

Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Bill 2017

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Western Australia

LEGISLATIVE ASSEMBLY

(As amended during consideration in detail)

**Civil Liability Legislation Amendment (Child
Sexual Abuse Actions) Bill 2017**

A Bill for

An Act to amend —

- **the *Civil Liability Act 2002*; and**
- **the *Limitation Act 2005*.**

The Parliament of Western Australia enacts as follows:

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Part 1 — Preliminary

1. Short title

This is the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2017*.

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.

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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);

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

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

8 **15B. Liability of current office holder in unincorporated**
9 **institution**

- 10 (1) Subsections (2) and (3) apply if —
- 11 (a) a person was subjected to child sexual abuse by
12 a person associated with an institution; and
- 13 (b) the person has or had a child sexual abuse cause
14 of action against the holder of an office of
15 authority in the institution (the ***office holder***)
16 founded on the responsibility of the office
17 holder for the associated person and for the
18 institution generally; and
- 19 (c) at the time of the accrual of the cause of action,
20 the institution —
- 21 (i) exercised care, supervision or authority
22 over children; and
- 23 (ii) was not incorporated;
- 24 and
- 25 (d) the institution is currently not incorporated; and
- 26 (e) the office holder no longer holds the office; and
- 27 (f) the person would be able to maintain an action
28 on the cause of action if the office holder
29 continued to hold the office.
- 30 (2) An action on the cause of action referred to in
31 subsection (1)(b) may be commenced against the

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

16 **15C. Assets available for judgments and settlements:**
17 **office holders**

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

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- 1 (b) a trustee of a trust may pay an amount in
2 satisfaction of the liability and, for that purpose,
3 realise assets of the trust.
- 4 (5) The holder of the office and a trustee may take the
5 actions referred to in subsections (2) and (4) despite —
- 6 (a) any written or other law (including any law
7 concerning trusts or the holding of property by
8 or for the office or the institution); or
- 9 (b) the terms of any trust; or
- 10 (c) any duty whether as member of the institution,
11 office holder, trustee or otherwise.
- 12 (6) Subsection (3) has effect despite any written or other
13 law, including the *Civil Judgments Enforcement*
14 *Act 2004*.
- 15 (7) This section does not apply in relation to a judgment in
16 or settlement of a child sexual abuse action given or
17 reached before the day on which the *Civil Liability*
18 *Legislation Amendment (Child Sexual Abuse Actions)*
19 *Act 2017* section 5 came into operation.
- 20 **15D. Liability of incorporated institution that was**
21 **unincorporated at time of abuse**
- 22 (1) Subsections (2) and (3) apply if —
- 23 (a) a person was subjected to child sexual abuse by
24 a person associated with an institution; and
- 25 (b) the person has or had a child sexual abuse cause
26 of action against the holder of an office of
27 authority in the institution (the *office holder*)
28 founded on the responsibility of the office
29 holder for the associated person and for the
30 institution generally; and

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

27 **15E. Assets available for judgments and settlements:**
28 **institutions**

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

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- 1 (2) The institution may satisfy the liability out of assets
2 held by or for the institution, including assets of a trust
3 (whether or not a charitable trust).
- 4 (3) For the purposes of subsection (2) —
5 (a) the institution may realise assets held by or for
6 the institution; and
7 (b) a trustee of a trust may pay an amount in
8 satisfaction of the liability and, for that purpose,
9 realise assets of the trust.
- 10 (4) The institution or a trustee may take the actions
11 referred to in subsections (2) and (3) despite —
12 (a) any written or other law (including any law
13 concerning trusts or the holding of property by
14 or for the office or the institution); or
15 (b) the terms of any trust; or
16 (c) any duty whether as member of the institution,
17 office holder, trustee or otherwise.
- 18 (5) This section does not apply in relation to a judgment in
19 or settlement of a child sexual abuse action given or
20 reached before the day on which the *Civil Liability*
21 *Legislation Amendment (Child Sexual Abuse Actions)*
22 *Act 2017* section 5 came into operation.

23 **15F. Continuity of institutions: institution substantially**
24 **the same**

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

- 1 institution (as it is currently) are substantially the same
2 as they were at the relevant time.
- 3 (3) Subsections (1) and (2) have effect regardless of
4 whether, after the relevant time —
- 5 (a) the name of the institution changed;
6 (b) the organisational structure of the institution
7 changed;
8 (c) the institution became incorporated;
9 (d) the geographic area in which the members of
10 the institution carried out the purposes or work
11 of the institution changed.

