

# CIVIL LIABILITY LEGISLATION AMENDMENT (CHILD SEXUAL ABUSE ACTIONS) BILL 2017 (WA)

## EXPLANATORY MEMORANDUM

### Overview of the Bill

The Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Bill 2017 (WA) seeks to amend the *Civil Liability Act 2002* (WA) and the *Limitation Act 2005* (WA).

This is the first stage of legislative reform in Western Australia which seeks to respond to the recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) in its Redress and Civil Litigation Report which was tabled in the Commonwealth Parliament on 14 September 2015.

Part 2 of the Bill contains the amendments to the *Civil Liability Act 2002* (WA). The aim of this Part is to provide a legal basis for commencing an action against institutions in the name of their current office holders for historical child sexual abuse. These provisions are required to overcome the difficulties that a victim may face in identifying a proper defendant, particularly those arising out of the lack of perpetual succession in unincorporated institutions as identified in the New South Wales Court of Appeal decision of *Trustees of the Roman Catholic Church, The Archdiocese of Sydney v Ellis* (2007) 70 NSWLR 565. These difficulties have been highlighted by the Royal Commission as creating impediments to justice for survivors of child sexual abuse.

Part 2 also contains provisions to allow institutions, trustees and office holders to use assets that are held by or for liable institutions or office holders to discharge any child sexual abuse liability. These provisions will enable institutions to meet their liabilities to survivors of child sexual abuse notwithstanding any restrictions that would otherwise have arisen from the institution's asset holding structure.

In order to prevent double compensation Part 2 contains provisions that provide for prior compensation payments received by a person for child sexual abuse to be taken into account by a court in awarding damages in a child sexual abuse action.

This Part also provides for a cap on the legal fees that may be charged by a law practice acting for or appearing on behalf of a person in a child sexual abuse action.

Part 3 of the Bill sets out the amendments to the *Limitation Act 2005* (WA) to remove limitation periods for all child sexual abuse actions, both retrospectively and prospectively. This implements recommendations 85-86 and 88 of the Royal Commission's Report. Without removal of these timeframes, the Royal Commission found that survivors, who typically do not report their abuse for long periods after the limitation period has expired, would be unable to have their claims of child sexual abuse determined by a court on their merits.

Part 3 also aims to remedy some of the past injustices caused by the operation of strict limitation periods to child sexual abuse actions by providing for the setting aside of previously barred and previously settled causes of action under certain circumstances.

## **Part 1 - Preliminary**

### **Clause 1 Short title**

Clause 1 provides that the Bill, once enacted, will be known as the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2017*.

### **Clause 2 Commencement**

Clause 2 provides for the commencement of the Act.

Part 1 comes into effect on the day the Act receives Royal assent. The rest of the Act will come into operation on a day fixed by proclamation. Different days may be fixed for different provisions of the Act.

## **Part 2 - *Civil Liability Act 2002* amended**

### **Clause 3 Act amended**

This clause provides that Part 2 will amend the *Civil Liability Act 2002* (Civil Liability Act).

### **Clause 4 Section 8 amended**

Clause 4 of the Bill provides for the amendment of section 8 to exclude proposed Part 2A from its operation because Part 2A may create or confer a cause of civil action for the recovery of damages in respect of an injury or death caused by the fault of a person.

### **Clause 5 Part 2A inserted**

Clause 5 inserts proposed new Part 2A into the Civil Liability Act after Part 2 titled 'Child sexual abuse actions'.

## **Division 1**

The proposed new Division 1 is titled 'Preliminary' and sets out the terms used for Part 2A under new section 15A.

## **Section 15A**

'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.

The terms 'child sexual abuse', 'child sexual abuse action', and 'child sexual abuse cause of action' have the meanings given in section 6A(1) of the *Limitation Act 2005* (WA) (inserted by clause 8 of the Bill).

'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. The issue of lack of perpetual succession of unincorporated associations, which the Bill is intended to address, does not arise in relation to the Crown. By section 5 of the *Crown Suits Act 1947* (WA), the Crown can be sued in any court in the same manner as a subject (an individual). As a result, the Crown has been excluded from the definition of 'institution' in section 15A.

'Sexual abuse' is intentionally left undefined. The court will have latitude to determine the application of the term 'sexual abuse' in the context of each case and in accordance with the Common Law, its ordinary meaning and common understanding. A court will not be confined to acts or omissions that are criminal offences. Consistently with the focus of the Royal Commission and its Report, the Bill deals only with child sexual abuse and does not cover physical or emotional abuse or neglect which occurred during childhood.

