The Legal Identity of Defendants (Organisational Child Abuse) Act 2018 (Vic)

Background

1. It is often said that speeches short and sharp are the most powerful. This might apply equally to legislation. For an Act comprising a mere 15 sections, the *Legal Identity of Defendants (Organisational Child Abuse) Act 20018* (Vic) ('the Act') has changed forever institutional abuse claims.

2. The Act's importance lies in overcoming some of the hurdles thrown up by the *Ellis*[1] decision, later known as the '*Ellis*' defence. This was once routinely relied on by institutions defending childhood sexual abuse claims; no longer.

3. Readers will be familiar with the *Ellis* defence. The case itself concerned a victim of sexual abuse who sued the then Archbishop of Sydney, Pell, the Trustees of the Roman Catholic Church for the Archdiocese of Sydney, and his alleged abuser, a priest. The perpetrator died impecunious, so that proceeding fell away. The archdiocese was unincorporated and therefore, at common law, was held not a juridical entity capable of being sued. Pell, in his position as Archbishop, was held not capable of being liable for the acts of a priest in one of the dioceses overseen by the Archbishop. In the upshot, despite, first, the horrendous alleged abuse, secondly, the Church's apparent capacity to pay damages and, thirdly, its relationship to the priest, Ellis was left with no viable claim.

4. The Act seeks to remove the common law limitations as to suing unincorporated entities and dispel the *Ellis* defence once and for all. There are, however, still some potential gaps and complexities addressed here.

5. This paper looks first at plaintiffs' claims to which the Act applies, then Defendant entities to which the Act applies, how to bring claims against such entities, what happens when an entity no longer exists, and finally what happens if an entity fails to respond to

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1 *Archdiocese of Sydney v Ellis & Anor* [2007] NSWCA 117 and see also the Second Reading Speech of the Act.

the claim. The paper includes ideas for potential law reform to the Act to see it improve and to bring it into line with other Australian jurisdictions whose acts are, in some respects, more comprehensive than the Act.

What plaintiff claims does the Act apply to?

6. The Act applies to any claim founded on or arising from "child abuse".

7. Section 3 of the Act defines sexual abuse as "an act or omission in relation to a person when the person is a minor that is physical abuse or sexual abuse". It includes psychological abuse, but only if that psychological abuse arises out of the act or omission of physical or sexual abuse. In other words, pure psychological abuse does not appear to be covered by the Act.

8. Like other legislation dealing with these matters, the Act does not descend into the detail of what may comprise "abuse", traditionally not an intentional tort law term, but one now receiving widespread use (and sometimes misuse). This leaves it open to the Court to determine what is, and is not, "abuse".

Secondary victims

9. In *RWQ v The Catholic Archdiocese of Melbourne & Ors*,[2] a parent of an alleged victim of sexual abuse relied on the Act to bring his claim against the Archdiocese. Justice McDonald held that the Act extends to nervous shock claims of secondary victims, including family members, not themselves the subject of the "child abuse" (i.e. not the primary victim).

10. This decision is also significant for potential intergenerational claims, having regard to the developing science on intergenerational trauma.

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2 [2022] VSC 483.

Retrospectivity

11. The Act applies whether the child abuse occurred before or after the enactment of this legislation. In other words, the legislation is retrospective.

What Defendant entities are affected by the Act?

12. The Act applies only to non-government organisations ('NGO') as defined by the Act.

13. An NGO is broadly defined in the Act as "a non-government organisation that is an unincorporated association or body".[3]

14. The NGO does not need to have a written constitution or fixed membership or any other prescribed attribute.[4]

15. The *Encyclopedic Australian Legal Dictionary*[5] defines an "unincorporated association" as a:

> *non-legal entity, formed by the mutual understanding of its members, consisting of nothing more than the aggregate of all its members at a particular time.*

16. In *Kibby v Registrar of Titles*,[6] Mandie J set out common characteristics of an unincorporated association, citing a miscellany of cases, and in particular noted the following:

    a. an unincorporated association has no existence apart from its members;

    b. it is a voluntary combination of persons with some objective or purpose in common;

    c. the members are bound together by rules, which may or may not constitute an enforceable contract among the members;

    d. the term "association" is capable of including a wide variety of loosely and irregularly constituted bodies of persons;

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3 Section 5(1) of the Act.
4 Section 5(2) of the Act.
5 *LexisNexis*.
6 [1999] 1 VR 861.

e. there will normally be a constitutional arrangement for meetings of members and the appointment of committees and officers; and

f. the association will normally continue in existence independently of any change that may occur in the composition of the association.