12 **15G. Continuity of institutions: no institution the same or**
13 **substantially the same**

- 14 (1) If, for the purposes of section 15B or 15D, there is no
15 current institution that is the same or substantially the
16 same as the institution referred to in section 15B(1)(a)
17 or 15D(1)(a) (the *earlier institution*), the current
18 institution that is, under this section, the relevant
19 successor of the earlier institution is taken to be the
20 same institution as the earlier institution for the
21 purposes of this Division.
- 22 (2) A current institution is the relevant successor of an
23 earlier institution if —
- 24 (a) 1 of the circumstances in subsection (3) applies
25 to the institution and the earlier institution; or
26 (b) in the case where there is at least 1 institution
27 interposed, over time, between the institution
28 and the earlier institution — at least 1 of the
29 circumstances in subsection (4) applies to each
30 link in the chain between the institution and the
31 earlier institution.

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- 1 (3) For the purposes of subsection (2)(a), the
2 circumstances are —
- 3 (a) some or all of the earlier institution merged into
4 the institution;
- 5 (b) some or all of the earlier institution merged
6 with 1 or more other entities to form the
7 institution;
- 8 (c) the institution is the remainder of the earlier
9 institution after some of the earlier institution
10 ceased to be part of the earlier institution.
- 11 (4) For the purposes of subsection (2)(b), the
12 circumstances are —
- 13 (a) some or all of an earlier institution merged into
14 an institution;
- 15 (b) some or all of an earlier institution merged with
16 1 or more other entities to form an institution;
- 17 (c) an institution is the remainder of an earlier
18 institution after some of the earlier institution
19 ceased to be part of the earlier institution;
- 20 (d) an institution as it is at a particular time is
21 substantially the same as it was at an earlier
22 time (and section 15F(2) and (3) apply, with all
23 necessary modifications, in determining what is
24 substantially the same).
- 25 (5) The Governor may, on the recommendation of the
26 Minister, make regulations providing that, for the
27 purposes of subsection (1), a specified current
28 institution is the relevant successor of a specified
29 earlier institution.
- 30 (6) The Minister cannot make a recommendation for the
31 purposes of subsection (5) unless satisfied that —
- 32 (a) the current institution has some relevant
33 connection to the earlier institution; or

- 1 (b) the head of the current institution, as worked
2 out under section 15H(3), has agreed to the
3 current institution being the relevant successor
4 of the earlier institution.
- 5 (7) Regulations made for the purposes of subsection (5) —
6 (a) prevail over subsections (2) to (4) to the extent
7 of any inconsistency; and
8 (b) may have effect from a day that is before the
9 day on which they are published in the *Gazette*,
10 but not before the day on which the *Civil*
11 *Liability Legislation Amendment (Child Sexual*
12 *Abuse Actions) Act 2017* section 5 came into
13 operation.

14 **15H. Continuity of offices**

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

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

7 **15I. Accrual of certain child sexual abuse causes of**
8 **action**

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

14 **15J. Displacement of Corporations legislation**

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

20 **Division 3 — Prior compensation payments**

21 **15K. Prior compensation payments taken into account**

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

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

17 **Division 4 — Caps on legal fees**

18 **15L. Caps on legal fees**

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

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- 1 (3) An agreement is void, and any money paid under the
2 agreement is recoverable by the person who paid the
3 money, if the agreement —
4 (a) is made contrary to this section; or
5 (b) would have been contrary to this section if it
6 had been made after the commencement of the
7 *Civil Liability Legislation Amendment (Child*
8 *Sexual Abuse Actions) Act 2017* section 5.
- 9 (4) Subsection (3) does not affect the operation of an
10 agreement so far as it relates to services provided
11 before the commencement of the *Civil Liability*
12 *Legislation Amendment (Child Sexual Abuse Actions)*
13 *Act 2017* section 5 and does not apply in relation to any
14 money paid or payable in respect of services so
15 provided.
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Part 3 — *Limitation Act 2005* amended

6. Act amended

This Part amends the *Limitation Act 2005*.

7. Section 5 amended

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

sections 6 and 6A.

8. 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.

