



**SHINE**  
LAWYERS

RIGHT WRONG.

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

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Submission to the Tasmanian Government  
August 2019

## 1. Introduction

Shine Lawyers are pleased to provide this submission to the Tasmanian Government in response to the Consultation Draft of the Justice Legislation (Organisational Liability for Child Abuse) Amendment Bill 2019.

Every day our clients show enormous courage coming forward to tell their story of abuse. It also requires courage to seek to hold institutions and individuals who wronged them in unspeakable ways accountable.

The reforms incorporated in the Bill are long overdue. Shine Lawyers supports the Bill as one element of the continued commitment to remove unfair obstacles and restrictions that survivors of child abuse have encountered for far too long.

## 2. About Shine Lawyers

Shine Lawyers is the third largest specialist plaintiff litigation law firm in Australia. The firm has 680 people spread throughout 44 offices in Australia.

We have a dedicated team of abuse lawyers who specialise in providing legal advice and guidance to survivors of abuse, standing as a voice for clients, and helping them access justice and acknowledgement for the wrongdoing they have suffered.

Shine Lawyers has extensive experience representing survivors seeking redress in every institutional redress scheme in Australia. Shine Lawyers represented clients giving evidence before the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission). The firm has conducted many individual and group actions in processing and negotiating compensation arrangements for survivors of sexual abuse. Significant litigation that the firm has successfully concluded includes:

### **Neerkol Group Litigation**

The claim involved some 80 former orphans of the St Joseph's Orphanage Neerkol, operated by the Sisters of Mercy.

### **Nudgee Orphanage Group Litigation**

This claim involved the successful resolution of claims for some 30 victims of sexual abuse, operated by the Sisters of Mercy.

### **Brisbane Grammar Sexual Abuse Litigation**

This action commenced in the Supreme Court of Queensland was on behalf of 75 former students of the Brisbane Grammar School who were subjected to sexual abuse as children.

### **St Paul's Sexual Abuse Group Litigation**

The claim involved some 25 former students of St Paul's School in Brisbane who were subjected to sexual abuse during their school years.

### **Scriven v Toowoomba Preparatory School**

This litigation on behalf of a single claimant resulted in the largest award in Australian history for compensation for a victim of sexual abuse, which included the largest award for punitive damages in Australian history.

### **Australian Defence Force**

Shine Lawyers has represented close to 200 current and former members of the Australian Defence Force in relation to abuse they suffered while in the Defence Force, including a large number of former child sailors who were abused at HMAS Leeuwin. Shine Lawyers worked closely with the legal representatives of the Australian Defence Force to develop a collaborative, cost effective and empathetic process which provides compensation, as well as Direct Personal Responses (apologies and acknowledgement of the harm done). The psychological welfare of the abuse survivor is central to the process.

### **3. Individuals associated with an organisation**

We note with approval, clause 6 of the bill and in particular the amendment to the *Civil Liability Act (2002)* with respect to when an organisation will be responsible for child abuse and when a person will be considered to be associated with an organisation. In particular we are pleased that the definition of a person associated with a religious institution is not limited to a minister of religious or religious leader.

Including 'members of the personnel of the organisation' is fundamentally important to holding religious institutions accountable for child abuse perpetrated by its members where the institution is responsible for the care of the child. This reflects high community standards regarding those in contact with children and is a necessary protective measure.

We support the mechanism proposed in clause 49G for an individual or class of organisations to be prescribed as associated with an organisation.

### **4. Reverse onus of proof**

In September 2015 the Royal Commission into Institutional Responses to Child Sexual Abuse released its Redress and Civil Litigation Report<sup>1</sup>. The Report identified the need for amendments to limitation periods, to the way duties of institutions were dealt with and the way proper defendants are identified. The Royal Commission also recommended that a non-delegable duty be imposed on institutions in certain circumstances.

The proposed insertion of section 49H into the *Civil Liability Act 2002* imposes a duty of care on an organisation responsible for a child to prevent child abuse. S49H (3) presumes an organisation has breached its duty if the plaintiff establishes that an individual associated with the organisation perpetrated the abuse in connection with the organisation's responsibility for the child, unless the organisation can establish that it took reasonable precautions to prevent the child abuse.

It is beneficial to remove the need for survivors to establish the standard of care and the breach of that standard by an organisation and to shift the burden to the organisation to establish the reasonable steps taken to prevent child abuse otherwise it will be found to have breached the duty. The non-exhaustive list of relevant factors indicating whether the organisation took reasonable steps are appropriate.

