



Western Australia

Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018

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Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018

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Western Australia

Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018

No. 3 of 2018

An Act to amend —

- **the *Civil Liability Act 2002*; and**
- **the *Criminal Injuries Compensation Act 2003*; and**
- **the *Limitation Act 2005*.**

[Assented to 19 April 2018]

The Parliament of Western Australia enacts as follows:

Part 1 — Preliminary

1. Short title

This is the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018*.

2. Commencement

This Act comes into operation as follows —

- (a) Part 1 — on the day on which this Act receives the Royal Assent;
- (b) the rest of the Act — on a day fixed by proclamation, and different days may be fixed for different provisions.

Part 2 — *Civil Liability Act 2002* amended

3. Act amended

This Part amends the *Civil Liability Act 2002*.

4. Section 8 amended

In section 8 delete “Act” and insert:

Act, other than Part 2A,

5. Part 2A inserted

After Part 2 insert:

Part 2A — Child sexual abuse actions

Division 1 — Preliminary

15A. Terms used

In this Part —

assets means any legal or equitable estate or interest (whether present or future, whether vested or contingent and whether personal or assignable) in real or personal property of any description, and includes money and securities, choses in action and documents;

child sexual abuse has the meaning given in the *Limitation Act 2005* section 6A(1);

child sexual abuse action has the meaning given in the *Limitation Act 2005* section 6A(1);

child sexual abuse cause of action has the meaning given in the *Limitation Act 2005* section 6A(1);

institution means an entity (other than the Crown), organised for some purpose or work, that exercises or exercised care, supervision or authority over children, whether as part of its primary functions or activities or otherwise.

Division 2 — Liability of certain office holders and institutions, and availability of assets

15B. Liability of current office holder in unincorporated institution

- (1) Subsections (2) and (3) apply if —
- (a) a person was subjected to child sexual abuse by a person associated with an institution; and
 - (b) the person has or had a child sexual abuse cause of action against the holder of an office of authority in the institution (the ***office holder***) founded on the responsibility of the office holder for the associated person and for the institution generally; and
 - (c) at the time of the accrual of the cause of action, the institution —
 - (i) exercised care, supervision or authority over children; and
 - (ii) was not incorporated;and
 - (d) the institution is currently not incorporated; and
 - (e) the office holder no longer holds the office; and
 - (f) the person would be able to maintain an action on the cause of action if the office holder continued to hold the office.
- (2) An action on the cause of action referred to in subsection (1)(b) may be commenced against the

current holder of the office (the *current office holder*)
in the name of the office.

- (3) Any liability that the office holder would have had in relation to the cause of action is taken to be held by the current office holder.
- (4) This section applies —
 - (a) regardless of when the act or omission that constitutes the child sexual abuse occurred; and
 - (b) regardless of when the cause of action accrued.
- (5) If the current office holder has a liability in relation to a cause of action in tort because of subsection (3), the current office holder is taken to be a tortfeasor, for the purposes of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* section 7, in respect of damage suffered as a result of the tort.

**15C. Assets available for judgments and settlements:
office holders**

- (1) This section applies if a holder of an office of authority in an institution has a liability under a judgment in or settlement of an action on a child sexual abuse cause of action of the type described in section 15B(1)(b).
- (2) The holder of the office may satisfy the liability out of assets held by or for the office or the institution, including assets of a trust (whether or not a charitable trust).
- (3) However, personal assets of the holder of the office cannot be used to satisfy the liability.
- (4) For the purposes of subsection (2) —
 - (a) the holder of the office may realise assets held by or for the office or the institution; and

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- (b) a trustee of a trust may pay an amount in satisfaction of the liability and, for that purpose, realise assets of the trust.
- (5) The holder of the office and a trustee may take the actions referred to in subsections (2) and (4) despite —
 - (a) any written or other law (including any law concerning trusts or the holding of property by or for the office or the institution); or
 - (b) the terms of any trust; or
 - (c) any duty whether as member of the institution, office holder, trustee or otherwise.
- (6) Subsection (3) has effect despite any written or other law, including the *Civil Judgments Enforcement Act 2004*.
- (7) This section does not apply in relation to a judgment in or settlement of a child sexual abuse action given or reached before the day on which the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* section 5 came into operation.