17. In sum, Mandie J concluded:

> *I do not think that a name or title, or the existence of a written constitution or rules governing the combination, or the existence of some form of contract between the members, is an essential characteristic, but clearly the existence of one or more of these would go a long way towards satisfying the need for some degree of organisation and continuity and for the satisfactory identification of members. Likewise, the existence of office-bearers, a committee and a bank account are relevant to a degree of organisation. The absence of all of these features makes it unlikely, but not impossible, that an association has been formed or is being carried on.*

18. In the same case, the learned judge cited "body" as being "a society, association, league, fraternity".

An NGO controlling one or more associated trusts

19. The Act does not simply make an NGO capable of being liability *per se*. The organisation must control one or more trusts.

20. But one would expect most NGO institutions to control one or more trusts (or they would otherwise be a separate legal person capable of being sued in its own right). How else, for example, would an institution hold property or money or conduct their activities?

21. Here, it is not unusual for the members of an association to form one or more trusts, for example to hold their property, including places of worship, and money.

22. The trustees, needless to say, hold the trust property for the benefit of the trust's members or, in the case of charitable trusts, for the advancement of religion or education.

23. Some such trusts are established by statute. A common example is the *Roman Catholic Trusts Act 1907* (Vic). The preamble to this Act provides, in summary:

    a. the property of the Catholic Church in Victoria is held by many different bodies of trustees;

    b. death and other causes necessitate the appointment of new trustees continually;

    c. therefore, the Act a council comprised of certain persons to, for example, form body corporates to hold church property (section 3).

24. Section 6 of the Act provides a broad definition of "control" of an NGO over one or more trusts, which includes direct or indirect power to control income or property of a trust or enjoyment of income or property or the power to appoint or remove beneficiaries of a trust or the power to determine the outcome of any decisions about the trust's operation. In other words, if the NGO's members can do any one of these things, that satisfies the test of control for the purposes of the Act. The bar here should be low.

How to bring a claim against an NGO

25. A plaintiff is entitled to sue an NGO under the Act, by section 13. However, a proper defendant then needs to be substituted, as the proceeding is launched "pending nomination".

26. The following mechanisms apply.

27. Under section 7, with proceedings on foot against the NGO, the NGO may nominate an entity that is capable of being sued (with the consent of that nominee) and that entity becomes the Defendant. This may occur at any time within 120 days of the commencement of the proceeding against the NGO. The court may determine any dispute about this (sub-section 4).

28. The NGO must continue to assist the defendant with interlocutory matters once the transfer takes effect (sub-section 5).

29. The Act facilitates a plaintiff making application under section 8 of the Act and the "court may make an order that the claim is to proceed against the trustees of an associated trust of the NGO on behalf of that NGO as a proper defendant". In this way, if there is any failure by the NGO to nominate a proper defendant, the Plaintiff is not left with no "proper defendant" under the Act. In practice, a plaintiff will often sue the "proper defendant" rather than the NGO and the "proper defendant" simply recognises in its defence that it is a proper defendant, by-passing these strictures, doubtless achieving the purposes of the *Civil Procedure Act 2010* (Vic).

30. Likewise, the "proper defendant" can rely on any of the usual defences of an NGO under section 10 (but on the assumption that the NGO has been incorporated, so as not to circumvent the purposes of the Act).

