

Civil Liability and Other Legislation Amendment Bill 2018

Replacement Explanatory Notes

FOR

Amendments To Be Moved During Consideration In Detail By The Honourable Yvette D'Ath MP, Attorney-General and Minister for Justice and Leader of the House

Title of the Bill

Civil Liability and Other Legislation Amendment Bill 2018.

Objectives of the Amendments

The objectives of the amendments are to:

- expand the application of the Bill to include not only child sexual abuse but also serious child physical abuse and psychological abuse connected with child sexual abuse and serious child physical abuse (connected abuse)(expanded application);
- remove the limitation periods for commencing a civil action for damages for personal injury relating to serious child physical abuse and connected abuse (expanded removal);
- respond to issues raised in stakeholders' submissions on the Bill to the Legal Affairs and Community Safety Committee (LACSC);
- strengthen and clarify the provisions of the Bill;
- achieve greater consistency with equivalent provisions in other jurisdictions;
- ensure that institutions can give genuine apologies to survivors of child abuse;
- provide a transitional provision for the amendment to the *Civil Proceedings Act 2011* (CP Act); and
- address minor and technical issues identified following introduction of the Bill.

Achievement of the Objectives

The objectives of the proposed amendments will be achieved by:

- expanding the application of the Bill to provide that:
 - the duty to prevent abuse in new part 2A, division 2 (in Chapter 2 of the *Civil Liability Act 2003* (CL Act) will apply to sexual abuse or serious physical abuse of the child; and
 - for the purposes of the other provisions in new part 2A (in Chapter 2 of the CL Act), abuse will be defined to mean sexual abuse or serious physical abuse of the child or connected abuse; and
- providing the trustee of an associated trust of an institution with statutory indemnities for reasonable legal costs and for liability for breach of trust for taking actions in accordance with the provisions of the Bill;
- clarifying terms relating to the management structure of unincorporated associations;
- clarifying that an ‘associated trust’, as defined in new section 33B (Meaning of associated trust), is one which the institution uses to carry out its functions or activities and for particular provisions includes a trust if a court orders that the trustee of the trust is the institution’s nominee;
- providing that, if the cause of action proceeds against an institution under new section 33F (Liability of incorporated institution that was unincorporated at time of abuse) or against a current office holder under new section 33G (Liability of current office holder of unincorporated institution), any defence, immunity or right to be indemnified that was available to the former office holder is available to the current office holder or institution;
- amending the definition of person ‘associated with’ an institution in new section 33C (When is a person *associated with* an institution) to reflect the wording used in the *Redress and Civil Litigation Report* of the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission Report) and to be consistent with equivalent definitions in New South Wales and Victoria;
- empowering a court, in certain circumstances, to order:
 - that the trustee of a trust that used to be an associated trust of the institution is the institution’s nominee, if the trust ceased to be an associated trust in an attempt to avoid trust property being applied to satisfy a liability that may arise under an abuse claim and the order would be appropriate; and
 - an institution to identify to the court any trusts that are, or used to be, associated trusts of the institution, including by providing particular information about the financial capacity of the trusts;
- amending section 72A (Application of pt 1A) of the CL Act to provide that an apology made by or on behalf of an institution in relation to the abuse of a child by a person associated with the institution cannot be construed or used as an admission of liability;
- providing that the amendment to the CP Act in the Bill applies in relation to a proceeding whether started before or after the commencement;
- amending the *Limitation of Actions Act 1974* and the *Personal Injuries Proceedings Act 2002* to retrospectively abolish limitation periods that apply to claims for damages brought by a person where that claim is founded on personal injury of the person resulting from serious physical abuse or connected abuse of the person when the person was a child; and
- making minor and technical amendments to the Bill.

Alternative Ways of Achieving Policy Objectives

There are no alternative ways to achieve the policy objectives.

Estimated Cost for Government Implementation

Expanded application

The amendments to expand the application of the Bill to include serious physical abuse and connected abuse may increase the costs associated with record keeping and implementation of child safe practices, policies and processes to mitigate risks of harm as part of a child and youth risk management strategy so that Government will be in a position to satisfy the reverse onus amendments in the Bill.

Expanded removal

Government has considered the potential costs and will manage these costs as they arise.

Other amendments

There are no anticipated additional costs to government in implementing the other amendments which are designed to clarify and strengthen the provisions of the Bill, or to achieve greater consistency with equivalent legislation in other jurisdictions.

Consistency with Fundamental Legislative Principles

Legislation must have sufficient regard to the rights and liberties of individuals (Legislative Standards Act 1992 s 4(2)(a)) – extension of reverse onus to serious physical abuse

The proposed extension of the duty of institutions and reverse onus amendments to include serious physical abuse potentially breaches the fundamental legislative principle (FLP) that legislation have sufficient regard to the rights and liberties of individuals (*Legislative Standards Act 1992* (LSA), section 4(2)(a)). This is because new section 33E (Proof of whether duty was breached) is a 'reverse onus' provision. In a civil matter, the onus of proof usually rests with the person commencing the proceedings.