15D. Liability of incorporated institution that was unincorporated at time of abuse

- (1) Subsections (2) and (3) apply if —
 - (a) a person was subjected to child sexual abuse by a person associated with an institution; and
 - (b) the person has or had a child sexual abuse cause of action against the holder of an office of authority in the institution (the *office holder*) founded on the responsibility of the office holder for the associated person and for the institution generally; and

- (c) at the time of the accrual of the cause of action, the institution —
 - (i) exercised care, supervision or authority over children; and
 - (ii) was not incorporated;and
 - (d) the institution is currently incorporated; and
 - (e) the person is able to maintain an action on the cause of action or would be able to do so if the office holder continued to hold the office.
- (2) An action on the cause of action referred to in subsection (1)(b) may be commenced against the institution.
 - (3) Any liability that the office holder would have had in relation to the cause of action is taken to be held by the institution.
 - (4) This section applies —
 - (a) regardless of when the act or omission that constitutes the child sexual abuse occurred; and
 - (b) regardless of when the cause of action accrued.
 - (5) If the institution has a liability in relation to a cause of action in tort because of subsection (3), the institution is taken to be a tortfeasor, for the purposes of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* section 7, in respect of damage suffered as a result of the tort.

15E. Assets available for judgments and settlements: institutions

- (1) This section applies if an institution has a liability under a judgment in or settlement of a child sexual abuse action.

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- (2) The institution may satisfy the liability out of assets held by or for the institution, including assets of a trust (whether or not a charitable trust).
- (3) For the purposes of subsection (2) —
 - (a) the institution may realise assets held by or for the institution; and
 - (b) a trustee of a trust may pay an amount in satisfaction of the liability and, for that purpose, realise assets of the trust.
- (4) The institution or a trustee may take the actions referred to in subsections (2) and (3) despite —
 - (a) any written or other law (including any law concerning trusts or the holding of property by or for the office or the institution); or
 - (b) the terms of any trust; or
 - (c) any duty whether as member of the institution, office holder, trustee or otherwise.
- (5) This section does not apply in relation to a judgment in or settlement of a child sexual abuse action given or reached before the day on which the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* section 5 came into operation.

15F. Continuity of institutions: institution substantially the same

- (1) For the purposes of sections 15B, 15D and 15H(4)(a), it is sufficient that an institution (as it is currently) is substantially the same as it was at the time when the cause of action accrued (the *relevant time*).
- (2) Without limiting the generality of subsection (1), an institution (as it is currently) is substantially the same as it was at the relevant time if the class or type of member and the primary purposes or work of the

institution (as it is currently) are substantially the same as they were at the relevant time.

- (3) Subsections (1) and (2) have effect regardless of whether, after the relevant time —
- (a) the name of the institution changed;
 - (b) the organisational structure of the institution changed;
 - (c) the institution became incorporated;
 - (d) the geographic area in which the members of the institution carried out the purposes or work of the institution changed.

15G. Continuity of institutions: no institution the same or substantially the same

- (1) If, for the purposes of section 15B or 15D, there is no current institution that is the same or substantially the same as the institution referred to in section 15B(1)(a) or 15D(1)(a) (the *earlier institution*), the current institution that is, under this section, the relevant successor of the earlier institution is taken to be the same institution as the earlier institution for the purposes of this Division.
- (2) A current institution is the relevant successor of an earlier institution if —
- (a) 1 of the circumstances in subsection (3) applies to the institution and the earlier institution; or
 - (b) in the case where there is at least 1 institution interposed, over time, between the institution and the earlier institution — at least 1 of the circumstances in subsection (4) applies to each link in the chain between the institution and the earlier institution.

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- (3) For the purposes of subsection (2)(a), the circumstances are —
 - (a) some or all of the earlier institution merged into the institution;
 - (b) some or all of the earlier institution merged with 1 or more other entities to form the institution;
 - (c) the institution is the remainder of the earlier institution after some of the earlier institution ceased to be part of the earlier institution.
- (4) For the purposes of subsection (2)(b), the circumstances are —
 - (a) some or all of an earlier institution merged into an institution;
 - (b) some or all of an earlier institution merged with 1 or more other entities to form an institution;
 - (c) an institution is the remainder of an earlier institution after some of the earlier institution ceased to be part of the earlier institution;
 - (d) an institution as it is at a particular time is substantially the same as it was at an earlier time (and section 15F(2) and (3) apply, with all necessary modifications, in determining what is substantially the same).
- (5) The Governor may, on the recommendation of the Minister, make regulations providing that, for the purposes of subsection (1), a specified current institution is the relevant successor of a specified earlier institution.
- (6) The Minister cannot make a recommendation for the purposes of subsection (5) unless satisfied that —
 - (a) the current institution has some relevant connection to the earlier institution; or

- (b) the head of the current institution, as worked out under section 15H(3), has agreed to the current institution being the relevant successor of the earlier institution.
- (7) Regulations made for the purposes of subsection (5) —
- (a) prevail over subsections (2) to (4) to the extent of any inconsistency; and
 - (b) may have effect from a day that is before the day on which they are published in the *Gazette*, but not before the day on which the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* section 5 came into operation.

