ANGELA SDRINIS | LEGAL

Submission: Justice Legislation (Organisational Liability for Child Abuse) Amendment Bill 2019

Angela Sdrinis Legal is a specialist legal firm based in Victoria and Tasmania with a strong interest and focus on institutional abuse claims.

This submission has been prepared by Sebastian Buscemi, Principal Lawyer of our Tasmanian office and Angela Sdrinis, Director of Angela Sdrinis Legal and personal injuries accredited specialist with over 20 years' experience in handling sexual and institutional abuse claims.

Angela Sdrinis is a recognised expert in the area of institutional abuse. She has been called to give evidence before two Senate Inquiries, the Victorian Parliamentary Inquiry into Institutional Responses to Complaints of Abuse of Children, written journal articles and is a regular speaker and commentator on institutional and sexual abuse issues. Angela has also participated in the Royal Commission Round Tables on Redress and Civil Litigation.

Angela Sdrinis Legal represented survivors in public hearings conducted by the Royal Commission into Geelong Grammar, the Catholic Church, the Australian Defence Force and the Salvation Army.

Angela Sdrinis Legal has successfully pursued claims against dozens of institutions including the Salvation Army, the Catholic Church and its religious orders including the Christian Brothers, the Franciscan Friars, Sisters of Mercy, Sisters of Nazareth, Sisters of St Joseph and the Good Shepherd Sisters. Angela has also pursued claims against the Uniting Church, the Anglican Church, the Lutheran Church, Glastonbury Inc, the Gordon Boys Home and many other institutions involved in out of home care for children.

Angela Sdrinis Legal also currently acts for people who were abused in the Scouts, the Defence Force, sporting clubs, private and state schools and in the media and entertainment industries.

Since its inception in 2014, Angela Sdrinis Legal has acted for approximately 1,500 victims of institutional abuse including approximately 200 victims of abuse who are seeking compensation from the Tasmanian Government and other Tasmanian based organisations.

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1. Reverse onus of Proof Requiring Organisations to take Reasonable Precautions

We support the proposed amendments requiring organisations to take, and to demonstrate the taking of, reasonable precautions. We say that these changes should not be retrospective. We say that organisations should at all times have taken reasonable precautions in any event and codification of the requirement to do so and implementation of the reverse onus of proof should not be regarded as creating new obligations and therefore should apply to all claims regardless of when abuse occurred.

2. Vicarious Liability

The clarification that organisations can be held liable for the actions of volunteers and not just employees is welcome, particularly the clarification that organisations can be held liable for the actions of priests or religious leaders who can be "associated individuals" (s49G). This codification is particularly important given that some religious organisations have argued that priests and other religious are not employees and that therefore at common law there can be no vicarious liability.

We also say that the extension of the common law concept of vicarious liability should operate regardless of when the abuse occurred and not from the date of the commencement of that section as is required under s4 of the Bill.

We also say that at common law, there are arguments that organisations can in any event be held liable for the actions of persons in positions "akin" to employment (see JGE v the Trustees of the Portsmouth Roman Catholic Diocesan Trust [2012] EWCA Civ 938). The codification of what we say is arguably the common law position in any event on the basis of an artificial date is likely to result in confusion and two classes of claimant depending upon when the abuse occurred.

At the very least, we say that the common law position should be specifically preserved as is the case pursuant to s6H (3) of the Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018 (NSW).

Otherwise, we support the wording and the clarifications provided by the other proposed amendments regarding the application of common law principles of vicarious liability.

3. Proceedings against Unincorporated Associations

The proposed changes regarding the requirement of unincorporated organisations to provide an entity that can be sued as a proper defendant are necessary and appropriate and consistent with similar legislation passed in Victoria[i] and New South Wales[ii].

We note however that the proposed changes mirror the NSW and Victorian legislative provisions which allow an organisation 120 days to nominate a proper defendant failing which an application can be made to the Court for a defendant to be appointed.

Our experience in Victoria is that whilst this process works, it causes significant delay with proposed defendants having some 4 months under the legislation to respond. If there is no response, making application to the Court then causes further delay and expense.