As for child sexual abuse:

- the reverse onus amendments address power imbalances and ensure that a victim does not have the burden of establishing liability and recognise that an institution should be liable where it has failed to put in place safe systems or failed to act;
- institutions should be in a good position to prove the steps they took to prevent serious physical abuse, and generally should have better access to records and witnesses capable of giving evidence about the institution's behaviour than plaintiffs are likely to have;

- reversing the onus of proof has the potential to encourage higher standards of governance and risk mitigation in institutions; and
- the impact of the potential breach is proposed to be mitigated by providing that the institution is able to discharge liability by proving on the balance of probabilities that it took all reasonable steps to prevent the abuse from occurring.

The FLP justifications provided for the Bill in relation to the proper defendant amendments, giving the court the authority to appoint a proper defendant, trustee use of assets and to allow for current property in a trust associated with an institution to be used to pay a successful claim equally apply in relation to serious physical abuse and connected abuse.

Legislation should not adversely affect rights and liberties, or impose obligations, retrospectively (LSA s 4(3)(g)) – retrospective removal of the limitation periods for serious child physical abuse and connected abuse

Amendment to the CP Act

A transitional provision will provide that the amendment to section 64 of the CP Act (to clarify that a person under a legal incapacity, such as being under 18 years of age, may recover the cost of trustee management fees in the award of damages for wrongful death of a member of the person’s family) will apply to an award of damages in a proceeding whether the proceeding was started before or after the commencement.

The transitional provision potentially breaches the FLP that legislation should not adversely affect rights and liberties or impose obligations, retrospectively (LSA, section 4(3)(g)). However, the amendment is clarifying in nature, designed to address conflicting Supreme Court decisions as to whether an award for damages for wrongful death can include trustee management fees for claimants under 18 years. The need for trustee management fees arises as a consequence of a legal incapacity existing at the time the cause of action accrues and is something that is foreseeable at that time.

Expanded removal

The expanded removal will apply to past claims that would previously have been subject to limitation periods. This amendment breaches the FLP that legislation should ‘not adversely affect rights and liberties, or impose obligations, retrospectively’ (LSA, s 4(3)(g)).

The proposed departure from the general principle, that legislation should operate prospectively, is justified on the basis that:

- it is appropriate to relax the limitation period for victims of child abuse who may not report their abuse for long periods after the limitation period has expired;
- access to justice should not be dependent on the nature of the abuse perpetrated against the child and claims for damages that arise from allegations of serious child physical abuse and connected abuse should be determined on their merits; and

- unfairness to the defendant can be addressed by preserving the right of the court to stay proceedings.

Legislation should not confer immunity from proceeding or prosecution without adequate justification (LSA s 4(3)(h)) – trustee is not liable for breach of trust only because of doing anything authorised by section

New section 33M (Satisfaction of liability by trustee of associated trust) of the Bill already provides for the liability of an institution, nominee or current office holder to be satisfied from the assets of an associated trust. This potential breach of the FLP was justified in the Explanatory Notes for the Bill on the basis that proposed amendments seek to prevent institutions from using their unincorporated status or asset structure as a means of escaping liability for child sexual abuse.

The proposed amendment to new section 33M provides in addition that the trustee is not liable for breach of trust only because of doing anything authorised by the section. This potentially breaches the FLP that legislation must not confer immunity from proceeding or prosecution without adequate justification. The proposed amendment is justified as it minimises the risk of adverse outcomes for trustees who realise trust assets to satisfy the liability of an institution as intended under the provisions of the Bill.

Consultation

On 16 August 2016, the Government released an issues paper, titled *The civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse: Redress and Civil Litigation Report – understanding the Queensland context* which canvassed a number of issues arising from the Royal Commission Report, including whether the legislative response should apply to other forms of abuse in addition to child sexual abuse. Public submissions closed on 25 October 2016 and further targeted consultation occurred in May and June 2017.

A number of the proposed amendments respond to issues raised during the LACSC examination of the Bill.

Consistency with legislation of other jurisdictions

The Bill is specific to the State of Queensland, and is not uniform with or complementary to legislation of the Commonwealth or another state. The amendments will make some aspects of the Queensland legislation consistent with equivalent positions in New South Wales and Victoria.

NOTES ON PROVISIONS

Amendment 1 amends clause 2 (Commencement) to provide that parts 2, 4 and 5 will commence on a date to be fixed by proclamation.

Amendment 2 amends clause 4 (Insertion of new ch 2, pt 2A) at the heading for new chapter 2, part 2A to remove the word ‘sexual’.

Amendment 3 amends clause 4 (Insertion of new ch 2, pt 2A) at new section 33A (Definitions for part) to insert a definition of ‘*abuse*’.

Amendment 4 amends clause 4 (Insertion of new ch 2, pt 2A) at new section 33A (Definitions for part) to remove the word ‘sexual’ from the definition of ‘*abuse claim*’.

Amendment 5 amends clause 4 (Insertion of new ch 2, pt 2A) at new section 33A (Definitions for part) to insert a definition of ‘*office of authority*’.

Amendment 6 amends clause 4 (Insertion of new ch 2, pt 2A) at new section 33B (Meaning of *associated trust*) by providing that a trust is an associated trust of an institution if the institution uses the trust to carry out its functions or activities.