## **Division 2**

The proposed new Division 2 is titled 'Liability of certain office holders and institutions, and availability of assets'.

### **Section 15B**

Section 15B provides the legal basis for commencing an action against a current office holder for a liability of a previous office holder of an unincorporated institution arising out of a child sexual abuse cause of action. It is designed to overcome the difficulties that a victim may face in identifying a proper defendant, as arose in *Trustees of the Roman Catholic Church, The Archdiocese of Sydney v Ellis* (2007) 70 NSWLR 565.

Section 15B(1) sets out the circumstances under which a person may commence an action and successfully attach liability against a current holder of the office of an institution in accordance with section 15B(2) and (3). These are that:

- (a) A person was subjected to child sexual abuse by a person associated with an institution
- (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) because of founded on the office holder for the associated person and for the institution generally.

Subsections (a) and (b) provide that the victim will need to establish a child sexual abuse cause of action against the former office holder in respect of the actions of the associated person (the perpetrator of the abuse). The cause of action must be based on the link between the institution and the associated person, on the one hand, and the responsibility that the office holder had for the associated person and for the institution generally, on the other. The causes of action against the office holder could be in the nature of vicarious liability, direct negligence, or non-delegable duty of care, amongst others.

These provisions do not determine the circumstances in which a court will uphold a child sexual abuse cause of action against the former office holder in respect of the actions of the associated person. This allows for common law and equitable principles of liability to develop over time. However, where a court finds a child sexual abuse cause of action has been made out against a former office holder, the provisions of section 15B will, if satisfied, carry that liability across to the current office holder.

- (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.

Subsection (c) clarifies that the institution must have been one that exercised care, supervision or authority over children at the time of the accrual of the cause of action and also confirms that section 15B only applies in the case of an institution that was unincorporated at that time.

- (d) The institution is currently not incorporated.

Subsection (d) confirms that section 15B only applies to institutions that are currently not incorporated. Where the institution is incorporated then the provisions of proposed section 15D may be applicable.

- (e) The office holder no longer holds the office.

In order for section 15B to apply the former office holder must no longer hold that office, for example is deceased or retired.

- (f) The person would be able to maintain an action on the cause of action if the office holder continued to hold the office.

Finally subsection (f) clarifies that in order to be able to hold the current office holder liable under section 15B(2) and (3), the victim must be able to show that there would have been a successful child sexual abuse action against the former office holder had that former office holder still been in office.

Section 15B(2) provides the legal basis for suing the current office holder in the name of the office as defendant in a child sexual abuse action contemplated under section 15B(1).

Under section 15B(3), where the victim sues a current office holder under section 15B(2) and makes out the case as contemplated under section 15B(1), then any liability that the former office holder would have had in relation to the cause of action is taken to be held by the current office holder. This allows for the enforcement of the judgment as against the current office holder and, in turn, provides for the availability of assets as contemplated by the provisions of section 15C.

Section 15B(4) confirms that section 15B is retrospective and prospective.

Section 15B(5) states that the current office holder, if liable in tort under section 15B(3), is taken to be a tortfeasor for the purposes of section 7 of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA). This ensures that the current office holder has the ability to seek a contribution from any liable joint tortfeasor.

### **Section 15C**

Section 15C(1) and (2) provides a legislative power for the holder of the office of an unincorporated institution, who is liable in a child sexual abuse cause of action of the type described in section 15B(1)(b), to satisfy the liability out of assets held by or for the office or the institution. The provisions could thus be applied where the relevant liability lies against the current holder of an office without the application of section 15B but does not apply retrospectively (see section 15C(7)).

As unincorporated institutions lack a separate legal entity from their members, they often have complex asset holding structures. In many cases, these structures utilise trusts whereby property is held by a separate legal entity (the trustee) for the benefit of the institution or the holder of an office in the institution. This section does not place an obligation on any holder of the office or trustee to satisfy the liability out of assets that would not ordinarily be the subject of the enforcement provisions under the *Civil Judgments Enforcement Act 2004* (WA) but will allow them to do so should they so choose.

Section 15C(2) confirms that where assets are held by or for an institution in a trust (whether or not a charitable trust) then that is not a bar to utilising those assets to satisfy the liability.

