

TASMANIA REFORMS CHILD ABUSE CLAIMS AND OBLIGATIONS

11 JUNE 2020 | PUBLIC & PRODUCT LIABILITY

The recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse has empowered the Tasmanian Government to revolutionise the law in Tasmania in regards to child abuse claims with the enactment of the *Justice Legislation Amendment (Organisational Liability for Child Abuse) Act 2019* (the Act).

The Act came into force on 1 May 2020. Prior to 1 May 2020, the *Civil Liability Act 2002* (CLA) excluded intentional acts that were sexual assaults or other sexual misconduct. Now, the CLA provides a definition of child sexual abuse, expands the scope of liability of organisations and individuals within organisations for child abuse and provides a presumption that organisations are liable unless it can be proven they have taken reasonable precautions to prevent child abuse being committed (s 49H(3) CLA).

AMENDMENTS TO THE CIVIL LIABILITY ACT 2002 (TAS)

CHILD ABUSE

Child abuse is defined and includes sexual abuse, physical abuse, and any psychological abuse arising from sexual or physical abuse. It does not include an act that was lawful at the time that act occurred (s 49L CLA).

ORGANISATIONS AND INDIVIDUALS

The child abuse provisions apply to organisations and individuals within organisations who exercise care, supervision or authority over children. An individual associated with an organisation includes but is not limited to an officeholder, officer, employee, owner, volunteer, contractor, religious leader or personnel of a religious organisation, and any individual that is prescribed or who is within a class of organisations that is prescribed (s 49G(1) CLA).

Prior to these amendments, victims experienced difficulties bringing actions against unincorporated organisations (for example, church groups) because unincorporated organisations often lacked legal capacity (i.e. not a separate entity). As a result of the amendments, victims can now bring proceedings against unincorporated organisations (s 49M CLA). The CLA permits organisations to elect a proper defendant to act on behalf of the organisation (s 49N CLA), and if they fail to do so within 60 days, the plaintiff may make an application requesting the Court appoint a proper defendant (s 49P CLA).

DUTY OF CARE

The CLA now imposes a statutory non-delegable duty on all organisations and individuals within those organisations to firstly, prevent an individual associated with their organisation from committing acts of child abuse (s 49F CLA) and secondly, take reasonable precautions to prevent those persons from perpetrating child abuse (s 48H(2) CLA). The duty is not retrospective.

Notably the amendments under the CLA reverse the onus of proof. Where once, prior to these amendments, the onus was placed on the victim, the organisation is now presumed to have breached their duty of care to the child if the plaintiff can establish that:

1. an individual associated with the organisation perpetrated child abuse on a child; and
2. had, by virtue of being associated with the organisation; authority, power or control over the child; or the trust of the child; or the ability to achieve intimacy with the child; and
3. was able, by virtue of that authority, power, control, trust or ability, to perpetrate the child abuse on the child (s49H(3) CLA).

An organisation can rebut that presumption if it can prove that it took reasonable precautions to prevent the child abuse (s 49H(3) CLA).

In determining whether reasonable precautions have been taken, the Court may take into account the following:

1. the nature of the organisation;
2. the resources reasonably available to the organisation;
3. the relationship between the organisation and the child;
4. whether the organisation delegated in whole or in part the exercise of care, supervision or authority in respect of the child to another organisation;
5. the role in the organisation of the individual who perpetrated the child abuse;
6. the level of control that the organisation had in respect of the individual who perpetrated the child abuse;
7. whether the organisation complied with any applicable standards (however described) in respect of child safety;
8. any matter prescribed by the regulations; and
9. any other matter that the court considers relevant (s 49H(4)).

VICARIOUS LIABILITY

An organisation is vicariously liable for child abuse perpetrated against a child by a person who is an employee of the organisation, if, at the time the abuse was perpetrated, that person by virtue of being such an employee had authority, power or control over the child, or the trust of the child, or the ability to achieve intimacy with the child, and the person was able, by virtue of that authority, power, control, trust or ability, to perpetrate the child abuse on the child (s 49J).

The test for vicarious liability is one of strict liability and requires the Court to consider the employee's role within an organisation and whether that role facilitated their offending (s 49J(2) CLA, [Draft Second Reading Speech](#)).

In addition to regular employees, vicarious liability is extended to include the perpetration of child abuse by individuals that are 'akin to employees'. For the purposes of the CLA an individual is considered to be 'akin to an employee' of an organisation if their role within the

organisation is for the aims or purpose of the organisation; and gives the individual authority, power or control over a child, or enables the individual to achieve intimacy with, or the trust of a child. Conversely, an individual is not 'akin to an employee' if the individual's role within the organisation is carried out for a recognisably independent business of the individual or of another person or organisation (s 49I CLA).

THE AMENDMENTS TO THE LIMITATIONS ACT 1974

The Act also makes amendments to the *Limitations Act 1974* (LA). As a result of those amendments an action that has previously been settled, can now be set aside on the grounds that it is in the interests of justice to do so (s 5C(2) LA).

Without limiting the matters that a Court may have regard to in determining whether it is in the interests of justice to set aside a settlement, under s 5C(3) of the LA the Court is to have regard to the following factors:

1. the amount of the agreement;
2. the relative strengths of the bargaining positions of the parties; and
3. any conduct by or on behalf of the organisation to which the agreement relates.

Child abuse under the LA is different to that under the CLA, in that the definition of child abuse under the LA, the physical abuse is required to be "serious" (s 5C(1) LA). The reason for this requirement is so that organisations are not liable for actions that were considered appropriate discipline at the time they occurred.

IMPLICATIONS FOR YOU

The amendments now impose on organisations an active duty to take measures and precautions to ensure that both their employees and individuals associated with their organisation are not perpetrating child sexual abuse. It is important that organisations review these measures and precautions regularly to ensure they remain relevant and purposeful. Further, organisations should review their legal relationships with persons 'akin to employees'. It goes without saying that any measures taken ought be recorded carefully together with their implementation and monitored.

REFERENCES

Draft Second Reading Speech, Hon Elise Archer MP:

http://www.parliament.tas.gov.au/bills/Bills2019/pdf/notes/36_of_2019-SRS.pdf

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

http://www.parliament.tas.gov.au/bills/Bills2019/pdf/notes/36_of_2019-Fact%20Sheet.pdf

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

Notes): http://www.parliament.tas.gov.au/bills/Bills2019/pdf/notes/36_of_2019-

[Clause%20Notes.pdf](http://www.parliament.tas.gov.au/bills/Bills2019/pdf/notes/36_of_2019-)

AUTHORS



DEMI PETERS
SOLICITOR

+61 3 6218 8816
demi.peters@bnlaw.com.au