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<sup>1</sup> <https://www.childabuseroyalcommission.gov.au/redress-and-civil-litigation>

We support the Bill insofar as it proposes to reverse the onus of proof as this is an important element of the Royal Commission's recommendations. However we also note the comment of the Australia Lawyers Alliance in its submission to the Queensland Parliament Legal Affairs and Community Safety Committee response to the Civil Liability and Other Legislation Amendment Bill 2018 dated 7 December 2018<sup>2</sup> that a reverse onus of proof 'does not adequately ameliorate challenges in establishing claims for abuse'. Utilising its disproportionately greater resources, if an organisation does put forward some materials indicating steps were taken the onus returns to the plaintiff survivor to show those steps were not reasonable or otherwise disprove this point.

## **5. Vicarious liability**

The introduction of a reverse onus of proof as well as some form of vicarious liability is in similar vein to amendments introduced in NSW and is supported.

The form of vicarious liability proposed codifies some elements of vicarious liability set out in *Prince Alfred College v ADC* [2016] HCA 37. A survivor would need to establish the perpetrator of abuse was an employee according to the definition found in the proposed section 49I<sup>3</sup>. A survivor would need to show that the apparent performance by the employee of the role in which the organisation placed the employee supplies the occasion for the perpetration of the child abuse by the employee and that the perpetrator/employee took advantage of that occasion to perpetrate the child abuse (see s49J (1)) having regard to whether the organisation placed the employee in a position involving:

- (a) authority, power or control over the child;
- (b) the trust of the child;
- (c) the ability to achieve intimacy with the child. (see s49J (2))

We note the reverse onus and the vicarious liability only apply prospectively and not retrospectively which means that these provisions will not be able to be called upon to assist survivors of historic child abuse. Vicarious liability will also only assist some survivors because vicarious liability only applies in circumstances of an employee or a person akin to an employee. We anticipate case law will develop around when a person will be considered to be an employee which comes at an emotional and financial cost to the survivor put to the task of pressing their claim. A non-delegable duty operating on a strict liability basis would avoid this uncertainty for survivors.

## **6. Division 4 – Proceedings against unincorporated organisations**

We broadly approve the proposed framework for the nomination of a proper defendant for an unincorporated organisation.

## **7. Amendment to the *Limitation Act 1974* with respect to previously settled causes of action relating to child abuse**

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<sup>2</sup><https://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/current-inquiries/CivilLiabilityandOtherLegislation2018>

<sup>3</sup> S49I (1) provides as follows 'in this Division – employee, in relation to an organisation, includes an individual who is akin to an employee of the organisation.'

Clause 8 proposes to insert a section 5C into the *Limitation Act* 1974 allowing an action to be brought on a previously settled relevant right of action if a relevant court, by order on application, sets aside the agreement reflecting the settlement, on the grounds that it is in the interest of justice to do so. The non-exhaustive list of relevant factors to be considered in determining whether it is in the interests of justice are appropriate. The power to set aside the deed is discretionary and appropriately based only in consideration of grounds that it is in the interests of justice to set the deed aside.

Countless survivors including many of our clients were put in positions where their ability to access much needed compensation was severely restricted. They were forced to give up their rights by signing a deed of release prohibiting any further legal action in exchange for compensation that was inadequate in many cases and due to the unfair compensation landscape at that time. This amendment is a positive step to allow those survivors to access justice following their horrendous experiences of abuse.

## **8. Conclusion**

Child abuse has a profound and lasting impact on a survivor's life. We applaud the definition of child abuse adopted in the bill insofar as the definition includes sexual abuse as well as serious physical abuse and psychological abuse. This reflects our experience assisting survivors of serious physical and psychological abuse in organisational settings whose lives are devastated just as survivors of abuse of a sexual nature are impacted.

We also note how important it will be that Courts are provided appropriate resources allowing for applications for deeds to be set aside or to have proper defendant's appointed without undue delay. A fast track process to avoid re-traumatising survivors of child abuse with undue delay should form part of these most important reforms.

We are grateful for the opportunity to provide our views in this submission. In the event you have any questions regarding this submission, please contact Lisa Flynn, Head of Specialist Personal Injury at [lflynn@shine.com.au](mailto:lflynn@shine.com.au) or on 13 11 99.