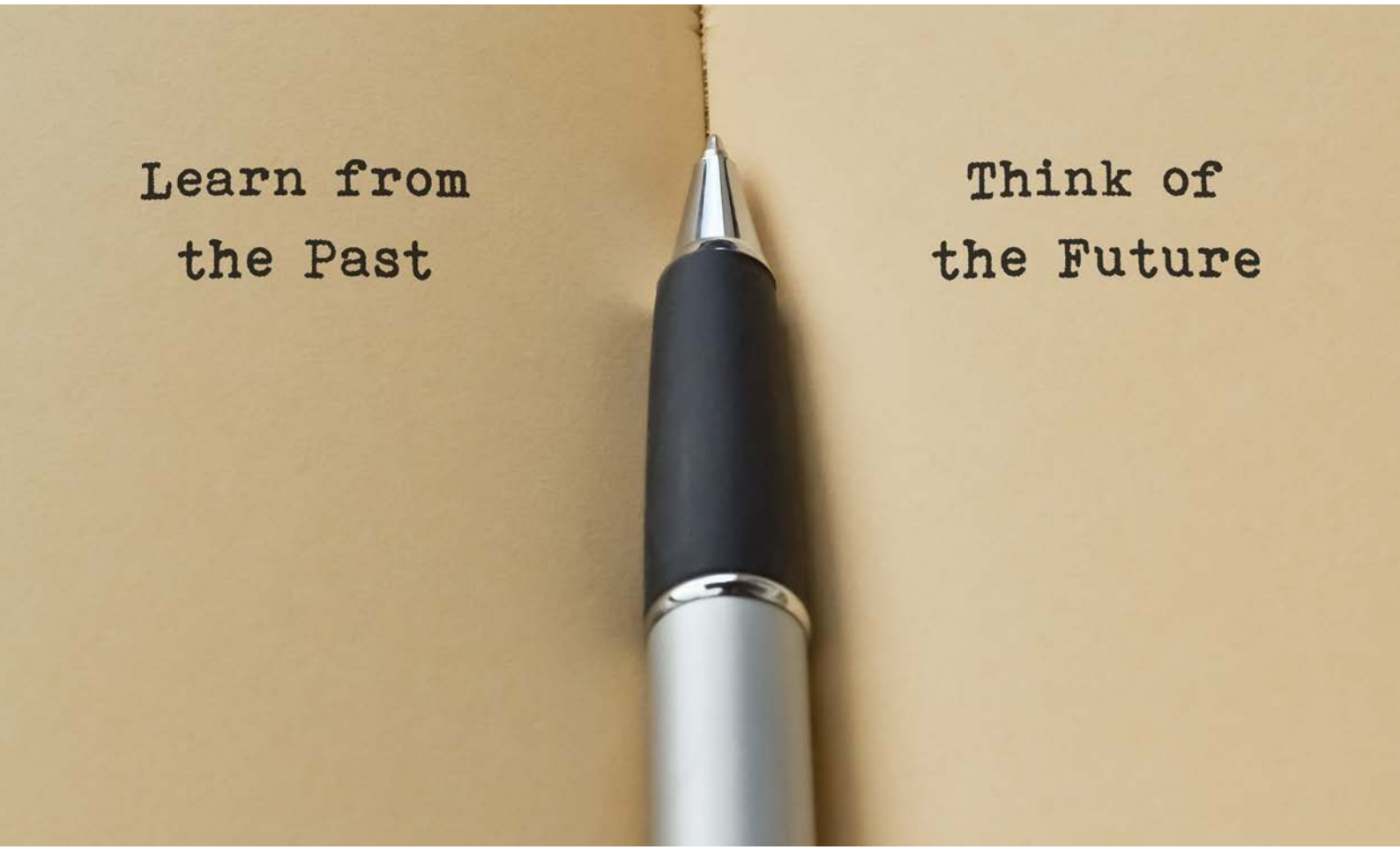

Child abuse – liability of organisations

The Civil Liability Act 2002 (NSW) and the new Part 1B

By Jeremy L Harrison

Introduction

Part 1B of the *Civil Liability Act 2002* (NSW), entitled 'Child abuse–liability of organisations', commenced on 26 October 2018 and 1 January 2019. Part 1B introduces at least three fundamental changes which concern suing an unincorporated organisation, reversing the onus of proof in respect of breach of duty of care in a negligence claim and codifying vicarious liability.

Background to the introduction of Part 1B

In September 2015 the Royal Commission into Institutional Responses to Child Sexual Abuse released its Redress and Civil Litigation Report which addressed four issues: (a) limitation periods; (b) the duty of institutions; (c) identifying a proper defendant, and; (d) model litigant approaches. The Royal Commission recommended that a non-delegable duty be imposed on certain institutions rather than legislating in respect of vicarious liability at all.

On 17 March 2016, s 6A of the *Limitation Act 1969* (NSW) was amended to adopt the Royal Commission's recommendations with respect to limitation periods. Time limitation periods were abolished with retrospective effect in respect of personal injury cases for child abuse.

After the Royal Commission published its recommendations, the High Court handed down a unanimous decision concerning vicarious liability in *Prince Alfred College Incorporated v ADC* [2016] HCA 37. This decision set out 'the relevant approach' (at [80] – [81]) to be adopted when determining

whether vicarious liability is established in cases concerning the sexual abuse of children in educational, residential or care facilities by persons who were placed in special positions with respect to the children. 'The relevant approach' is evidently intended to be reflected in Division 3 of Part 1B, discussed below.

