



New South Wales

Civil Liability Amendment (Child Abuse) Act 2021 No 28

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Civil Liability Amendment (Child Abuse) Act 2021 No 28

Act No 28, 2021

An Act to amend the *Civil Liability Act 2002* to enable courts to set aside certain agreements that settled claims for child abuse where it is just and reasonable to do so and to ensure that Part 2A of that Act does not restrict awards of damages for child abuse. [Assented to 18 November 2021]

The Legislature of New South Wales enacts—

1 Name of Act

This Act is the *Civil Liability Amendment (Child Abuse) Act 2021*.

2 Commencement

This Act commences on the date of assent to this Act.

Schedule 1 Amendment of Civil Liability Act 2002 No 22

[1] Section 3 Definitions

Insert in alphabetical order—

affected agreement, for Part 1C—see section 7C.

applicant, for Part 1C—see section 7D.

[2] Part 1C

Insert after Part 1B—

Part 1C Child abuse—setting aside settlements

7A Definitions

In this Part—

affected agreement—see section 7C

applicant—see section 7D.

7B Object of Part

The object of this Part is to provide a way for a person to seek to have an agreement set aside if—

- (a) the agreement settled a claim for child abuse perpetrated against the person, and
- (b) at the time of the agreement, there were certain legal barriers to the person being fully compensated through a legal cause of action.

7C Meaning of “affected agreement”

- (1) In this Part, an *affected agreement* means an agreement that prevents the exercise of an action on a cause of action to which section 6A of the *Limitation Act 1969* applies, if the agreement occurred—
 - (a) before the commencement of that section, and at the time of the agreement, a limitation period applying to the cause of action had expired, or
 - (b) before the commencement of Part 1B of this Act, and at the time of the agreement, an organisation, that would have been liable under Part 1B for child abuse had the Part been in force, was not incorporated, or
 - (c) before the commencement of Part 1B of this Act, and the agreement is not just and reasonable in the circumstances.
- (2) For the purposes of this section, a limitation period is taken to have expired even if it were possible at the time to seek the leave of a court to extend the period.

7D Court may set aside affected agreement

- (1) A person (the *applicant*) who, because of an affected agreement, is prevented from exercising an action on a cause of action may—
 - (a) commence proceedings on the cause of action in a court with sufficient jurisdiction to hear the cause of action, and
 - (b) apply to the court to set aside the affected agreement.

- (2) The court may set aside an affected agreement if it is just and reasonable to do so.
- (3) The court may consider the following in making its decision to set aside the affected agreement—
 - (a) the amount paid to the applicant under the agreement,
 - (b) the bargaining position of the parties to the agreement,
 - (c) the conduct in relation to the agreement of—
 - (i) the parties other than the applicant, or
 - (ii) the legal representatives of the parties other than the applicant,
 - (d) any other matter the court considers relevant.
- (4) Section 131(1) of the *Evidence Act 1995* does not prevent evidence being adduced in proceedings under this section, even if the evidence is of a communication made, or a document prepared, in connection with an attempt to negotiate a settlement of the dispute to which the affected agreement relates.

7E Court may also set aside other things

- (1) If the court decides to set aside an affected agreement under this Part, it may also set aside any of the following that gives effect to the agreement—
 - (a) a contract, deed or other agreement,
 - (b) an order or judgment of the court or of a lower court.
- (2) However, the court must not set aside the following—
 - (a) a deed of release signed by or on behalf of the applicant in acceptance of an offer under the National Redress Scheme and an agreement relating to a relevant prior payment that has been taken into account in the offer,
 - (b) an agreement to the extent to which—
 - (i) it settled a cross-claim between 2 or more defendants, or
 - (ii) 1 defendant indemnified another,
 - (c) a contract of insurance.
- (3) In this section—

National Redress Scheme means the National Redress Scheme for Institutional Child Sexual Abuse established by the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* of the Commonwealth.

7F Effect of setting aside affected agreement

- (1) A court may set aside an affected agreement or anything else under this Part only to the extent that it relates to the applicant.
- (2) An affected agreement and anything else set aside under this Part is void but only to the extent that it relates to the applicant.
- (3) An amount paid, including legal costs or disbursements, or other consideration given under the affected agreement—
 - (a) is not recoverable despite the agreement being void, and
 - (b) may be taken into account by a court in determining damages in proceedings for a cause of action to which the affected agreement relates.

[3] Section 26B Application of Part

Insert after section 26B(2)—

- (2A) This Part does not apply to, and is taken never to have applied to, an injury arising from child abuse.

[4] Section 26B(6)

Insert after section 26B(5)—

- (6) In this section—

child means a person under the age of 18 years.

child abuse, of a child, means sexual abuse or physical abuse of the child but does not include an act that is lawful at the time it takes place.

[5] Schedule 1 Savings and transitional provisions

Insert at the end of the Schedule, with appropriate Part and clause numbering—

Part Provisions consequent on enactment of Civil Liability Amendment (Child Abuse) Act 2021

Pre-existing judgments and settlements to which Part 2A applied

- (1) This clause applies to a cause of action against a protected defendant for child abuse of a person who at the time of the child abuse was an offender in custody.
- (2) The person may commence proceedings on the cause of action in a court with sufficient jurisdiction to hear the cause of action despite any earlier judgement or settlement given or made before the commencement of section 26B(2A).
- (3) The action may be brought as if the earlier judgment or settlement, including related proceedings, had not occurred.
- (4) The court hearing the action may, if it decides that it is just and reasonable to do so, do any or all of the following—
 - (a) set aside the earlier judgment or settlement,
 - (b) take into account any amounts paid or payable by way of damages under an earlier judgment or settlement,
 - (c) take into account any amounts paid or payable by way of costs in the related proceedings.
- (5) The Supreme Court may, on application, exercise the power to set aside a judgment under subclause (4)(a) even though it is not hearing the action.
- (6) A court, other than the Supreme Court, may not, under this clause, set aside a judgment of any other court.

(7) In this section—

child means a person under the age of 18 years.

child abuse, of a child, means sexual abuse or physical abuse of the child but does not include an act that is lawful at the time it takes place.

offender in custody has the same meaning as in Part 2A of this Act.

protected defendant has the same meaning as in Part 2A of this Act.

[Second reading speech made in—

Legislative Assembly on 17 March 2021

Legislative Council on 21 October 2021]