

Abuse Claims and Civil Liability

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Factsheet



This fact sheet summarises the Ask LOIS webinar on this topic presented on 8 April 2020 by Jacqueline Townsend, Special Counsel, Donaldson Law
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This factsheet will cover the following:

- [Findings and recommendations from the Royal Commission into Institutional Child Sex Abuse](#)
- [National Redress Scheme](#)
- [Civil law reforms](#)
- [Civil liability](#)
- [Cases](#)
 - assault & battery
 - negligence
 - vicarious liability

Royal Commission into Institutional Responses to Child Sex Abuse 2013-2017

Terms of reference included what institutions and governments should do to address, or alleviate the impact of, past and future child sexual abuse and related matters in institutional contexts, including, in particular, in ensuring justice for victims through the provision of redress by institutions, processes for referral for investigation and prosecution and support services.

Key findings from the Royal Commission¹

- The Commission received 42,041 calls, held 8013 private sessions, made 2,575 referrals to authorities including police, published 59 research reports and made 409 recommendations to acknowledge and assist survivors of institutional abuse, to make institutions safer for children in the future and to achieve law reform.
- 88.5% of child sexual abuse in Australia is perpetrated by someone known to the child
 - 32% of survivors reported abuse in a government managed institution
 - 10.4% reported abuse as a child in childcare centres, sports clubs, independent schools or medical clinics.
 - 58.6% said they were sexually abused in an institution managed by a religious organisation.
 - Abusive living or working conditions
 - Living at the workplace or another place owned/controlled by the employer

¹<https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final-report-redress-and-civil-litigation.pdf>

Recommendations from the Royal Commission

- Governance and regulations that includes making institutions safe for children
- The Australian Government establish a national office for children's safety
- People working with children are suitable and supported
- A National Redress Scheme be established to provide direct personal response, counselling and psychological care and monetary payments capped at \$150k
- Introduction of new criminal offences
- Civil law reforms to include remove limitation periods in relation to child sexual abuse

National Redress Scheme

The National Redress Scheme helps people who have experienced institutional child sexual abuse gain access to counselling, a direct personal response, and a Redress payment. As at 3 January 2020, the Scheme:

- Received over 5,829 applications
- Resolved about 30% of those applications
- Average payment was \$81,376

Applications can be made any time before 30 June 2027.

Civil Law Reforms

The Royal Commission recommended changes in relation to civil litigation compensation laws as civil claims for compensation are an alternative to the National Redress Scheme.

Some of these recommendations have already been introduced across states and territories. Many are still under discussion. Currently under discussion in NSW is to allow former abuse settlements or judgments to be set aside where a court considers it is just and reasonable to do so.

The most significant of the reforms introduced in NSW is section 6A to the Limitation Act 1969. This change abolishes limitation periods in child sexual abuse matters. All states and territories have now abolished limitations periods in child sexual abuse matters.

Limitation Act 1969 – section 6A

No limitation period for child abuse actions

- (1) An action for damages that relates to the death of or personal injury to a person resulting from an act or omission that constitutes child abuse of the person may be brought at any time and is not subject to any limitation period under this Act despite any other provision of this Act.
- (2) In this section, "child abuse" means any of the following perpetrated against a person when the person is under 18 years of age:
 - (a) sexual abuse,
 - (b) serious physical abuse,
 - (c) any other abuse ("connected abuse") perpetrated in connection with sexual abuse or serious physical abuse of the person (whether or not the connected abuse was perpetrated by the person who perpetrated the sexual abuse or serious physical abuse).
- (3) To remove doubt, connected abuse is child abuse only if both the connected abuse and the sexual abuse or serious physical abuse in connection with which it is perpetrated are perpetrated when the person is under 18 years of age.
- (4) This section applies regardless of whether the claim for damages is brought in tort, in contract, under statute or otherwise.

Civil Liability

A civil liability claim is commenced by a person who seeks compensation for a wrong that has been done to them, not through a scheme but through the legal system from a decision of the court or at mediation.