The Main Points of Part 1B

Division 2 concerns negligence claims. It sets out the scope of the duty of care owed by organisations and it reverses the onus of proof in respect of breach of duty of care – i.e., there is a presumption of a breach of duty unless the organisation proves otherwise.

Part 1B does not impose a non-delegable duty of care upon organisations in spite of the Royal Commission's recommendation that one be imposed. Instead, Division 3 concerns vicarious liability and effectively codifies 'the relevant approach' laid out in *Prince Alfred College v ADC*. Employee is defined broadly in s 6G to include an individual akin to an employee. The heart of Division 3 is in s 6H(1) which renders an organisation vicariously liable for child abuse perpetrated against a child by an employee of an organisation provided that two pre-conditions are satisfied – that the employment role supplied the occasion for the perpetration of the abuse and that the employee took advantage of that occasion to perpetrate the abuse. In this regard, a Court must take into account whether the organisation placed the perpetrator in a position in which the perpetrator had: authority, power or control over the child; the trust of the child; or, the ability to achieve intimacy with the child, as prescribed in s 6H(2). These are concepts directly derived from *Prince Alfred College v ADC*.

The objectives of Division 4 are to enable child abuse proceedings to be brought against unincorporated organisations and to enable an organisation to pay liabilities arising from child abuse proceedings from the assets of an associated trust in certain circumstances.

Finally, Schedule 1, Part 14 stipulates that the presumption of a breach of duty of care and the provision which imposes vicarious liability only apply in respect of child abuse that was perpetrated after the commencement of those sections on 26 October 2018. By contrast, all of the provisions in Division 4 concerning proceedings against unincorporated organisations also operate retrospectively even though they were not enacted until 1 January 2019.

What might be the consequences of Part 1B?

Proceedings against unincorporated organisations

Part 1B will assist a survivor where he or she can only identify an unincorporated organisation as a potential defendant. This benefit however might only be fruitful if that organisation, or a trust associated with it, holds assets to satisfy any judgment awarded.

The Second Reading Speech makes it clear that Division 4 is intended to abolish 'the *Ellis* defence.' All survivors of child abuse might now consider suing an unincorporated organisation or seeking to amend pleadings in existing proceedings to do so. Thereafter, such survivors might apply to the Court to appoint the trustee of an associated trust should the unincorporated organisation not appoint a proper defendant within 120 days.

The reversal of the onus of proof in negligence claims in respect of whether the duty was breached is a radical development.

Establishing liability of organisations

Part 1B will assist survivors to establish liability against an organisation in respect of abuse perpetrated after 26 October 2018 by firstly codifying the principles concerning vicarious liability set out in *Prince Alfred College v ADC* in favour of survivors and secondly reversing the onus of proof in respect of breach of duty in a negligence claim.

No decisions have yet considered any provision in Part 1B. During the Second Reading Speech on 26 September 2018 the Attorney-General described Part 1B as 'beneficial legislation' enacted in favour of survivors and stated that Part 1B should be interpreted as such by the Courts. Part 1B marks the beginning of a new era in which new terms and phrases will alter the legal analysis in child abuse proceedings against organisations such as *organisation, organisation responsible for a child, individual associated with an organisation, employee, akin to an employee, the occasion,* and *takes advantage of that occasion.*

Negligence

The reversal of the onus of proof in negligence claims in respect of whether the duty was breached is a radical development. Future contests might centre on whether or not the perpetrator was *associated* with the organisation for the purposes of s 6E. This may involve debate as to whether the perpetrator was an office holder, officer, employee, owner, volunteer, contractor, religious leader, priest, minister or authorised carer of the organisation. Otherwise, the contest might focus on whether or not the abuse occurred in connection with the organisation's *responsibility* for the child.

Vicarious liability v negligence

It is predicted that the advent of Division 3 will make vicarious liability the primary focus of suits brought by survivors. It may be expected that survivors will strive to prove that the perpetrator was an *employee* for the purposes of s 6G in order to obtain the benefit of the vicarious liability provisions in Division 3, rather than alleging that the perpetrator falls within the broader category of persons defined as an *individual associated with an organisation* for the purposes of s 6E which merely opens the gateway to the lesser benefit flowing from the rebuttable presumption of breach of duty in Division 2.

Vicarious liability provisions are more beneficial than claims in negligence to a survivor because the presumed breach of duty in negligence is rebuttable whereas there is no escape from vicarious liability once the three pre-conditions are met. Accordingly, the contest between the parties might focus on those three pre-conditions to vicarious liability which are:

- Whether the perpetrator was an employee as defined in s 6G.
- Whether the employment role supplied the occasion for the abuse for the purposes of s 6H(1)(a).
- Whether the perpetrator took advantage of that occasion to perpetrate the abuse for the purposes of s 6H(1)(b).

Part 1B will likely give rise to a new era of interpretation disputes especially in considering the meaning of *employee*, determining whether employment supplied the occasion for the abuse and determining whether the perpetrator took advantage of that occasion to perpetrate the abuse. These disputes might be resolved in part through a deeper appreciation of the issues and decisions discussed in *Prince Alfred College v ADC*.