We note that 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 in respect of whom the organisation is liable to be sued.

We say that the Tasmanian Government should give serious consideration to adopting the Western Australian position which is quicker, cheaper and ultimately has the same outcome as the clunkier and more expensive processes set out in the NSW and Victorian legislation.

4. Setting Aside Deeds of Release

4.1 What is just and reasonable?

We note that the Queensland Government has passed the Limitation of Actions (Child Sexual Abuse) and Other Legislative Amendment Act 2016 (the Act). Section 48 of the Act empowers the Supreme Court in Queensland to set aside a deed of release "where it is just and reasonable to do so" but provides that any previous amounts paid be taken into account.

We note that the Western Australian Government has passed the Limitation of Actions (Child Limitation Act 2005 (WA) (the Act). Inter alia, s 92 states that where there are previously settled causes of action:

(3) The court may, if satisfied that it is just and reasonable to do so —

> (a) grant leave to commence the action, subject to conditions; and
> (b) to the extent necessary for that, set aside the settlement agreement and any judgment giving effect to the settlement.

There have been two court decisions to date, one under the Queensland legislation which we shall refer to as "TRG"[iii] and one under the Western Australian legislation which we shall refer to as "JAS"[iv]. In neither act are the words "just and reasonable" defined nor are criteria listed which a judge would be required to take into account.

In JAS, the application was conceded by the Christian Bros and the deed was set aside. In TRG, which was not conceded and in fact the application to set aside the deed was vigorously opposed by Brisbane Grammar, the Judge read down the provision and 'purpose' of the legislation. We say the TRG decision potentially makes any like provision unworkable in all but the most extreme cases, akin to the types of situations (fraud, deception, unconscionable conduct) where arguably deeds could already be set aside at common law without the necessity of specific legislation.

4.2 A Prima Facie Position

We say that in order to avoid the harsh outcome in TRG, the Tasmanian legislation should make it clear that in all instances, where limitation periods were in existence when the release was entered into, by inference the existence of limitation periods would have impacted on the decision on the part of a claimant to compromise his or her claim.

In TRG the Court found that the limitation period did not play a specific role in the applicant's settlement as there was no direct evidence the limitation period was raised in

his specific negotiation. This was in spite of the limitation period being pleaded in defence of the initial litigation which gave rise to the negotiations.

We say it is self-evident that where limitation periods were in existence, the very fact of an applicable limitation period would have had to have influenced negotiations, whether explicitly stated or not, by the fact that the matter was statute barred and unable to be litigated. Both parties would have considered their legal position in making offers during negotiation, and the inability to pursue a course of action through Court would be a central tenant on either side. This is in effect the core principal of the amendment, being the existence of a limitation period/the inability to seek civil recourse meant victims were in an extremely weak negotiating position, often reflected in the amount of compensation.

In other words, we say that in addition to the factors set out the proposed s 5C(3), the existence and potential application of limitation periods in any previously settled matter should be a factor that a judge is required to take into account in determining whether a prior deed should be set aside.

4.3 Past Legal Advice

We note that the fact that the plaintiff had been legally represented in his prior settlement was a factor on which the judge in TRG placed considerable weight. We submit that it is important for the legislation to limit the weight of any legal advice/representation in a prior settlement. The reality of limitation periods and other technical legal defences such as the “Ellis” defence meant that the scope of advice in most cases was extremely limited.

For example, the effect of legal advice during the Abuse in Care process would have, practically speaking, been limited to ensuring the appropriate application of the assessment framework. A lawyer suggesting litigation, that in many cases would have been doomed to failure because of limitation periods, would arguably have been acting against his or her professional duties.

It is vital that the realities of the harshness of the technical legal defences when many prior deeds were entered into by abuse victims is reflected in the legislation. The practical reality was that the limitation period and other technical legal defences dramatically limited legal options and the importance placed on legal representation should be weighted accordingly.

