

Civil Liability (Institutional Child Abuse) Amendment Bill 2018

Explanatory Notes

Short Title:

This Bill may be cited as the *Civil Liability (Institutional Child Abuse) Amendment Bill 2018 (the Bill)*.

Policy Objectives and the reasons for them:

The policy objective of the Bill is to implement Recommendations 89 – 94 of the 2015 *Redress and Civil Litigation Report (the Report)* of the Royal Commission into Institutional Responses to Child Sexual Abuse (**the Royal Commission**).

Implementation of these recommendations before the National Redress Scheme comes into effect is imperative to remove barriers to civil litigation and ensure survivors of child abuse are not denied any potential avenues for redress.

Recommendation 46 of the Royal Commission makes clear that the National Redress Scheme should not commence until after the Parliament legislates the reforms relating to time limits and the duty of institutions.

In 2016 time limits were removed, but the duty of institutions remains unaddressed in Queensland. The Bill seeks to address this as soon as possible in light of the imminent commencement of the National Redress Scheme.

Brief statement of the way the policy objectives will be achieved by the bill and why this way of achieving the objectives is reasonable and appropriate:

The Bill amends:

- *Civil Liability Act 2003* by inserting the following in a new Chapter 2 Part 6 Liability of institutions for child abuse:
 - section 49C Definitions
 - section 49D Duty of care for institutions
 - section 49E Particular institutions must nominate defendant
 - section 49F Particular trustees may be liable for breach of institution's duty of care

- *Limitations of Actions Act 1974* by inserting a definition of child abuse in section 11A so that the statutory exemption from limitation of action applies to child abuse more broadly, as defined; and
- *Personal Injuries Proceedings Act 2002* by inserting a definition of child abuse in section 9(10) so that the statutory exemption from time limits around commencement of personal injuries claims applies to child abuse more broadly, as defined.

The amendments are reasonable and appropriate as they are consistent with the following recommendations of the Royal Commission:

Royal Commission Recommendation 89

“introduce legislation to impose a non-delegable duty on certain institutions for institutional child sexual abuse despite it being the deliberate criminal act of a person associated with the institution”

Royal Commission Recommendation 90

“non-delegable duty should apply to institutions that operate ... facilities or provide ...services ... to children who are in the care, supervision or control of the institution...”

Royal Commission Recommendation 91

“introduce legislation to make institutions liable for institutional child sexual abuse by persons associated with the institution unless the institution took reasonable steps to prevent the abuse. The ‘reverse-onus’ should be imposed on all institutions”

Royal Commission Recommendation 92

“persons associated with the institution should include the institution’s officers, office holders, employees, agents, volunteers and contractors. For religious organisations, persons associated with the institution also include religious leaders, officers and personnel of the religious organisation”

Royal Commission Recommendation 94

“where the institution is alleged to be an institution with which a property trust is associated, then unless the institution nominates a proper defendant to sue that has sufficient assets to meet any liability arising from the proceedings:

- a) the property trust is a proper defendant to the litigation,
- b) any liability of the institution with which the property trust is associated that arises from the proceedings can be met from the assets of the trust”

Alternative way of achieving the policy objectives

There is no alternative way of achieving the policy objectives.

Administrative cost to government of implementing the bill

The Bill applies to the liability of institutions which includes private and government institutions, but should not result in additional administrative cost to government.

The Bill may reduce litigation administrative costs to government by providing clearer laws and reducing legal argument over the matters addressed in the Bill.

Government institutions may face liability flowing from civil action facilitated by the Bill, and as anticipated by the Royal Commission, and such costs (i.e. payment of liability)

may be offset by savings to government elsewhere. For example payment of liability for a survivor's health care treatment may be offset by savings to the public health system, including State government services, that would have otherwise funded the health care.

This Bill facilitates more accurate and dignified restitution of damages for survivors of abuse which could reasonably be expected to correlate with greater health outcomes, decreased cost to community and government and greater economic participation and contribution by survivors and may result in decreased dependence upon government services reducing cost of child abuse to government.

Consistency of the bill with Fundamental Legislative Principles

The Bill is consistent with FLPs.

Consultation carried out in relation to the bill

The Bill implements recommendations drawn from four years of evidence before the Royal Commission including two years of extensive government, stakeholder, industry, institutional, legal, insurance, NGO, child protection advocacy and community consultation specifically focusing on the policy objectives.