15H. Continuity of offices

- (1) For the purposes of section 15B, it is sufficient that an office (as it is currently) is substantially the same as it was at the time when the cause of action accrued.
- (2) However, if there is no current office that is the same or substantially the same as the office referred to in section 15B(1)(b) but there is continuity of the institution, the current head of the institution is taken to be the current office holder for the purposes of this Division.
- (3) The head of an institution is the individual or body who or which, as a member or part of the institution —
 - (a) is acknowledged by the institution as the head of the institution; or
 - (b) in the absence of such an individual, body or acknowledgment — has overall responsibility for the institution.

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- (4) For the purposes of subsection (2), there is continuity of the institution if the institution (as it is currently) —
- (a) is the same as it was at the time when the cause of action accrued; or
 - (b) is the same institution, under section 15G, as the institution referred to in section 15B(1)(a).

15I. Accrual of certain child sexual abuse causes of action

For the purposes of this Division, if a child sexual abuse cause of action does not accrue at the time of the act or omission giving rise to the cause of action, the cause of action is taken to have accrued at the time of the act or omission, despite any written or other law.

15J. Displacement of Corporations legislation

Sections 15C and 15E are declared to be Corporations legislation displacement provisions for the purposes of the *Corporations Act 2001* (Commonwealth) section 5G in relation to the Corporations legislation generally.

Division 3 — Prior compensation payments

15K. Prior compensation payments taken into account

- (1) In this section —
- compensation payment***, made in respect of a person —
- (a) means a payment made in respect of the person by way of compensation or redress (including an ex gratia payment) for child sexual abuse of the person; but
 - (b) does not include an amount paid under a judgment in or settlement of a child sexual abuse action.

- (2) A court, in making an award of damages in a child sexual abuse action in respect of a person, must deduct an amount equal to the amount of any compensation payment made in respect of the person for the child sexual abuse the subject of the action.
- (3) The court must do so only to the extent to which the compensation payment is for that child sexual abuse.
- (4) If the court is not satisfied as to the extent to which the compensation payment is for that child sexual abuse, the court must deduct an amount equal to 50% of the payment.
- (5) This section does not limit a court's power, in making an award of damages in a child sexual abuse action in respect of a person, to take into account an amount paid under a judgment in or settlement of a previous child sexual abuse action in respect of the person.

Division 4 — Caps on legal fees

15L. Caps on legal fees

- (1) In this section —
costs determination has the meaning given in the *Legal Profession Act 2008* section 252;
law practice has the meaning given in the *Legal Profession Act 2008* section 3.
- (2) An agreement must not be made for a law practice to receive, for appearing for or acting on behalf of a person in a child sexual abuse action, any greater reward than is provided for by any costs determination that is in force.

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- (3) An agreement is void, and any money paid under the agreement is recoverable by the person who paid the money, if the agreement —
 - (a) is made contrary to this section; or
 - (b) would have been contrary to this section if it had been made after the commencement of the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* section 5.
- (4) Subsection (3) does not affect the operation of an agreement so far as it relates to services provided before the commencement of the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* section 5 and does not apply in relation to any money paid or payable in respect of services so provided.

Division 5 — Review of Part 2A

15M. Review of Part

- (1) The Minister must carry out a review of the operation and effectiveness of this Part as soon as is practicable after the 3rd anniversary of the day on which the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* section 5 comes into operation.
- (2) The Minister must prepare a report based on the review and, as soon as is practicable after the report is prepared, cause it to be laid before each House of Parliament.

Part 3 — *Criminal Injuries Compensation Act 2003* amended

6. Act amended

This Part amends the *Criminal Injuries Compensation Act 2003*.

7. Section 68 amended

After section 68(1) insert:

- (1A) Subsection (1) does not apply if the amount referred to in subsection (1)(b) was reduced to take into account the compensation award referred to in subsection (1)(a).

Part 4 — *Limitation Act 2005* amended

8. Act amended

This Part amends the *Limitation Act 2005*.

9. Section 5 amended

In section 5(2) delete “section 6.” and insert:

sections 6 and 6A.

10. Section 6A inserted

After section 6 insert:

6A. Special provisions for child sexual abuse actions: no limitation period

(1) In this section —

child means a person under 18 years of age;

child sexual abuse, of a person, means an act or omission in relation to the person, when the person is a child, that is sexual abuse;

child sexual abuse action means an action on a child sexual abuse cause of action;

child sexual abuse cause of action means a cause of action that relates, directly or indirectly, to a personal injury of the person to whom the cause of action accrues, where the injury results from child sexual abuse of the person.

(2) Despite anything in this or any other Act, no limitation period applies in respect of a child sexual abuse action.