31. Any insurance held by the NGO must extend to the proper defendant under section 12 of the Act.

32. Practitioners should be aware of Order 85 of the Rules. Rule 85.02 provides the form whereby the NGO nominates, and the "proper defendant" submits to being, joined to the proceeding.

33. Once a "proper defendant" is nominated, then unless the Court directs otherwise, within seven days, the Plaintiff is required to file an Amended Writ (or other originating process) and Statement of Claim identifying the "proper defendant" to the claim acting on behalf of the NGO, which then needs to be served.[7]

What happens if the NGO fails to respond?

34. If the NGO fails to nominate a "proper defendant", which arguably includes in circumstances where it ceases to exist, discussed below, the Court is empowered to "order that the claim is to proceed against the trustees of an associated trust of an NGO

[7] Rule 85.03.

on behalf of the NGO as a proper defendant."[8]

What happens if the NGO no longer exists?

35. Arguably, the language of various sections of the Act indicates that the NGO must exist at the time the Plaintiff commences or wishes to commence a claim against it. This is problematic when so many sexual abuse claims are historical and an NGO may, during the intervening time, have transformed into some other, albeit related, NGO or even incorporated.

36. Yet such a construction of the Act is a narrow one and may not take into account that the legislation is to be interpreted beneficially.[9] A wider interpretation of the Act would permit a claim against trustees of the trust to which the NGO once existed, or alternatively permit a claim against a related NGO to the NGO that existed at the time of the abuse.

37. A wider interpretation is consistent with section 4 of the Act that applies to a claim "founded on or arising from child abuse whether the child abuse occurred or occurs before, on or after the commencement of this section."

38. Interestingly, Western Australia has mechanisms in place dealing with this very issue. This raises the question whether Victoria should adopt this approach to avoid legal complexities that may arise and could result in another *Ellis*-type defence.

39. In Western Australia, section 15F of the *Civil Liability Act 2002* (WA) provides that so long as the institution when the abuse occurred is substantially the same as the institution when the proceedings are issued, the claim can be brought against the current institution.

40. Further, even if there is no institution substantially the same, section 15G of the same Act permits claims against a relevant successor of the institution at the time of the abuse.

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8 Section 8(2) of the Act.

9 *Motor Accidents Insurance Board v Bricknell* (2017) 81 MVR 331 at [9], in this case applying to a motor vehicle accident, but the principle is a general one and applied in numerous context: see, for e.g., *Re Kearney; Ex parte Jurlama* (1984) 158 CLR 426 at 433; 52 ALR 24 at 27–8, relating to Aboriginal land rights.

41. Queensland and South Australia also make provision for entities who, when the abuse occurred, were not corporate entities, but later became corporate entities.[10] Western Australia also has such provision.[11] This is not an uncommon scenario in Victorian claims, although I am unaware of a defence being raised on this basis to date.

42. Ensuring provision for victims seems only fair if the victim is seeking to sue an entity that was sufficiently related to the relevant entity at the time of the abuse (and an objective of the Act), so it seems the Act ought to be amended to prevent potential *Ellis* defences.

How does the Court treat an NGO in determining liability?

43. As I have mentioned, at common law, an NGO is not capable of being sued. It is only by virtue of the Act that a person may sue the NGO.

44. In *O'Connor v Comensoli* [2022] VSC 313, Keogh J held that an NGO, for the purposes of the Act, is to be treated as it if were a corporate entity, as set out in the Act.[12]

45. These views were echoed by the Court of Appeal in *Bird v DP (a pseudonym)*,[13] where the Court said:

> *It is evident that the combined effect of those provisions* [of the Act] *is not only to ensure the proper nomination of a representative party to an NGO, but, importantly, to provide that the NGO bear the same legal liabilities to an abused claimant, and have the same defences to a claim for such abuse, as if the NGO were an incorporated entity. In that way, as we have stated, the effect of the provisions that we have discussed is to convert an unincorporated association (an NGO) to a fictitious incorporated entity, for the purpose, not only of the nomination of an appropriate defendant, but also to impose on*

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10 Section 33F of the *Civil Liability Act 2003* (Qld); section 50H of the *Civil Liability Act 1936* (SA).
11 Section
12 Under sub-section 7(2) and 7(4) of the Act.
13 [2023] VSCA 66 at [76].

the entity the same liabilities that would have applied had the entity been incorporated at the time of the abuse.