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- 1 (3) The following provisions do not apply in respect of a
2 child sexual abuse action —
- 3 (a) the *Crown Suits Act 1947* section 6 (as applying
4 under the *Limitation Legislation Amendment
5 and Repeal Act 2005* section 8);
- 6 (b) the *Limitation Act 1935* section 47A (as
7 applying under the *Limitation Legislation
8 Amendment and Repeal Act 2005* section 4);
- 9 (c) section 5 of this Act.
- 10 (4) This section applies regardless of whether the action is
11 brought in tort (including trespass), in contract, under
12 statute or otherwise.
- 13 (5) This section does not limit —
- 14 (a) any inherent, implied or statutory jurisdiction of
15 a court; or
- 16 (b) any other powers of a court arising or derived
17 from the common law or under any other Act
18 (including any Commonwealth Act), rule of
19 court, practice note or practice direction.
- 20 Note for this subsection:
21 For example, this section is not intended to limit a court's
22 power to summarily dismiss or permanently stay
23 proceedings where the lapse of time has a burdensome
24 effect on the defendant that is so serious that a fair trial is
25 not possible.
- 26 (6) A cause of action referred to in the definition of ***child
27 sexual abuse cause of action*** does not include a cause
28 of action, action on which could not be maintained but
29 for the *Fatal Accidents Act 1959* or the *Law Reform
30 (Miscellaneous Provisions) Act 1941*.
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1 **9. Section 9 amended**

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

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

5
6 **10. Part 7 inserted**

7 After Part 6 insert:

8
9 **Part 7 — Transitional provisions**

10 **Division 1 — Provisions for *Civil Liability Legislation***
11 ***Amendment (Child Sexual Abuse Actions) Act 2017***

12 **89. Terms used**

13 In this Division —

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

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

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

20 ***commencement day*** means the day on which the *Civil*
21 *Liability Legislation Amendment (Child Sexual Abuse*
22 *Actions) Act 2017* section 10 comes into operation;

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

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

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

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

8 **90. Application of section 6A**

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

12 **91. Previously barred causes of action**

- 13 (1) An action on a previously barred cause of action may
14 be commenced even though one or more of the
15 following apply —
16 (a) the action was statute barred before
17 commencement day;
18 (b) an action on the cause of action had
19 commenced but was discontinued or not
20 finalised before commencement day;
21 (c) a judgment was given before commencement
22 day in relation to the cause of action on the
23 ground that the action was statute barred;
24 (d) an action on the cause of action was dismissed
25 before commencement day on the ground that
26 the action was statute barred.
27 (2) Application may be made to a court with jurisdiction to
28 deal with the action to set aside a judgment referred to
29 in subsection (1)(c) or (d) (the **previous judgment**). An
30 application may be made prior to the commencement
31 of the action.

- 1 (3) The court may, if satisfied that it is just and reasonable
2 to do so, set aside the previous judgment to the extent
3 to which it relates to the action.
- 4 (4) If the previous judgment is wholly or partly set aside, a
5 person who paid an amount under the judgment cannot
6 seek to recover that amount on the basis of the
7 judgment having been set aside to that extent.
- 8 (5) If an action on a previously barred cause of action is
9 commenced, the court dealing with the action may, if
10 satisfied that it is just and reasonable to do so, take into
11 account any amount paid under a previous judgment
12 relating to the cause of action.
- 13 (6) A court, other than the Supreme Court, may not set
14 aside a previous judgment of another court.

15 **92. Previously settled causes of action**

- 16 (1) This section applies in relation to a proposed action on
17 a previously settled cause of action and to the
18 agreement effecting the settlement (the *settlement*
19 *agreement*).
- 20 (2) Application may be made to a court that would have
21 jurisdiction to deal with the action, but for the
22 settlement agreement, for leave to commence the
23 action.
- 24 (3) The court may, if satisfied that it is just and reasonable
25 to do so —
- 26 (a) grant leave to commence the action, subject to
27 conditions; and
- 28 (b) to the extent necessary for that, set aside the
29 settlement agreement and any judgment giving
30 effect to the settlement.
- 31 (4) If an action on the previously settled cause of action is
32 commenced, the settlement agreement and each

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- 1 agreement relating to the settlement, other than a
2 contract of insurance, is, despite any written or other
3 law, void to the extent to which it relates to the child
4 sexual abuse the subject of the cause of action.
- 5 (5) A party to an agreement that is wholly or partly void
6 under subsection (4) cannot seek to recover an amount
7 paid by or for the party under the agreement on the
8 basis that the agreement is void to that extent.
- 9 (6) The court dealing with the action may, if satisfied that
10 it is just and reasonable to do so, take into account any
11 amount paid under an agreement that is wholly or
12 partly void under this section, to the extent to which the
13 amount relates to the child sexual abuse the subject of
14 the cause of action.
- 15 (7) For the purposes of subsection (6), amounts paid under
16 an agreement are taken to relate to the child sexual
17 abuse the subject of the cause of action to the extent of
18 50% if the agreement —
- 19 (a) does not relate solely to that child sexual abuse;
20 and
- 21 (b) does not expressly deal with the extent to which
22 the agreement and amounts paid under it relate
23 to that child sexual abuse.
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