- (3) The following provisions do not apply in respect of a child sexual abuse action —
- (a) the *Crown Suits Act 1947* section 6 (as applying under the *Limitation Legislation Amendment and Repeal Act 2005* section 8);
 - (b) the *Limitation Act 1935* section 47A (as applying under the *Limitation Legislation Amendment and Repeal Act 2005* section 4);
 - (c) section 5 of this Act.
- (4) This section applies regardless of whether the action is brought in tort (including trespass), in contract, under statute or otherwise.
- (5) This section does not limit —
- (a) any inherent, implied or statutory jurisdiction of a court; or
 - (b) any other powers of a court arising or derived from the common law or under any other Act (including any Commonwealth Act), rule of court, practice note or practice direction.

Note for this subsection:

For example, this section is not intended to limit a court's power to summarily dismiss or permanently stay proceedings where the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible.

- (6) A cause of action referred to in the definition of ***child sexual abuse cause of action*** does not include a cause of action, action on which could not be maintained but for the *Fatal Accidents Act 1959* or the *Law Reform (Miscellaneous Provisions) Act 1941*.
- (7) The Minister must carry out a review of the operation and effectiveness of this section and Part 7 as soon as is practicable after the 3rd anniversary of the day on which the *Civil Liability Legislation Amendment (Child*

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Sexual Abuse Actions) Act 2018 section 10 comes into operation.

- (8) The Minister must prepare a report based on the review and, as soon as is practicable after the report is prepared, cause it to be laid before each House of Parliament.

11. Section 9 amended

In section 9(1) delete “section 28(3) and (5))” and insert:

sections 6A and 28(3) and (5))

12. Part 7 inserted

After Part 6 insert:

Part 7 — Transitional provisions

**Division 1 — Provisions for *Civil Liability Legislation
Amendment (Child Sexual Abuse Actions) Act 2018***

89. Terms used

In this Division —

child sexual abuse has the meaning given in section 6A(1);

child sexual abuse action has the meaning given in section 6A(1);

child sexual abuse cause of action has the meaning given in section 6A(1);

commencement day means the day on which the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* section 12 comes into operation;

previously barred cause of action means a child sexual abuse cause of action that was statute barred immediately before commencement day;

previously settled cause of action means a child sexual abuse cause of action that was settled after it was statute barred but before commencement day;

statute barred, in relation to a child sexual abuse cause of action, means that action on the cause of action cannot be maintained —

- (a) under one of the provisions referred to in section 6A(3); or
- (b) because a limitation period applicable to the action under this or any other Act has expired.

90. Application of section 6A

Section 6A applies in relation to a child sexual abuse action regardless of when the act or omission constituting child sexual abuse occurred.

91. Previously barred causes of action

- (1) An action on a previously barred cause of action may be commenced even though one or more of the following apply —
 - (a) the action was statute barred before commencement day;
 - (b) an action on the cause of action had commenced but was discontinued or not finalised before commencement day;
 - (c) a judgment was given before commencement day in relation to the cause of action on the ground that the action was statute barred;
 - (d) an action on the cause of action was dismissed before commencement day on the ground that the action was statute barred.

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- (2) Application may be made to a court with jurisdiction to deal with the action to set aside a judgment referred to in subsection (1)(c) or (d) (the *previous judgment*). An application may be made prior to the commencement of the action.
- (3) The court may, if satisfied that it is just and reasonable to do so, set aside the previous judgment to the extent to which it relates to the action.
- (4) If the previous judgment is wholly or partly set aside, a person who paid an amount under the judgment cannot seek to recover that amount on the basis of the judgment having been set aside to that extent.
- (5) If an action on a previously barred cause of action is commenced, the court dealing with the action may, if satisfied that it is just and reasonable to do so, take into account any amount paid under a previous judgment relating to the cause of action.
- (6) A court, other than the Supreme Court, may not set aside a previous judgment of another court.

92. Previously settled causes of action

- (1) This section applies in relation to a proposed action on a previously settled cause of action and to the agreement effecting the settlement (the *settlement agreement*).
- (2) Application may be made to a court that would have jurisdiction to deal with the action, but for the settlement agreement, for leave to commence the 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.
- (4) If an action on the previously settled cause of action is commenced, the settlement agreement and each agreement relating to the settlement, other than a contract of insurance, is, despite any written or other law, void to the extent to which it relates to the child sexual abuse the subject of the cause of action.
- (5) A party to an agreement that is wholly or partly void under subsection (4) cannot seek to recover an amount paid by or for the party under the agreement on the basis that the agreement is void to that extent.
- (6) The court dealing with the action may, if satisfied that it is just and reasonable to do so, take into account any amount paid under an agreement that is wholly or partly void under this section, to the extent to which the amount relates to the child sexual abuse the subject of the cause of action.
- (7) For the purposes of subsection (6), amounts paid under an agreement are taken to relate to the child sexual abuse the subject of the cause of action to the extent of 50% if the agreement —
 - (a) does not relate solely to that child sexual abuse; and
 - (b) does not expressly deal with the extent to which the agreement and amounts paid under it relate to that child sexual abuse.

