

National Redress Scheme and civil liability update



The child sexual abuse liability environment continues to evolve in Australia.

The commencement of the National Redress Scheme (NRS) was intended to provide an alternative pathway for survivors of institutional child sexual abuse. Notwithstanding the significant number of survivors that have applied to the NRS, there has been a concurrent elevation in the volume of civil claims; this has been aided by significant legislative reform across all Australian jurisdictions which has removed some of the historical barriers to civil litigation. The uplift in civil claims is understood to be one of the key reasons the insurance market has withdrawn molestation coverage for many organisations.

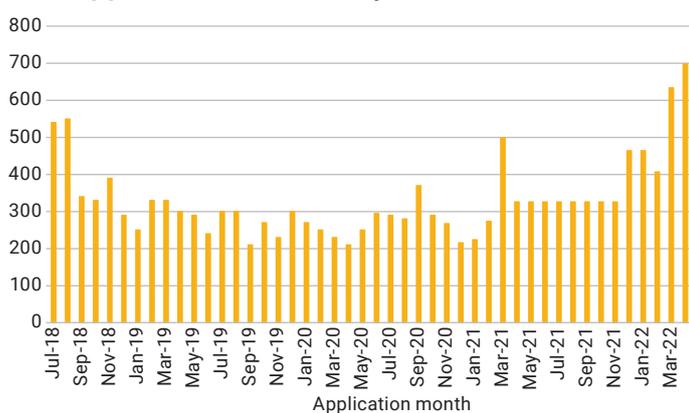
National Redress Scheme

The NRS which commenced on 1 July 2018 is now four years into the anticipated 10-year scheme duration.

Scheme applications

As at 22 April 2022, there has been 15,280 applications to the NRS¹. While the number of applications received by the scheme was relatively stable at around 200 to 300 per month, numbers have increased materially in recent months to around 600 to 700 per month, as shown in the chart. The number of applications already reported in the first 10 months of 2021/22 (estimated to be over 4,200) is higher than the total applications received in any of the previous three financial years.

NRS application numbers by month²



Average redress payments

The scheme has made over \$700m in redress payments to over 8,000 applicants (just over 50% of the total applications received to date). The average redress payment reported from the scheme inception to 22 April 2022 is around \$87,000, compared to an average of around \$82,000 two years into the scheme. This implies that the average redress payments in the last couple of years have been higher (estimated to be around \$90,000 or 10% higher) than the average redress payments in the first two years of the scheme.

Changes to the scheme legislation

The second year review of the National Redress Scheme was released in July 2021³ along with the Australian Government's draft response⁴. In September 2021, a number of changes were made to the scheme⁵ in response to some of the recommendations from the second year review including (among others):

- Advance payments of \$10,000 are for survivors who are aged over 70 (over 55 for Indigenous survivors) or those who are terminally ill
- Changes to the indexation of prior payments to the date of application rather than the date of payment
- Extension of review and acceptance periods
- Removal of statutory declaration requirements for applications
- Option for payments to be made to survivors by instalment.

In addition to these changes, other laws⁶ were passed in November 2021 enabling access to the NRS for survivors who were abused in previously out of scope defunct institutions and institutions without the financial capacity to join the scheme. Previously, only defunct institutions where there was shared responsibility with a government were in scope (for example, where children who were wards of the state were placed in a non-government operated residential institution). Under the expanded funder of last resort provisions, the States, Territories and Commonwealth are expected to act as Funder of Last Resort (FOLR) for other types of defunct institutions, expanding the reach of the NRS.

At the time of drafting this update there are 64 institutions declared as defunct institutions under the original FOLR provisions and 6 institutions declared under the new expanded FOLR rules. It is possible that the spike in applications made to the scheme since November 2021 may have been impacted by this change in legislation, however there may equally be other plausible explanations for this increase.

1 <https://www.nationalredress.gov.au/about/updates/1496>

2 Monthly numbers have been approximately estimated based on intermittent scheme updates published on the NRS website. Actual applications received each month may be different to the approximate estimates shown.