4.5 Differences in Compensation

One of the standout aspects of TRG was the Judge finding the difference in compensation being awarded now, as opposed to when the deed was initially signed, went against overturning the deed. We say that it is necessary to clarify that in fact a stark difference between the levels of compensation awarded when technical legal defences applied as compared to today should support the overturning of the deed. The Judge in TRG found that this difference in compensation was not in the interests of justice as the defendant would be liable for higher compensation.

The legislation must clarify the fact that this amendment seeks to address the unfair amounts of compensation that persons were paid, due to limitation periods and other technical legal defences. In TRG without such clarification the Judge found the opposite,

that these changes and the higher compensation the applicant would have received today, were not in the interest of justice.

It is vital this be clearly defined in the legislation as a guiding principal to ensure the proposed legislation is fairly and consistently applied, in keeping with its purpose. The decision in TRG makes it clear that it is necessary to explicitly state that the "amount of the agreement" as referred to in s5C (3)(a) of the proposed bill is not referable to any comparable settlements at the time which would all have been impacted by technical defences but that the reference to prior amounts is in relation to what would be payable today.

4.6 Developments in the Law

Another concerning aspect of the TRG decision is the way legal developments were weighted as factors in support of not overturning the deed. It should be self-evident that these changes to the law (for example the removal of limitation periods and the expansion of vicarious liability which were relevant in TRG) function as the genesis for the amendment. The developments in the law, without the ability to overturn past deeds, has and is resulting in two distinct classes of victim, those who have access to actual justice and those shut out. The former are able to seek compensation through civil litigation and/or pursue an informal settlement knowing they can pursue litigation, while the latter are locked out by virtue of a deed waiving rights in circumstances where practically speaking they were not actually able to exercise their rights to litigate. The amendment clearly seeks to ensure all survivors are treated equally, especially now that survivors have a genuine path to justice.

The lack of guidance on this point in Queensland led the Judge to find the developments in the law were in fact unfair to the defendant/respondent. In essence, this meant that the defendant benefitted by settling at a time where the plaintiff had no real legal recourse, and that it ought to retain this benefit in spite of the changes in the law. Had this been the intention of Parliament the status quo could simply have been maintained.

4.7 Burden on Defendant/Respondent to show why deed should be upheld

We have learnt that the vast majority of settlements considered in historical abuse matters considered by the Royal Commission were unjust which has led to the legislative changes we have seen throughout Australia and as contemplated by this bill.

We note that in JAS, the judge found that the applicant for leave has the onus of establishing that the circumstances of their case demonstrate that it is just and reasonable that leave should be granted.

We say the opposite should be the case and there should be a reverse onus on the defendant to demonstrate why a deed should not be overturned. A reverse onus would have the added benefit of encouraging defendants to engage in informal settlement discussions/re-negotiation by mutual agreement as opposed to the victim having to apply to the court from the outset.

4.8 Transparency

In addition to the factors set out in the proposed legislation at s5C (3), we say that it is important to recognise that there was little or no transparency on the part of defendants when negotiating prior deeds in historical abuse cases. We submit that a failure to share important and relevant information such as prior complaints regarding a particular perpetrator or other systemic failures should be one of the factors that a judge should be required to take into account in deciding whether a deed should be set aside. We say lack of transparency should be a factor included in the proposed s 5C (3)(c).

4.9 A Clear Purpose

At the very core of our submission is the absolute importance of a clearly defined purpose contained within the legislation.

Without a clearly defined purpose, along with a lack of any guidance in the legislation, the Judge in TRG essentially found the amendment had no real bearing on whether a Court can overturn a prior agreement.

We say that the purpose of the proposed changes which is to allow previous deeds of release to be overturned where a victim had no path to civil litigation and for compensation which was by and large unfair, should be paramount in the legislation.

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[i] Legal Identity of Defendants (Organisational Child Abuse) Act 2018 (Vic)
[ii] Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018 (NSW)
[iii] *TRG v Brisbane Grammar School* [2019] QSC 157
[iv] *JAS v The Trustees of the Christian Brothers* [2018] WADC 169; BC201840778