship with the organisation is akin to employment. This may include religious officers or volunteers whose work is integral to the activities of the organisation and to its benefit – even though they are not technically employees.

NSW Government response to the Royal Commission

NSW has been a leader among states and territories, acting swiftly on the recommendations of the Royal Commission.

The NSW Government formally responded to the Royal Commission on 23 June 2018, accepting the overwhelming majority of its recommendations. This includes measures across Government to keep children safe, hold perpetrators to account and provide justice and support to survivors.

For the full NSW Government response to the Royal Commission visit:
www.nsw.gov.au

The National Redress Scheme

On 9 March 2018, NSW was one of the first two states to opt into a national redress scheme for survivors of institutional child sexual abuse.

In May, NSW was the first state to pass legislation referring powers to the Commonwealth to establish the National Redress Scheme.

The National Redress Scheme commenced on 1 July 2018 and includes a monetary payment of up to \$150,000, access to counselling and psychological support and a direct personal response from the participating institution(s).

For information about the National Redress Scheme visit the website:
www.nationalredress.gov.au