Civil liability for child sexual abuse comes in a number of actions, the most common are:

- against the perpetrator the civil action will likely be framed as tort of trespass to the person, better known as assault and battery;
- Direct liability of organisations – negligence; and
- Liability of an organisation for the acts of an employee -intentional tort (vicarious liability).

Cases

Assault & battery - KS v GR District Court NSW²

A 66-year-old female commenced an action in the District Court of NSW against the unrepresented perpetrator for the tort of battery and her consequential injuries in respect of abuse when she was aged 3 to 14 (1955 to 1967).

The perpetrator, who had been her stepfather at the time, had been convicted of four of the assaults in around 1995, and served a term of imprisonment. However, the plaintiff's evidence was that the abuse was a very regular occurrence

over many years. Although the assaults were frequent, there was no penetrative abuse.

The perpetrator did not engage a lawyer and did not file a defence. He told the court he was unable to participate due to age, frailty and lack of financial resources. Default judgment was entered, and damages were assessed as follows:

The psychiatric evidence was that although there were other factors contributing to her psychiatric conditions, overall the sexual assaults made a substantial contribution to her current mental state.

The court awarded total damages of \$622,182.

Negligence - McCrae v The Boy Scout Association (NSW Branch) [2007] NSWDC 196

The survivor, then a boy scout, was sexually abused over several years by a scoutmaster. The perpetrator pleaded guilty to sexually assaulting four young male complainants including Mr McCrae between 1978 and 2002.

The claim was brought against the Association who admitted breach of its duty of care, and against the perpetrator, Potter.

Potter was not only a paedophile but also a hebephile, that is, an adult who has a strong sexual and emotional attraction to adolescents. The ages of such children are between 11 and 17 years of age. Hebephiles invariably display predatory behaviour in identifying troubled or withdrawn post-pubescent children. They often comfort and support vulnerable post-pubescent children and make the child dependent upon them.

The effect of the abuse on the plaintiff was profound. He had signs of self-mutilation on his arms clearly indicating the diverse effect of the abuse.

The judge found the plaintiff the plaintiff suffered a severe and debilitating psychological conditions as a result of the sexual abuse and awarded damages against the Scout Association in the sum of \$501,941. The judge awarded against Potter separately in the sum of \$766,94.

Negligence – State of New South Wales v DC

Two sisters claimed against the State of New South Wales (Department of Youth and community Services) for the sexual abuse they suffered at the hands of their stepfather.

The trial judge held the State owed each sister a duty to use reasonable care in the exercise of its powers for the protection of children at risk conferred by it by the Child Welfare Act.

The Department had breached that duty by failing to notify the police of the serious physical and sexual abuse suffered by the two sisters.

²<https://www.caselaw.nsw.gov.au/decision/5e82bce9e4b0529762cf093a>

On appeal, the Court found the continuing abuse by the stepfather after the complaint to the Department was made formed the basis for the sisters claim that they suffered harm, including serious psychiatric injury because of the abuse postdating the complaint to the Department.

Damages awarded to DC \$536,463.60. Damages awarded to her sister TB, \$939,435.60.

Vicarious liability – Prince Alfred College Inc v ADC (2016) 258 CLR 134

An allegation of vicarious liability against say, a Bishop of a Diocese for the sexual abuse of one its young students by a brother of the Diocese, in the current state of the law in Australia is problematic to establish.

In *Prince Alfred College* the primary judgment of the High Court noted that vicarious liability for the acts of an employee is arguable despite the employer not itself being at fault.

Vicarious liability is usually factually and legally complex to prove as it surrounds an enquiry as to whether an act is in the course of the scope of employment.

The current law does not attract vicarious liability just by the fact that the employment affords an opportunity to commit a wrongful act.

Victims Support Package³

In NSW victims of sexual abuse, and other violent crimes, can apply for victims support. A victims support pack includes 22 hours of free counselling and more if needed. Financial support and recognition payment available to victims of violent crime in NSW.

See www.asklois.org.au for more information on the Victims Support scheme.

³

https://www.victimsservices.justice.nsw.gov.au/Pages/vss/vs_financial_support/vs_financial_support.aspx