46. That has significant effects to defendants' potential liability – some clear; some arguable.

47. One, if the perpetrator under the NGO was the directing 'mind and will' (sometimes referred to also as the 'brains') of the NGO, then arguably the NGO is directly liable for that person under the principle of attribution. The same would apply for others who, the plaintiff would say, ought to have known of prior abuse and stopped the perpetrator before the subject abuse (e.g. a headmaster who ignored complaints of abuse before the abuse occurred).

48. Two, it gives rise to an argument that the NGO may be vicariously liable for those working under it, treating them as if they were employees. Having said that, it is important to note that vicarious liability is not always limited to employees at common law, as confirmed by the Court of Appeal in *Bird v DP*. In that case, the Diocese was found vicariously liable for the abuse committed by its then assistant priest.[14]

The *Wrongs Act 1958* (Vic)

49. For completeness, Part XIII of the *Wrongs Act 1958* (Vic), titled Organisational Liability for Child Abuse, makes some provision for shifting liability from an entity not capable of being sued (called a 'relevant organisation' in the *Wrongs Act*). Unlike the operation of the Act, this legislation applies to abuse that occurs from 1 July 2017.[15]

50. This Part is powerful – it assumes that a 'relevant organisation' has breached its duty of

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[14] As the Court said at [163]:
It was through Coffey [the assistant priest and abuser of the plaintiff] *that the Diocese did its work and performed its role with the parishioners of that parish. The uncontested evidence of Father Dillon was that the pastoral work of the assistant priest was an integral and important part of his role. That work necessarily involved and required the priest to develop personal acquaintances, and indeed friendships, with his parishioners. In performing that work, Coffey, as a duly appointed assistant priest in the parish, was invested with the authority of the Diocese, and as such he gained the trust of, and intimacy with, his parishioners.*

[15] See section 93 of the *Wrongs Act*.

care if an individual associated with that 'relevant organisation'[16] has committed abuse on a child while the child was under the car, supervision or authority of the 'relevant organisation'.[17] In other words, it reveres the usual onus of proof and assumes vicarious liability where there is an association between individual and their 'relevant organisation'.

51. For present purposes, section 92 of the *Wrongs Act* is the relevant provision relating to the ability to an entity not capable of being sued to nominate another entity who is capable. However, the nominee must provide consent for the purposes of nomination. In other words, it does not appear by this section that a plaintiff can sue and enforce a judgment against a 'relevant organisation' that is not otherwise capable of being sued or that does not nominate an entity, with that entity's consent, who is capable of being sued. But the legislation itself is not entirely clear, and thus probably needs testing or amending.

52. The State may also become liable if the abuse was committed by an individual connected to a 'relevant organisation' related to the public service which, in its own name, is not capable of being sued.[18]

Take home points

53. The key points identified above follow:

    a. the Act applies to childhood sexual and physical abuse and consequential psychiatric injury;

    b. the Act applies to an NGO who controls one or more associated trusts;

    c. the NGO may be sued, but needs to be substituted for the "proper defendant" either nominated by the NGO or appointed by the Court;

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16 Within the meaning of section 90 of the *Wrongs Act*.
17 See section 91 of the *Wrongs Act*.
18 Section 91(5)(b) of the *Wrongs Act*.

d. once substituted, the NGO still has to comply with interlocutory and other obligations and any insurance of the NGO extends to the "proper defendant";

e. if an NGO ceases to exist at the time of seeking to bring the claim, there are still avenues to pursue the associated trust or trusts. However, it is suggested that law reform to follow Western Australia's lead would do well to avoid any further legal complexities; and

f. the NGO, for the purposes of liability, should be treated as if it were a corporate entity, which would seem to include rules as to attribution and vicarious liability that apply to corporate entities and their employees.

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