3 <https://www.nationalredress.gov.au/document/1386>

4 <https://www.nationalredress.gov.au/document/1391>

5 The changes were documented in the National Redress Scheme for Institutional Child Sexual Abuse Amendment Bill (2021)

6 The National Redress Scheme for Institutional Child Sexual Abuse Amendment (Funders of Last Resort and Other Measures) Bill

Civil Litigation

Legislative changes across all jurisdictions since 2015 have aided survivors in making civil abuse claims against organisations. The key changes are summarised in the table below.

Summary of legislative changes

Jurisdiction	Removal of the statute of limitations	Setting aside deeds of release	'Ellis defence' abolished	Reversal of onus of proof
ACT	✓**		✓	
NSW	✓*	✓	✓	✓
NT	✓*	✓	✓***	
Qld	✓*	✓	✓	✓
SA	✓*	✓	✓	✓
Tas	✓*	✓	✓	✓
Vic	✓*	✓	✓	✓
WA	✓**	✓	✓	

* Includes child sexual abuse, child serious physical abuse and psychological abuse related to sexual abuse or serious physical abuse.

** Applies to child sexual abuse only.

*** Legislation passed but not yet commenced.

Every Australian jurisdiction has passed laws to remove the statute of limitations enabling survivors to bring forward claims many years after the incident occurred. The scope of abuse to which this applies varies by jurisdiction.

Almost all jurisdictions have passed legislation enabling the setting aside of deeds of release signed upon historical settlement, meaning that survivors of abuse can reopen past claims and take further legal action against the responsible organisation. In WA and TAS, it is assumed that half of any previous settlement related to child sexual abuse when determining the relevant top up payment.

All jurisdictions have also abolished the 'Ellis defence', with proceedings able to be commenced against unincorporated institutions. This has removed the challenges of identification of a proper defendant.

Some jurisdictions have enacted a reverse onus of proof clause that shifts the burden of proof onto the individual accused who is required to disprove the allegation, rather than requiring the survivor to prove the allegation occurred. This change is typically prospective only (i.e. does not apply to historical abuse).

A recent judgement: O'Connor v Comensoli [9 June 2022]

There have been many interesting cases and judgements relating to child abuse in recent years. In one such recent decision, Justice Keogh of the Supreme Court of Victoria ruled that the 64 year old plaintiff was entitled to \$1.9m in damages to be paid by the Catholic Archdiocese of Melbourne. The plaintiff was sexually abused by Catholic priest Desmond Gannon between 1968 and 1970. In addition to the sizeable award, which included \$1.5m in loss of earnings, this judgement is interesting for two reasons:

- **Legal Identity:** In 2018 the Victorian Government passed the Legal Identity Act which sought to overturn the problem of the so-called 'Ellis Defence' whereby unincorporated institutions, with their assets held in a protected trust, did not legally exist (i.e. there is no entity to sue). In this recent case, the defendant submitted that the Legal Identity Act is directed only to the issue of recovery of damages and does not have the effect of retrospectively making the Archdiocese capable of being sued. Justice Keogh rejected this submission.
- **Vicarious Liability:** Two questions arose in this case. The first was 'is a priest an employee of the church?' for which the apparent answer was 'no'. The second question is whether the church can be held vicariously liable for the actions of someone who is not an employee. While touched on in earlier decisions (see Prince Alfred College v ADC), the judge stated that this is one of very few issues on which there is no authoritative case law. Having worked through the arguments of the defence, the judge determined that the church was vicariously liable for the actions of Desmond Gannon in this situation.

The circumstances of this case highlight the effectiveness of recent legislative reform in breaking down the historical barriers to civil litigation for survivors of institutional child sexual abuse.

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If you would like to receive future updates on Child Sexual Abuse Redress and Civil Litigation, please contact Finity on +61 2 8252 3350 or news@finity.com.au.

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ABN 89111470270



finity.com.au

Speak directly to the experts



Danielle Casamento

danielle.casamento@finity.com.au
+61 2 8252 3325



Justin Portelli

justin.portelli@finity.com.au
+ 61 2 8252 3368



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