Section 15C(3) states that personal assets of the holder of the office cannot be used to satisfy the liability. This is consistent with section 15B(2) where it is clear that the holder of the office is being sued in the name of the office and not in a personal capacity. This also ensures that a person is not deterred from taking up a position of responsibility as the holder of an office in an institution by the prospect of their personal assets being placed at risk as a result of past child sexual abuse within the institution.

Section 15C(4) enables the holder of the office and/or the trustees of a relevant trust to realise assets and satisfy the liability.

In order to ensure that the holder of the office and the trustees may act in accordance with section 15C(4) without contravening any law, section 15C(5) states that they may act in accordance with subsections (2) and (4) despite any written or other law (including any law concerning trusts or the holding of property by or for the office or the institution); or the terms of any trust; or any duty whether as member of the institution, office holder, trustee or otherwise.

In order that the holder of the office and the trustees is not in contravention of the *Corporations Act 2001* (Cth), where that Act is applicable, proposed section 15J declares this section as a Corporations legislation displacement provision for the purposes of the *Corporations Act 2001* (Cth).

Section 15C(6) reinforces the exclusion of the personal property of the holder of the office from any enforcement of the liability created by virtue of section 15B(3).

Section 15C(7) provides that where a judgment in or settlement of a child sexual abuse action was given or reached before the day on which this Part of the Bill came into operation, the provisions of section 15C do not apply. The intention behind this provision is that section 15C should not apply retrospectively to matters that have already been concluded.

## **Section 15D**

The Bill also contemplates a scenario where an institution was unincorporated at the time of the abuse but is now incorporated. This is covered under section 15D as the provisions of section 15B, which relate to institutions that are currently unincorporated, do not apply.

Section 15D(1) follows a similar structure to section 15B(1) (as explained above), save that it only applies to an institution that is currently incorporated as provided in section 15D(1)(d).

While sections 15B(2) and (3) seek to attach the liability of the unincorporated institution to the current office holder, in contrast sections 15D(2) and (3) attach liability of the unincorporated institution to the incorporated institution.

Section 15D(2) provides the legal basis for naming the institution as defendant in an action contemplated under section 15D(1) in respect of a child sexual abuse cause of action against the former holder of an office of authority in the institution when that institution was unincorporated.

Under section 15D(3), where the victim sues an institution under section 15D(2) and makes out the case as contemplated under section 15D(1), then any liability that the former office holder would have had in relation to the cause of action is taken to be held by the institution. This allows for the enforcement of the judgment as against the institution and, in turn, provides for the availability of assets as contemplated by the provisions of section 15E.

Section 15D(4) confirms that section 15D is retrospective and prospective.

Section 15D(5) states that the institution, if liable in tort under section 15D(3), is taken to be a tortfeasor for the purposes of section 7 of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA). This ensures that the institution has the ability to seek a contribution from any liable joint tortfeasor.

## **Section 15E**

Section 15E(1) and (2) permits an institution (as defined at section 15A) which has a liability under a judgment in or settlement of a child sexual abuse action, to satisfy the liability out of assets held by or for the institution.

This section does not place an obligation on the institution to satisfy the liability out of assets that would not ordinarily be the subject of the enforcement provisions under the *Civil Judgments Enforcement Act 2004* (WA) but will allow it to do so should it so choose.

Section 15E(2) confirms that where assets are held by or for an institution in a trust (whether or not a charitable trust) then that is not a bar to utilising those assets to satisfy the liability.

Section 15E(3) enables the institution and/or the trustees of a relevant trust to realise assets and satisfy the liability.

To ensure that the institution and the trustees may act in accordance with section 15E(3) without contravening any law, section 15E(4) states that they may act in accordance with subsections (2) and (3) despite any written or other law (including any law concerning trusts or the holding of property by or for the institution); or the terms of any trust; or any duty whether as member of the institution, office holder, trustee or otherwise.

In order that an act permitted under section 15E is not in contravention of the *Corporations Act 2001* (Cth), where that Act is applicable, proposed section 15J declares this section as a Corporations legislation displacement provision for the purposes of the *Corporations Act 2001* (Cth).

Section 15E(5) provides that where a judgment in or settlement of a child sexual abuse action was given or reached before the day on which this Part of the Bill came into operation, the provisions of section 15E do not apply. The intention behind this provision is that section 15E should not apply retrospectively to matters that have already been concluded. This is balanced with the ability of a victim to apply for the setting aside of a judgment or settlement in certain circumstances under the transitional provisions contained in clause 10 of the Bill.

