Comments on the Civil Liability (Institutional Child Abuse Liability) Amendment Bill 2020

Submission to the South Australian Attorney-General

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Contents

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 Civil Liability (Institutional Child Abuse Liability) Amendment Bill 2020.

2. The draft Bill is well intended but in reality, and upon analysis, gives victims very little.

Definitions

3. The definition of "child abuse" limits abuse to sexual abuse of the child. Victoria defines it as sexual abuse, physical abuse and associated psychological abuse. So does Tasmania. New South Wales defines it as sexual abuse, significant physical abuse and associated psychological abuse. Queensland started out by confining abuse to sexual abuse but recently has widened it to include physical abuse. The exclusion of physical abuse (which can be as damaging as sexual abuse) and the uncertainty in relation to associated psychological abuse is simply unacceptable given that many institutions including those of South Australia inflicted serious and long-term physical suffering upon child victims.

4. The definition of employee and persons associated with an Institution is reasonable. It rightly follows the New South Wales model.

Onus of proof

5. Sections 50E and 50F effectively reverse the onus of proof in negligence. This is almost precisely the same as in New South Wales. In practice, this is of very limited utility to victims. Generally, victims are impecunious and institutions well funded for the purposes of litigation. Once an institution adduces some evidence that it took reasonable steps to prevent abuse (which could be as little as calling a single witness) then the evidentiary onus effectively shifts back to the victim. It is noteworthy that institutions can be very selective in their record keeping and it will be very hard to adduce evidence as to a better system, particularly when institutions commonly claim not to have records of complaints against particular members of staff who might have been involved.

Vicarious liability

6. Section 50G makes institutions vicariously liable for child sexual abuse. The test is that laid down by the *Prince Alfred College* decision in the High Court. The terminology is identical with New South Wales but, it adds nothing to the existing common law obligations. Indeed, because the section is prospective only it offers less than the common law already lays down retrospectively. Accordingly, section 50G adds nothing. Section 50G(3) is identical with the provision preserving the common law which New South Wales added after submissions from ALA to avoid any argument that existing rights might be taken away or reduced. However, taken as a whole, section 50G gives absolutely nothing to victims that does not already exist for the future at common law and gives nothing at all for the past. Victims would be as well off without this section.

Who to sue

7. Sections 50H, 50I, 50J and 50K deal with having an entity to sue in the manner which is workable albeit rather more clumsy than the simpler system adopted in Western Australia.

Assets available to meet claims

8. Sections 50L, 50M, 50N, 50O, 50P, 50R and 50S provide for assets to be available to meet any judgment in the same manner as is provided in New South Wales. This is reasonable. The provisions in respect of having someone to sue and the liability to meet damages are largely identical with those in New South Wales and are retrospective in effect.

Ellis defence not fixed

9. Unfortunately, however, the provision giving vicariously liability to those associated with an institution, section 50C, is not retrospective. The consequence is that a critical element of the *Ellis* defence remains. The Catholic Church claims not to employ its clergy so that the provisions only deal with the rights of future victims. It is nothing short of outrageous that institutions should be able to raise a defence that someone acting for them who was not strictly employed but was doing their work, does not give rise to vicarious liability at common law and therefore existing victims get no relief.

10. In any event, it is by no means clear that at common law there is no vicarious liability for employment like situations. The position in every major common law country other than Australia is clear in saying that such liability exists. In the United Kingdom see *Armes v Nottinghamshire County Council* [2017] UKSC 60 where the Council which appointed foster carers was held liable for their abuse. A similar decision was made in another non-employment case in *Cox (Respondent) v Ministry of Justice (Appellant)* [2016] UKSC 10. See also *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56. In New Zealand a similar result was found in *S v Attorney-General* [2003] 3 NZLR 450 (NZCA). See also, *SB v State of NSW* [2004] 13 VR 527 (Redlich J) where the State of New South Wales was held liable for abuse in foster care. In Canada see *John Doe v Bennett* [2004] 1 SCR 346 and *EB v Order of Oblates of Mary Immaculate in the Province of British Colombia* [2005] 3 SCR 45.

11. Moreover, the position is by no means clear in Australia. In *Scott v Davis* [2000] HCA 52 at [6] Gleeson CJ said:

> *"A claim that an owner or a bailee of a chattel is vicariously liable for the negligence of another person who has the temporary management of the chattel, even when that other person is not an employee of the owner or bailee, is a familiar feature of modern litigation".*

Hayne J at [301] took a slightly more restrictive view but nonetheless accepted there were cases where vicarious liability applied outside employment. The older case of *Colonial Mutual Life Assurance Society Limited v Producers and Citizens Co-Operative Assurance Company of Australia Limited* [1931] HCA 53 contains the following words from Gavin Duffy CJ and Starke J at pages 466-7:

> *"But if it does not, still we apprehend that one is liable for another's tortious act `if he expressed he directs him to do it or if he employs that other person as his agent and the act complained of is within the scope of the agent's authority'. It is not necessary that the particular act should have been authorised: it is enough that the agent should have put in a position to do the class of acts complained of (Barwick v English Joint Stock Bank; Lloyd v Grace, Smith & Co). And if an unlawful act done by an agent be within the scope of his authority, it is immaterial that the principal directed the agent not to do it".*

12. It is noteworthy that the High Court in *Prince Alfred College* said that the criminality of the conduct did not preclude vicarious liability. Accordingly, it is certainly arguable that at common law those in employment like situations can give rise to vicarious liability even for criminal acts if

the circumstances placed the abuser in a position of authority and in the service of the Institution.