Further consultation has been carried out since the release of the Royal Commission's recommendations in 2015 confirming wide-spread support for the implementation of the recommendations in Queensland, including submissions to a Government Issues Paper.

Former Independent Member for Cairns Mr Rob Pyne introduced a similar bill to the previous Parliament based on extensive stakeholder consultation. That bill lapsed due to the 2017 State election. This Bill honours Mr Pyne's labours and commitment to implementing the Recommendations of the Royal Commission and also draws upon the consultation and legislation in other jurisdictions, specifically Victoria and New South Wales.

Explanation of the purpose and intended operation of clauses

Clauses 3 and 4 - amendment of *Civil Liability Act 2003*

The Bill amends the *Civil Liability Act 2003* by inclusion of Part 6 'Liability of institutions for child abuse'.

Section 49C Definitions

Section 49D defines: child abuse; duty of care; institution; official of an institution, related entity; and, relevant child.

Child abuse means any of the following perpetrated in relation to an individual while the individual is a child—

- sexual abuse;
- serious physical abuse;
- any other abuse perpetrated in connection with sexual abuse or serious physical abuse of the child, whether or not the other abuse was perpetrated by the person who perpetrated the sexual abuse or serious physical abuse.

This definition is consistent with other jurisdictions that extend beyond only sexual abuse and to apply to ‘serious physical’ and ‘connected other’ (where connected to sexual or serious physical) abuse. This is consistent with the delivery of the National Apology on 22 October 2018 which acknowledged all forms of abuse.

Duty of care is defined by reference to s49D(1) to create a non-delegable duty of an institution to ensure that a child does not suffer child abuse perpetrated by an official of the institution. The intention is to create statutory vicarious liability of institutions for child abuse.

Institution is defined as an entity (other than an individual) that has or had a child in its care, or under its supervision or authority, or provides or provided activities, facilities, programs or services of any kind that give or gave a person an opportunity to have contact with a child. It is irrelevant whether or not the entity currently exists, whether or not the entity is incorporated, and how the entity is described.

Institution is defined by function rather than structure. That is, the function of having a child in its care, supervision or authority or a function that provides (or provided) activities, facilities, programs or services of any kind giving a person an opportunity to have contact with a child.

It is the function of having access to children that is relevant to the policy objective sought to be achieved by this Bill, not any specific structure that results in that function.

Official includes:

- (a) a representative, however described, of the institution or a related entity; and
- (b) a member, officer, employee, associate, contractor or volunteer, however described, of the institution or a related entity; and
- (c) if the institution has, in any way, delegated the care of, supervision of or authority over the relevant child to another institution—an official of the other institution within the meaning of paragraph (a) or (b); and

- (d) if the institution has, in any way, delegated the care of, supervision of or authority over the relevant child to an individual to whom paragraphs (a) to (c) do not apply—that individual; and
- (e) any other person who would be considered, or should be treated as if the person were, an official of the institution.

This definition is drafted to ensure that the changing nature of the delivery of child services by institutions is captured by the Bill. For example, the increasing use of delegated services, sub-contracting or even informal volunteer based programs operated on institutional premises, with institutional imprimatur and promotion, but perhaps with absent or incomplete legally formalised nexus to the institution.

This definition of official implements Royal Commission Recommendation 92 which recommends the non-delegable duty and the vicarious liability with a reverse onus of proof apply to ‘persons associated’ with the institution.

It is intended that the Bill be fit to address future incidences of abuse in institutions or delegated entities. Similarly, to deliver the child protection incentives, institutions as well as their delegated entities and officials of both must have their liability properly and clearly defined at law.

Related entity of an institution, is defined as an entity that provides or provided activities, facilities, programs or services of any kind for the institution, or, if the institution is or was a corporation, another corporation that is or was related to the institution within the meaning of the *Corporations Act 2001* (Cth), section 50.

Relevant child is defined as a child involved in the activities, facilities, programs or services provided by the institution or is in the care, supervision or authority of the institution, and includes a child for whom the institution has delegated care of, supervision of or authority over to another institution or an individual.

Section 49D Duty of care of institutions

This section creates the non-delegable duty, also known as statutory vicarious liability, and places the onus upon an institution to prove that it took reasonable steps to prevent child abuse.

This section implements Royal Commission Recommendations 89, 90 and 91.