## **Section 15F**

The operation of the provisions under sections 15F and 15G links an institution that existed at the time of the accrual of the cause of action with an institution as it is currently to provide continuity in law in the absence of perpetual succession.

Section 15F(1) contains the central premise for providing the deemed continuity - for the purposes of sections 15B, 15D and 15H(4)(a), it is sufficient that the institution (as it is currently) is substantially the same as it was at the time when the cause of action accrued.

Sections 15F(2) and (3) provide statutory guidance in the consideration of whether or not the institutions that are being compared are sufficiently similar as to be regarded as being 'substantially the same':

- Under section 15F(2) and without limiting the generality of section 15F(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; and
- Under section 15F(3) a court may disregard whether after the accrual of the cause of action the name of the institution changed; the organisational structure of the institution changed; the institution became incorporated; or the geographic area in which the members of the institution carried out the purposes or work of the institution changed.

## **Section 15G**

Section 15G is designed to establish the identity of a relevant institution for the purposes of sections 15B, 15D or 15H, where the institution has undergone some change or changes over time such that under section 15F there is no current institution that is the same or substantially the same as the institution at the time of the accrual of the cause of action (the earlier institution).

In such circumstances section 15G(2) and (5) can be utilised to deem a current institution as the relevant successor of the earlier institution.

For the purposes of section 15G(2)(a), section 15G(3) sets out the possible circumstances that may have created difficulties in establishing the necessary link between the current institution and the earlier institution. These 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.



In terms of section 15G(2)(a) a current institution is taken to be the relevant successor of an earlier institution if 1 of the circumstances in subsection (3) applies to the institution and the earlier institution.

For the purposes of section 15G(2)(b), section 15G(4) sets out the possible circumstances that may have created difficulties in establishing the necessary chain between the current institution and the earlier institution, where there is one or more institutions interposed between them over time. These 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, to determining what is substantially the same).

In terms of section 15G(2)(b) a current institution is taken to be the relevant successor of an earlier institution if, 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 section 15G(4) applies to each link in the chain between the institution and the earlier institution.

Section 15G(5) states that, on the recommendation of the Minister, the Governor may make regulations providing that, for the purposes of subsection (1), a specified institution is taken to be the relevant successor of another specified institution. This allows for the making of regulations in cases either where a party requests to be deemed the institution for the purposes of sections 15B, 15D and 15H, or where a particular situation of facts has not been contemplated by the deeming provisions to the extent that an institution that ought to have been captured avoids the operation of the legislation.

Section 15G(6) sets limits on the operation of the regulatory-making power under section 15G(5). 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 individual or body with overall responsibility for the current institution has agreed to the current institution being taken to be the relevant successor of the earlier institution.

Section 15G(7) confirms that any regulation made under section 15G(5) will prevail over subsections (2) to (4) to the extent of any inconsistency. This provision ensures that the operation of section 15G and the regulations do not simultaneously result in the identification of 2 different institutions for the purposes of section 15B, 15D or 15H.

### **Section 15H**

Section 15H sets out the provisions that ensure the identification of an office holder against whom an action can be brought under section 15B.

In accordance with section 15H(1) 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.

In the event that it cannot be determined that the office at the time of the accrual of the cause of action is substantially the same as a current office then section 15H(2) operates to deem , the current head of the institution the current office holder for the purposes of this Division 2 where there is continuity of the institution.

Under section 15H(4), and for the purposes of section 15H(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).

Section 15H(3) provides for the manner in which the current head of the institution can be determined. 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.

### **Section 15I**

Section 15I provides that for the purposes of Division 2 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.

The purpose of this provision is to ensure that the provisions regarding accrual of a cause of action for damages relating to personal injury in section 55 of the Limitation Act do not have the effect that a cause of action accrues in a child sexual abuse action at a later point in time to the act or omission giving rise to the cause of action, for example the child sexual abuse itself.

Given that the limitation period is, by Part 3 of the Bill, removed in respect of child sexual abuse actions, the date of accrual of the cause of action in child sexual abuse is not relevant for limitation purposes. However, sections 15B to 15H refer to the time of the accrual of the cause of action in a number of instances in order to identify the institution or the office holder at the particular time. For this purpose, it is the time of

the act of omission giving rise to the cause of action that is relevant and this is the time at which the cause of action is taken to have accrued.

