

Case Alert

Shaping the future of insurance law

NSW Child Abuse Bill opens door to revisit settled claims

Civil Liability Amendment (Child Abuse) Bill 2021

18 MARCH 2021

AT A GLANCE

- The *Civil Liability Amendment (Child Abuse) Bill 2021* (the **Bill**) was introduced to the NSW Legislative Assembly on 17 March 2021.
- The Bill, if passed, will allow the courts to set aside settled claims for child abuse where it is “just and reasonable to do so” and ensure damages for child abuse are not restricted.
- This new legislation may have a significant impact on insurers managing historic child abuse claims, particularly those who settled claims before the 2016 amendments to the *Limitation Act 1969*.

The *Civil Liability Amendment (Child Abuse) Bill 2021*

On 17 March 2021, NSW Attorney General Mark Speakman introduced the *Civil Liability Amendment (Child Abuse) Bill 2021* (the **Bill**) to the Legislative Assembly. The Bill has two objectives:

1. to enable courts to set aside certain agreements that settled claims for child abuse where it is just and reasonable to do so, and
2. to ensure that Part 2A of that Act does not restrict awards for damages for child abuse.

Mark Speakman issued a press release stating:

“We know from the harrowing accounts heard by the Royal Commission that many survivors, often suffering significant trauma, felt they had no choice but to accept inadequate settlements due to legal technicalities preventing them from suing responsible institutions.

This bill will give courts the power to set aside certain settlement agreements for sexual abuse, serious physical abuse and other connected abuse and enable survivors to access the civil justice they deserve”.

The settlement revisit provisions

If passed, the Bill will introduce a new Part 1C to the *Civil Liability Act 2002*. The new Part is designed to enable a person to seek to have a child abuse settlement set aside if, at the time of the agreement, there were legal barriers that prevented them from being fully compensated through a legal cause of action.

What types of settlements can be revisited?

These new provisions will only apply to “affected agreements”, which are defined to include actions to which section 6A of the *Limitations Act 1969* applies. In effect, these provisions apply only to “child abuse” claims as defined under that legislation. These claims involve sexual abuse, serious physical abuse, or any other abuse (connected abuse) perpetrated against a person who was under 18 years of age at the time of the abuse.

The new legislation will apply to settlements of such cases only when the claim was settled before the introduction of:

1. Section 6A to the *Limitations Act 1969* (introduced in 2016), and at the time of settlement, a limitation period applying to the cause of action had expired, or
2. Part 1B of the *Civil Liability Act 2002* (introduced in 2018), and at the time of settlement, the settlement was against an unincorporated organisation that would have been liable under Part 1B.

Under draft Section 7D of the Bill, claimants that meet either of those criterion will be able to commence proceedings, despite any settlement agreement, and apply to the court to set aside the affected agreement.

When will the Court overturn such settlements?

The Court may set aside the affected agreement “if it is just and reasonable to do so”. In making that decision, the Court may consider:

1. the amount paid to the applicant under the agreement

2. the bargaining position of the parties to the agreement
3. the conduct regarding the agreement of:
 - a) the parties other than the applicant, or
 - b) the legal representatives of the parties other than the applicant,
4. any other matter the Court considers relevant.

Evidence can be adduced in proceedings under this legislation that would otherwise be privileged under section 131 of the *Evidence Act 2011* (settlement negotiations privilege).

If the Court overturns such an agreement, it can also overturn anything giving effect to that agreement, including a contract, deed or other agreement, or judgment. However, the Court cannot set aside a National Redress Scheme deed of release, or an agreement under which one defendant indemnifies another.

What is the impact of old settlements upon quantum?

If a settlement is overturned, the amount paid under the original settlement, including costs and disbursements, is not recoverable despite the overturning of the agreement. However, the old settlement may be considered by the court when determining damages.

Special provisions for offenders in custody to no longer apply to child abuse claims

If passed, the Bill will insert a new section 26B(2A) to the *Civil Liability Act*. This will mean that Part 2B of the *Civil Liability Act*, which addresses special provisions for offenders in custody, will not apply to, and is taken never to have applied to, an injury arising from child abuse. This provision will be retrospective in operation.

“Child abuse” is defined for the purposes of this Part as sexual or physical abuse, but not an act that was lawful at the time it took place. This definition is slightly different to the way child abuse is defined in the *Limitations Act 1969*, which covers only serious physical abuse, but also includes connected abuse. The definition in the *Civil Liability Act 2002* also includes an exclusion for conduct lawful at the time,

such as corporal punishment in certain circumstances. It is conceivable a claim could be for child abuse as defined in the *Civil Liability Act 2002*, but not as defined in the *Limitations Act 1969*, and vice versa.

If a person was abused as a child offender in custody, and has a cause of action against a protected defendant, they will be able to commence proceedings irrespective of any earlier settlement or judgment made before the introduction of s 26B(2A). The court hearing the action may, if it decides that it is just and reasonable to do so, take any, or all, of these actions:

1. set aside the earlier judgement or settlement,
2. consider any amounts paid or payable by way of damages under an earlier judgement or settlement, or
3. consider any amounts paid or payable by way of costs in the related proceedings.

What's next?

The Bill will need to pass through the usual legislative process. If it is passed through both houses, it will be assented to and then come into force 28 days later or on a proclaimed date.

The new legislation may have a significant impact on insurers managing historic child abuse claims, particularly those that settled claims before the 2016 amendments to the Limitation Act 1969. It raises the possibility that many historic settlements may be revisited "if it is just and reasonable to do so". That provision grants the courts a wide latitude in determining which settlement agreements will be overturned.

We expect a body of caselaw will emerge in the years to come, which will provide some guidance on the settlements that are liable to be overturned. Until that caselaw emerges, insurers may be guided by decisions coming from other states where similar legislative regimes are already in place.

We will keep you updated on these legislative developments.

Need to know more?

For more information please contact us.



Greg Carruthers-Smith

Partner, Sydney

T: +61 2 8273 9965

E: greg.carruthers-smith@wottonkearney.com.au



Sean O'Connor

Partner, Sydney

T: +61 2 8273 9826

E: sean.oconnor@wottonkearney.com.au



Patrick Thompson

Special Counsel, Sydney

T: +61 2 8273 9820

E: patrick.thompson@wottonkearney.com.au

FOR MORE INSIGHTS FROM W+K, VISIT:

<https://www.wottonkearney.com.au/knowledge-hub/>

© Wotton + Kearney 2021

This publication is intended to provide commentary and general information. It should not be relied upon as legal advice. Formal legal advice should be sought in particular transactions or on matters of interest arising from this publication. Persons listed may not be admitted in all states and territories. Wotton + Kearney Pty Ltd ABN 94 632 932 131, is an incorporated legal practice. Registered office at 85 Castlereagh St, Sydney, NSW 2000