This section provides that the non-delegable duty (or vicarious liability) applies to abuse perpetrated before the commencement, consistent with the approach taken in other jurisdictions. This is also consistent with Royal Commission recommendations for nationally consistent legislation. This also ensures that this Bill meets the needs of the

victims and survivors of abuse for whom the Bill is intended – those children abused before the commencement of this legislation.

These are the survivors whose suffering led to the Royal Commission and whose courage made the Royal Commission and these Recommendations and reforms possible. It is essential that these reforms apply to the benefit of those victims and survivors.

This section then provides a defence for institutions, having the effect of reversing the onus of proof and the section provides guidance on the sort of considerations for what may be considered ‘reasonable precautions’ and ‘due diligence’. The section preserves that as a matter for the court to determine, on the facts of each case and may take into regard, at the time of the abuse, such considerations as: the resources of the institution, the relationship between institution and child, whether there was any delegation, the role of the institution or official who perpetrated the abuse.

Section 49E Particular institutions must nominate defendant

This section implements the Royal Commission’s Recommendation 94.

This section provides that an institution not capable of being sued must nominate a ‘proper’ defendant who is capable in law of being sued.

This section also provides for institutions that, while capable in law of being sued, are otherwise not in a financial position to meet current or future claims for any breach of duty of care (e.g. incorporated institutions who intentionally hold their assets in trust).

Section 49E(1)(b) is necessary to ensure that institutions capable of being sued, but without the financial means to meet current or future claims, are covered by section 49F. This is consistent with the Royal Commission’s Recommendation 94, which states:

“...unless the institution nominates a proper defendant to sue *that has sufficient assets to meet any liability arising from proceedings*: (a) the property asset is a proper defendant to the litigation, (b) any liability of the institution with which the property trust is associated that arises from the proceedings can be met from the assets of the trust”.

This recommendation in no way is intended to apply solely to ‘unincorporated’ institutions but clearly is intended to also apply to ‘incorporated’ institutions who are not in the financial position to meet a claim for damages for a breach of their duty of care.

Section 49F Particular trustees may be liable for breach of institution's duty of care

This section implements the Royal Commission's Recommendation 94.

This section ensures that trusts associated with the institutions identified at section 49E(1) may be held responsible at law for any liability arising from a breach of the institution's duty of care.

The section ensures that this applies to child abuse occurring before and after commencement, and this is consistent with the approach by other jurisdictions and considered reasonable for the same reasons stated above in relation to section 49D(2).

The liability of a trustee is limited to the value of the trust property.

This section protects a trustee by ensuring that compliance with this section does not constitute any other breach of trust by the trustee, and by making clear that the application of trust property under this section is a proper expense for which the trustee may be indemnified out of trust property.

Clauses 5 to 7 - Limitation of Actions Act 1974

The Bill amends the *Limitation of Actions Act 1974* by changing the application of the removal of limitation periods from narrowly applying only to child sexual abuse to applying to serious physical and other abuse (where it is connected with either the sexual or serious physical abuse). This creates consistency with other jurisdictions and consistency with the definition of child abuse proposed by this Bill to be used in the *Civil Liability Act 2003*.

Clauses 8 and 9 - Personal Injuries Proceedings Act 2002

Similarly, the Bill amends the *Personal Injuries Proceedings Act 2002* replacing the definition of child sexual abuse with a definition of child abuse that applies to serious physical and other abuse (where it is connected with either the sexual or serious physical abuse) to maintain legislative and procedural consistency.

Consistency with legislation in other jurisdictions

The Bill forms part of a national framework of legislation in all states and territories implementing the recommendations of the Royal Commission.

This Bill takes elements from those jurisdictions including Victoria and New South Wales.

Consistency with other jurisdictions includes ensuring that the commencement of the non-delegable duty of care applies whether the abuse was perpetrated before, on or after the commencement (49D(2)) and that the trustee is responsible for law for any liability arising out of a breach of the institutions duty of care, whether the breach happened before or after the commencement (49F(2)).

Another consistency with other jurisdictions includes the amendment of the application of the Policy Objectives to **child abuse** and not only child sexual abuse. This has the wide support of key child protection and legal stakeholders. It is also consistent with the recommendations of the Royal Commission who advised that Parliaments apply their findings outside of the narrow scope of the Royal Commission's Terms of Reference.

This definition of child abuse is also consistent with the National Apology delivered by the Federal Government and Federal Opposition on 22 October 2018, the Federal Parliament unanimously acknowledging *all forms* of child abuse.