13. All of this suggests that the provisions relating to employment like conduct should contain a proviso preserving the common law since it may well be that as with employment the common law already is in advance of what is proposed. We would not wish to see an argument that the legislation in this regard is intended to cover the field and would accordingly reduce the liability of institutions for those in employment like circumstances. Better still the vicarious liability provision and its inclusion of employment like circumstances should be expressly retrospective.

Existing settlements

14. Finally, the legislation makes no provision for the setting aside of existing settlements. Such settlements were commonly procured extremely cheaply because it was very difficult to extend limitation periods to sue institutions and because their liability was often in doubt. Every State and Territory except New South Wales and South Australia have brought in legislation to set aside unjust settlements. New South Wales is conducting an inquiry and it is understood that legislation is likely to follow. That leaves South Australia as the only jurisdiction in Australia not to provide relief to victims.

Non-delegable duties

15. The draft legislation correctly rejects the Royal Commission recommendation for a non-delegable duty. It has been evident at least since *New South Wales v Lepore* [2003] 212 CLR 511 that the High Court strongly preferred vicarious liability to non-delegable duty of care. However, the Royal Commission also noted that based upon its interviews the average time from last abuse to first reporting is 22 years. This accords with an Anglican Church survey of abuse cases in Queensland which found 23 years on average. Accordingly, the clarification of vicarious liability applying to employment like cases is unlikely to assist many victims for a very long time. In short, the well intentioned legislation promises much but offers little and in respect of vicarious liability, provides less than the common law already gives.

Key issues

16. Turning to the "key issues" we comment as follows. For the reasons previously set out the reverse onus is of quite limited value. However, it clearly should apply to institutions in all circumstances. The definition of those associated with an Institution to include clergy and volunteers is entirely appropriate and seems adequate. Attempting to define "reasonable steps" might be of assistance if those reasonable steps included the obligation to have a clear system for discouraging and dealing with abuse and a requirement for the keeping of good records of complaints, investigations and actions taken including records particular to those used by the Institution whether employed or not.

17. In respect of vicarious liability, the "codification" means no more than repeating that which the High Court has already laid down in *Prince Alfred College*. It is consistent with the common law. Vicarious liability already applied to all institutions and the question as to whether it should, is asking whether the common law should be restricted. The only answer clearly is no. As to who should be considered as "akin to an employee", the proposed definition seems reasonable but being prospective only may well be offering less than the common law already permits. That however remains a question for determination by the Courts in Australia, although the answer clearly in other common law jurisdictions is quite clear. The main issue with vicarious liability is what the point of a codification is, given that it repeats the common law but, unlike the common law, is not retrospective. The only thing the legislation adds is a clear extension to non-employees but this, for the reasons set out above, will not be a benefit for most victims for a long time. It will not assist past victims. This should be retrospective.

18. As to identifying a proper defendant, a system is proposed which will work but is slow and inefficient compared to the Western Australian system which ought to be considered. That simply permits the suing of a current senior officer of the organisation.

General key issues

19. As to the general key issues, the notion that child abuse should be limited to sexual abuse instead of including physical and associated psychological abuse would leave South Australia well behind most other States. It would be a difficult distinction to draw and would create difficulties for a Court as to whether a victim would need an extension of time in which to obtain a remedy for physical abuse which had the effect of enabling the sexual abuse to proceed. The potential injustice is obvious.

20. As to the impact on institutions, the question might be asked in another way. Should institutions be allowed to save money by permitting abuse of children to continue? Clearly institutions can insure and many institutions have done so in the past. The Archbishops of the Catholic Church for Melbourne and Sydney were announced by the Honourable Justice Peter McClellan AM on 15 July 2015 to have stated publicly that it is the:

> *"… agreed position of every Bishop and every leader of a religious congregation in Australia that we will not be seeking to protect our assets by avoiding responsibility in these matters …".*

And that:

> *"… anyone suing should be told who is the appropriate person to sue and ensure that they are indemnified or insured so that people will get their damages and get their settlements".*

21. Sadly, the drafting of this legislation and the questions asked clearly imply that it is proposed to offer less than the largest group of abusive institutions in the country has already undertaken to give.

ALA recommendations

22. The ALA makes the following recommendations:

(a) The definition of child abuse should extend to physical and associated psychological abuse as well as sexual abuse;

(b) The vicarious liability provisions including those covering employment like situations should be retrospective;

(c) It should be sufficient to sue a senior or the most senior person in an organisation (with appropriate personal protection) and the assets of the organisation available to meet any verdict along with those of associated trusts, former organisations and associated organisations as is presently proposed;

(d) Inadequate past settlements should be able to be set aside.

Conclusion

23. 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

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Australian Lawyers Alliance