### **Section 15J**

Section 15J confirms that sections 15C and 15E are Corporations legislation displacement provisions for the purposes of the *Corporations Act 2001* (Cth) section 5G in relation to the Corporations legislation generally.

The Corporations Act, section 5G, provides that if a State law declares a provision of a State law to be a Corporations legislation displacement provision, any provision of the Corporations legislation with which the State provision would otherwise be inconsistent does not apply to the extent necessary to avoid the inconsistency.

The proposed displacement provisions are for the purposes of enabling directors or other officers of corporations to exercise their powers in fulfilment of proposed sections 15C and 15E without fear of contravening the Corporations legislation in relation to the exercise of their powers and the discharge of their duties.

### **Division 3**

The proposed new Division 3 is titled 'Prior compensation payments'.

### **Section 15K**

Section 15K(1) defines the term 'compensation payment' to mean 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 does not include an amount paid under a judgment in or settlement of a child sexual abuse action.

The definition includes payments made under the various ex gratia and redress schemes administered by the State, Commonwealth or other States and Territories, criminal injuries compensation awards, and ex gratia payments and compensation payments made by non-government institutions.

Under section 15K(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. This is consistent with the principle of preventing double compensation.

Section 15K(3) contemplates that compensation payments may have been in respect of acts or omissions that were not only related to child sexual abuse. For that reason section 15K(3) states that the court must only deduct compensation payments from the award of damages to the extent to which the compensation payment is for that child sexual abuse.

Section 15K(4) states that where a court cannot determine which portion of a payment related to that child sexual abuse then the court must deduct an amount equal to 50% of the payment.

While amounts paid under a judgment in or settlement of a child sexual abuse action are excluded from the definition of 'compensation payment' by section 15K(1)(b), this does not prevent a court from taking such payment into account in any subsequent child sexual abuse action, in accordance with the usual common law principles regarding the assessment of damages in personal injuries claims. This is made abundantly clear by section 15K(5) which provides that this section does not limit the court's powers in this respect.

#### **Division 4**

The proposed new Division 4 is titled 'Caps on legal fees.'

#### **Section 15L**

Section 15L(1) defines the terms used for this section as follows:

- 'costs determination' has the meaning given in the *Legal Profession Act 2008* section 252; and
- 'law practice' has the meaning given in the *Legal Profession Act 2008* section 3.

Section 3 of the *Legal Profession Act 2008 (WA)* defines 'law practice' as:

- (a) an Australian legal practitioner who is a sole practitioner; or
- (b) a law firm; or
- (c) a multi-disciplinary partnership; or
- (d) an incorporated legal practice.

Section 15L(2) provides that 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 (legal services agreement), any greater reward than is provided for by any costs determination that is in force.

The costs determination is made by the Legal Costs Committee for the purposes of regulating the costs that may be charged by law practices. As such it provides for a cap on the legal fees that may be charged. Section 280(2) of the *Legal Profession Act 2008 (WA)* provides that a court may order costs above that of the costs determination where of the opinion that the amount of costs allowable in respect of a matter under a costs determination is inadequate because of the unusual difficulty, complexity or importance of the matter.

Section 15L(3) confirms that a legal services agreement contrary to this section is void and any money paid under the agreement is recoverable by the person who paid the money.

Section 15L(3)(b) provides for the retrospective application of this section to such legal services agreements that were entered into prior to Part 2A commencing, subject however to section 15L(4).

Section 15L(4) confirms that section 15L(3) does not affect the operation of a legal services agreement so far as it relates to services provided before the commencement of Part 2A and does not apply in relation to any money paid or payable in respect of services so provided.

### **Part 3 - *Limitation Act 2005* amended**

#### **Clause 6 Act amended**

This clause provides that Part 3 will amend the *Limitation Act 2005* (Limitation Act).

#### **Clause 7 Section 5 amended**

Proposed section 6A sets out the provisions that remove limitation periods for child sexual abuse actions. The amendment of section 5(2), through the inclusion of reference to the new section 6A, confirms that section 6A removes limitation periods that may have applied through the operation of the *Limitation Act 1935* and the *Crown Suits Act 1947* that were repealed by the *Limitation Legislation Amendment and Repeal Act 2005*. This must be read together with section 6A(3).

#### **Clause 8 Section 6A inserted**

Clause 8 inserts proposed new section 6A after section 6.

#### **Section 6A**

Section 6A(1) defines the terms used in section 6A. These are:

- '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.