Amendment 7 amends clause 4 (Insertion of new ch 2, pt 2A) at new section 33B (Meaning of *associated trust*) to provide that a reference in division 4 or 5 to an *associated trust* includes a trust in relation to which an order is in force under section 33H(6).

Amendments 8 and 9 amend clause 4 (Insertion of new ch 2, pt 2A) at new section 33C (When is a person *associated with* an institution) to add new categories of associated person.

Amendment 10 amends clause 4 (Insertion of new ch 2, pt 2A) at new section 33D (Duty to prevent child sexual abuse) to remove the word ‘sexual’ from the section heading.

Amendment 11 amends clause 4 (Insertion of new ch 2, pt 2A) at new section 33D (Duty to prevent child sexual abuse) to remove the word ‘sexual’.

Amendment 12 amends clause 4 (Insertion of new ch 2, pt 2A) at new section 33E (Proof of whether duty was breached) to remove the word ‘sexually’ from new section 33E(1).

Amendment 13 amends clause 4 (Insertion of new ch 2, pt 2A) at new section 33F (Liability of incorporated institution that was unincorporated at time of abuse) to remove the word ‘sexual’ from new subsection 33F(1)(a).

Amendment 14 amends clause 4 (Insertion of new ch 2, pt 2A) at new section 33F (Liability of incorporated institution that was unincorporated at time of abuse) to provide that any liability, duty or obligation of the former office holder is a liability, duty or obligation of the institution and any defence, immunity or right to be indemnified of the former office holder is available to the institution.

Amendment 15 amends clause 4 (Insertion of new ch 2, pt 2A) at new section 33G (Liability of current office holder of unincorporated institution) to remove the word ‘sexual’ from new subsection 33G(1)(a).

Amendment 16 amends clause 4 (Insertion of new ch 2, pt 2A) at new section 33G (Liability of current office holder of unincorporated institution) to provide that any liability, duty or obligation of the former office holder is a liability, duty or obligation of the current office holder and any defence, immunity or right to be indemnified of the former office holder is available to the current office holder.

Amendment 17 amends clause 4 (Insertion of new ch 2, pt 2A) at new section 33H (Claim against unincorporated institution and nomination of appropriate defendant) to allow a court to appoint a trustee of a trust that used to be an associated trust of the institution as the institution’s nominee in certain circumstances, if the court is satisfied that:

- a reason for causing the trust to cease to be an associated trust was to try to avoid trust property being applied to satisfy a liability that may arise under a decision on an abuse claim; and
- the order would be appropriate.

The amendment further provides the court with a power to order the institution within 28 days or other appropriate period to:

- identify to the court any trusts that are, or used to be, associated trusts of the institution; and
- provide particular information about the financial capacity of the trusts.

Amendment 18 amends clause 4 (Insertion of new ch 2, pt 2A) at new section 33I (Proceeding against nominee of unincorporated institution) to address a minor drafting issue.

Amendment 19 amends clause 4 (Insertion of new ch 2, pt 2A) at new section 33J (Assets available to satisfy liability of institution) as a consequence of Amendment 6.

Amendment 20 amends clause 4 (Insertion of new ch 2, pt 2A) at new section 33L (Assets available to satisfy liability of current office holder) as a consequence of Amendment 6.

Amendment 21 amends clause 4 (Insertion of new ch 2, pt 2A) at new section 33M (Satisfaction of liability by trustee of associated trust) to provide that the trustee is not liable for a breach of trust only because of doing anything authorised by the section.

Amendment 22 amends clause 4 (Insertion of new ch 2, pt 2A) by inserting a new section 33MA (References to liability) to provide that a reference to a liability under a judgment in, or settlement of, an abuse claim includes any costs associated with a proceeding for the claim.

Amendment 23 amends the Bill to insert a new clause 4A (Amendment of s 72A (Application of pt 1A)) to clarify that an apology made by or on behalf of an institution in relation to the abuse of a child by a person associated with the institution cannot be construed or used as an admission of liability.

Amendment 24 amends clause 6 (Amendment of sch 2 (Dictionary)) to insert a definition of ‘*abuse*’ that refers to new section 33A (Definitions for part).

Amendment 25 amends clause 6 (Amendment of sch 2 (Dictionary)) to insert a definition of ‘*office of authority*’ that refers to new section 33A (Definitions for part).

Amendment 26 amends the Bill to insert:

- a new clause 9 which makes transitional provision (in new part 17) for the amendment at clause 8; and
- new Part 4 (Amendment of *Limitation of Actions Act 1974*) and Part 5 (Amendment of *Personal Injuries Proceedings Act 2002*) expanding the removal of the limitation periods in the relevant Acts, defining ‘*abuse*’, of a child, to mean sexual abuse or serious physical abuse of the child, or psychological abuse of the child perpetrated in connection with sexual abuse or serious physical abuse of the child.

Amendment 27 amends the Long Title of the Bill to include the *Limitation of Actions Act 1974* and the *Personal Injuries Proceedings Act 2002*.