

WINTER 2018



Message from the
Editor

In this edition of the Legal Check-up, we put the spotlight on sexual abuse and provide advice for medical professionals caring for survivors.

Legislation was recently introduced in Victoria which abolishes a significant barrier for institutional child abuse victims - the 'Ellis defence'. This defence was previously used by churches to prevent child sexual abuse victims from bringing compensation claims. Read more about the removal of this barrier to compensation in our cover story.

There are number of legal options available to survivors of sexual abuse. Inside this edition, Lawyer Kirsty Osborne outlines these options and provides recommendations for medical professionals. She also covers circumstances where it is necessary for survivors to use a pseudonym; and outlines a case against dentist, Hartley Davey.

We are very pleased to announce that due to client demand, we have opened a visiting office in Wangaratta. Managing the office is Lauren Freeman, Special Counsel.

If you require further information about any of the topics discussed in this edition of the Legal Check-up, contact us on (03) 9321 9988.

Bree Knoester, Partner

'Ellis defence' no longer a barrier for survivors

New legislation in Victoria has removed a significant barrier to survivors of institutional child abuse obtaining compensation.

The *Legal Identity of Defendants (Organisational Child Abuse) Act 2018 (Vic) (The Act)* prevents unincorporated organisations who hold their assets in trust from using the 'Ellis defence' to avoid being sued by survivors.

The 'Ellis defence'

The 'Ellis defence' presents a major hurdle for survivors. Although a survivor is able to sue their abuser directly, the abuser may lack sufficient assets or have died by the time an action is commenced. The survivor must then look to sue the organisation in which they were abused. However, many organisations are unincorporated and hold their assets in trust. The common law position is that these organisations are not legal entities that can be sued in their own right.

This is known as the 'Ellis defence' and comes from the 2007 decision *Trustees of the Roman Catholic Church v Ellis (2007) 70 NSWLR 565*.

Mr John Ellis attempted to sue Cardinal George Pell on behalf of the Catholic Archdiocese of Sydney and the trustees of the Roman Catholic Church for sexual abuse suffered when volunteering as an altar boy in the 1970s. As the Court could not identify a proper defendant, Mr Ellis' case was dismissed and he did not obtain compensation.

Explanation of the Act

The Act 2018 was assented to on 5 June 2018. It was introduced as a response to recommendations in the Victorian Parliament's Betrayal of Trust report and the Royal Commission into Institutional Responses to Child Sexual Abuse's 2015 Redress and Civil Litigation Report.

The Act will apply if:

- a plaintiff wishes to commence a claim against an unincorporated non-government organisation (NGO) founded on or arising from child abuse;
- but for being unincorporated the NGO would be able to be sued and found liable for such a claim; and
- the NGO controls one or more associate trusts.

If these conditions are met, the Act enables the NGO to nominate an entity that is capable of being sued to act as a proper defendant to the claim on their behalf and to incur any liability arising from a claim on their behalf. If an NGO fails to nominate a proper defendant within 120 days from the commencement of a proceeding against them, or if the nominated entity lacks sufficient assets and property or is not an entity capable of being sued, then the plaintiff may apply to the court for an order that the claim is to proceed against the trustees of an associated trust of the NGO.

Effect of the Act

The Act therefore abolishes the 'Ellis defence'. It means that, in Victoria, survivors of institutional child abuse can be certain they will be able to identify an entity to sue for compensation regardless of that institution's legal structure.

The New South Wales Government has announced that it will follow Victoria's lead and introduce laws to abolish the 'Ellis defence' by the end of 2018.

Bree Knoester, Partner



What's in a name?

Protecting the anonymity of sexual assault survivors

Often sexual assault survivors are nervous about bringing Court proceedings because of the potential to be identified.

The Victorian Courts and legislature have recognised that this is a common experience for survivors of sexual assault and have responded accordingly, allowing the opportunity to bring Court proceedings anonymously.

Under the *Judicial Proceedings Reports Act 1958*, the names of sexual assault survivors cannot be published by the media without the express permission of the survivor or a Court. However, the survivor's name will still be published on publically available Court documents.

In circumstances where a survivor does not want to be identified in any circumstances, we can assist them to bring a pseudonym application.

If a pseudonym application is successful, the Court will allow the survivor to bring proceedings under a different name or alias, for example "AA".

When deciding whether to grant a pseudonym application, a Court will consider all the relevant factors, including:

- whether there is likely to be media interest;
- whether the publication of the survivor's name is likely to have a negative impact on the survivor, including their psychological health, ability to recover from the abuse, personal relationships, career or standing in their community;
- whether the publication of the survivor's name would deter the survivor from bringing Court proceedings and pursuing their legal rights;
- whether the likely impact on the survivor outweighs the need to ensure that Courts are open and accessible to the public.

Due to the above, Courts often find that a pseudonym is necessary in sexual assault proceedings.

Justice for child survivors of abusive dentist

It takes courage to come forward as a survivor of child sexual assault, and even more so after a lifetime of carrying the burden. Adviceline Injury Lawyers is assisting a number of survivors seek justice for offending which happened over 60 years ago at the hands of Hartley Davey.

During the 1950's, Hartley Davey was a trusted member of the church community in Prahran. Davey was the organist at a Methodist church, enthusiastic photographer and dentist at a Prahran clinic.