The definition of "child sexual abuse cause of action" is specifically limited to a cause of action that relates to a personal injury resulting from child sexual abuse to the person to whom the cause of action accrues. It does not include a cause of action

relating to personal injury of a third party (not being the victim of child sexual abuse) even where that injury resulted from the child sexual abuse, for example, a cause of action based on nervous shock.

Section 6A(2) states that despite anything in this or any other Act, no limitation period applies in respect of a child sexual abuse action. The limitation periods in regard to physical or emotional abuse remain unaltered by this Bill.

Section 6A(3) confirms that the limitation periods under the *Crown Suits Act 1947* (WA) section 6, the *Limitation Act 1935* (WA) section 47A and the retention of previous limitation periods through the operation of section 5 of the Limitation Act, do not apply in respect of a child sexual abuse action.

Sections 6A(2) and (3) provide for the prospective and retrospective removal of limitation periods.

Section 6A(4) ensures that the limitation periods are removed for all child sexual abuse causes of action including whether the action is brought in tort (including trespass), in contract, under statute or otherwise.

Section 6A(5) confirms that the removal of limitation periods does not limit a court's jurisdiction and powers to protect the integrity, efficiency and fairness of its processes in the administration of interests of justice, such as the 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.

Section 6A(6) provides that 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* (WA) or the *Law Reform (Miscellaneous Provisions) Act 1941* (WA). In particular limitation periods remain unaltered by this Bill in regard to:

- Causes of action arising from child sexual abuse which a deceased person would have had but for his or her death, which could potentially include a person who has suffered child sexual abuse and had died since the commencement of the *Law Reform (Miscellaneous Provisions) Act 1941* (WA) (that is, since 24 October 1942); and
- Causes of action arising under the *Fatal Accidents Act 1959* (WA) (that is, since 8 October 1959) where the death arose as a result of child sexual abuse.

## **Clause 9     Section 9 amended**

Section 9(1) of the Limitation Act is amended by including reference to section 6A so that the removal of limitation periods under section 6A will apply despite any contrary provision in other written law, or anything done under such a contrary provision.

## **Clause 10 Part 7 inserted**

Clause 10 inserts proposed new Part 7 into the Limitation Act after Part 6 titled 'Transitional provisions'.

### **Division 1**

The proposed new Division 1 of Part 7 is titled 'Provisions for *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2017*'.

### **Section 89**

Section 89 sets out the definitions for the terms used in this Division. These are:

- '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 2017* section 10 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.

### **Section 90**

Section 90 confirms that the removal of limitation periods in relation to a child sexual abuse action under section 6A is of retrospective operation, that is, it applies regardless of when the act or omission constituting child sexual abuse occurred.

### **Section 91**

Section 91(1) provides that 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.

Section 91(2) provides that 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. This allows for an application to be brought as a preliminary step before having to engage in the full trial on the cause of action.

Section 91(3) confirms that the court may set aside the previous judgment if satisfied that it is just and reasonable to do so.

Section 91(4) provides that if the previous judgment is 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.

Section 91(5) provides that where a previously barred cause of action is commenced, the court dealing with the action may, if satisfied it is just and reasonable to do so, take into account any amount paid under a previous judgment relating to the cause of action.

Section 91(6) states that a court, other than the Supreme Court, may not set aside a previous judgment of another court.

## **Section 92**

Section 92 deals with causes of action that were settled before the limitation period was removed by this Bill. Section 92(1) provides that 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).

In order to avoid the unnecessary expense and trauma of commencing an action before knowing whether the settlement agreement could be set aside, section 92(2) provides that an 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.

Section 92(3) provides that the court may, if satisfied that it is just and reasonable to do so - (a) grant leave to commence the action, subject to conditions (for example, that the action must be commenced within a certain period of time); and (b) to the extent necessary for that, set aside the settlement agreement and any judgment giving effect to the settlement.

Section 92(4) provides that if an action on a 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.



Although an agreement referred to in section 92(4) may be partly or wholly void, section 92(5) prevents a party from seeking to recover an amount paid under such agreement on the basis of it being void to that extent.

While under section 92(5) there may be no recovery of amounts paid under such agreements, section 92(6) empowers the court dealing with the action, if satisfied that it is just and reasonable to do so, to take into account any amount paid under such an agreement to the extent to which the amount relates to the child sexual abuse the subject of the cause of action.

Section 92(7) provides that, for the purposes of section 92(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.
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