In 2016, more than 60 years after the offending, Davey pleaded guilty to five counts of indecent assault against three child patients of his dental clinic. Some of the offending also occurred in the church.

Davey was sentenced to a wholly suspended jail sentence of 18 months with strict conditions. Immediately following the conviction, Adviceline Injury Lawyers brought applications for compensation on behalf of the survivors.

During the proceedings, the Melbourne Magistrates' Court heard how Davey, now in his 90's, used his position of trust and respect in the community to foster relationships with the families and gain unsupervised access to the children. For their distress and trauma, Magistrate Duncan Reynold's awarded compensation to the three applicants in the sum of \$250,000 collectively.

Partner at Adviceline Injury Lawyers, Bree Knoester, who acted for the survivors, said that no amount of compensation would ever be enough, but that the successful claims for compensation were a way of acknowledging the terrible crimes that had been committed against the applicants.

"Trauma in childhood can have a significant effect on daily life and can persist into adulthood," Bree said. "Here, young children were taken advantage of and as adults were brave enough to face the offender and demand justice and compensation."

As a result of these proceedings, Adviceline Injury Lawyers has been contacted by a number of Davey's victims. Investigations are currently being undertaken into the potential liability of the Church with respect to Davey's offending.

Legal options for survivors of sexual assault



If your patient is a survivor of sexual assault, we recommend that you encourage them to report the incident to the police; and contact a lawyer.

Reporting to police

There are specialised units of Victoria Police that assist survivors of sexual assault. These units are called Sexual Offences and Child Abuse Investigation Teams (SOCITs). SOCIT locations can be found on the Victoria Police website.

Reporting a sexual assault to the police will usually involve making a written statement. The SOCIT can then investigate the incident and determine whether they will lay charges.

There may be some circumstances where a survivor is reluctant to make a police report. In these circumstances, the survivor should speak with a lawyer. A lawyer can provide advice about the compensation options and explain how making a police report can assist in bringing a claim.

How can a lawyer help?

A lawyer can assist survivors receive compensation for the physical, psychological and financial harm caused by the sexual assault by making one or more of the following claims:

Type of claim	What is it?	Police report required?	Time limits *	Who pays?
VOCAT claim	VOCAT stands for the Victims of Crime Assistance Tribunal. A survivor can make an application to VOCAT for particular categories of loss. The Tribunal then has the discretion to make payments in response to the application.	No, but the process can be quicker and easier if a report has been made.	2 years from the date of the crime.	Government fund.
Sentencing Act Application	This type of claim is made under the <i>Sentencing Act 1991 (Vic)</i> . This claim can only be made if the offender has been charged and convicted of the crime.	Yes.	1 year from the date the offender is found guilty.	The offender.
Civil claim	This type of claim is where the survivor sues the offender personally. In some circumstances an institution, like a school or church, should have taken reasonable steps to prevent a sexual assault from occurring. In these circumstances, it is possible to sue the institution for negligence. **	No, but a police report may assist with the claim.	If the person was assaulted as a child, there is no time limit. If the person was assaulted as an adult, 3 years from the date of the crime.	The offender or responsible institution.

* Extensions of time can be obtained in certain circumstances for all types of claims.

** If the survivor was sexually assaulted in an institutional context, they may also be able to bring a claim for a reparation payments under a redress scheme.

Our news



Adviceline Injury Lawyers is now in Wangaratta!

For the last few years, Special Counsel Lauren Freeman has helped a large number of Wangaratta locals claim their rightful entitlements for injuries sustained at work, on the road or in a public place.

Lauren is pleased to be opening the Wangaratta office and provide the north-eastern community with a convenient contact point for legal assistance.

"Growing up in the north east of Victoria I understand the difficulty locals face when they need advice from an expert."

"I am pleased that following strong demand we have been able to swiftly respond to client needs," said Lauren.

Managing Partner at Adviceline Injury Lawyers, Bree Knoester, said that the expansion of the firm into this area is evidence of the firm's long-term commitment to the region.

"This is a great milestone for Adviceline and further strengthens our suburban strategy," Bree said.

The Wangaratta office is located at 26B Reid Street, and is open by appointment only.

Would you like free legal advice from a local lawyer about your patient's claim? Come and visit our new office at our "drop in" day on Tuesday 4 September.



Now open! Adviceline Injury Lawyers, Wangaratta

Free legal in-service: We'll even bring lunch!

Based locally to you, a team of experts from Adviceline Injury Lawyers can attend your clinic to provide a **free information session** on entitlements under the main compensation schemes.

They are also available to answer any questions that you or your team may have.

The information presented is up to you! Let us know what you would like to hear about, and we can tailor a session that will meet the specific needs of your clinic.

To schedule your free information session, please contact Niki Patterson on (03) 9321 9925 or email niki.patterson@alil.com.au.

Remember, you can access **free legal assistance** at any time during business hours on our Adviceline - (03) 9321 9988.

When you call, you will speak directly to a lawyer - not a secretary or call centre.

CONTACT US

T (03) 9321 9988 | E advice@alil.com.au

LOCATIONS

EPPING | MELBOURNE | MELTON | MOE | SPRINGVALE | WANGARATTA

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