

Civil Liability and Other Legislation Amendment Bill 2018

Explanatory Notes

Short title

The short title of the Bill is the Civil Liability and Other Legislation Amendment Bill 2018.

Policy objectives and the reasons for them

The Royal Commission into Institutional Responses to Child Sexual Abuse (the Commission) in the *Redress and Civil Litigation Report* (the Report) made recommendations for improving the capacity of the justice system to provide fair access and outcomes to survivors of child sexual abuse wishing to pursue a claim for civil damages for personal injury arising from the abuse.

The main objective of the Bill is to amend the *Civil Liability Act 2003* (CL Act) in response to recommendations 91-94 of the Report.

The Bill includes amendments to the CL Act to:

- introduce a reverse onus (applied prospectively) under which an institution must prove it took reasonable steps to prevent the sexual abuse of a child in its care by a person associated with the institution to avoid legal liability for the abuse (reverse onus amendments); and
- establish a statutory framework for the nomination of a proper defendant by an unincorporated institution to meet any liability incurred by the institution (proper defendant amendments).

The Bill also includes an amendment to section 64 of the *Civil Proceedings Act 2011* (CP Act) with the objective of ensuring that a person under a legal incapacity may recover the cost of trustee management fees in the award of damages for wrongful death of a member of the person's family.

Achievement of policy objectives

Amendments to the CL Act - reverse onus

The Bill provides for amendments to the CL Act to reverse the onus of proof for claims concerning institutional child sexual abuse to require the defendant institution to prove that it took 'all reasonable steps' to prevent the sexual abuse of a child in its care by a person associated with the institution to avoid legal liability for the abuse.

The following factors would be taken into consideration in determining whether an institution took all reasonable steps: the nature of the institution; the resources that were reasonably available to the institution; the relationship between the institution and the child; and the position in which the institution placed the person in relation to the child (e.g. authority, power, trust, control and the ability to achieve intimacy with the child).

Amendments to the CL Act - proper defendant

The Bill proposes amendments to the CL Act which are intended to overcome the difficulties that a victim may face in identifying a proper defendant to sue, for example, due to the lack of perpetual succession in unincorporated institutions.

The Bill provides for:

- the liability of an incorporated institution that was unincorporated at the time of the abuse;
- the liability of the current office holder where there is a cause of action against a former office holder of the institution, which was unincorporated at the time the cause of action accrued and is currently an unincorporated body;
- nomination by an unincorporated institution of a person as the proper defendant to meet the institution's liability; and if no nomination is made within 120 days, or if the nominee is incapable of being sued or has insufficient assets, a court may order, where appropriate, the claim to proceed against the trustees of an associated trust of the institution;
- authority for an institution which has a liability under a judgment in/settlement of a child sexual abuse claim, if it elects to do so, to satisfy the liability out of the assets of the institution and the assets of an associated trust that the institution uses to carry out its functions or activities; and
- the continuity of institutions/offices where an institution / relevant office holder has changed over time.

Amendments to the CP Act

The Bill amends section 64 of the CP Act to clarify that a person under a legal incapacity may recover the cost of trustee management fees in the award of damages for wrongful death of a member of the person's family. This amendment is proposed to clarify the law in this area following conflicting court decisions and to ensure that an amount awarded, for example, to the child for the loss of parents will not be significantly depleted by the cost of managing the funds.

Alternative ways of achieving policy objectives

There are no other feasible options for achieving the objectives.

Estimated cost for government implementation

The reverse onus amendments may result in more cases involving the State being litigated.

Consistency with fundamental legislative principles

Reverse onus

The proposed reverse onus amendments potentially breach 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 the onus of proof in a civil matter usually rests with the person commencing the proceedings.

The departure is justified for a number of reasons. The majority of matters before the Commission revealed a failure by institutions to prevent the abuse despite the abuse being suspected, reported or even confirmed. The reverse onus amendments address power imbalances and ensure that a victim does not have the burden of establishing liability and recognises that an institution should be liable where it has failed to put in place safe systems or failed to act.

The Commission was satisfied that institutions should be in a good position to prove the steps they took to prevent 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. The Commission also considered reversing the onus of proof has the potential to encourage higher standards of governance and risk mitigation in institutions, both through their own efforts and through their compliance with the requirements of their insurers. Importantly, 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 child sexual abuse from occurring.

Proper defendant

The amendment for ensuring that relevant liability lies against the current holder of an office in an unincorporated institution could be viewed as a breach of the FLP that legislation should 'not adversely affect rights and liberties, or impose obligations, retrospectively' (section 4(3)(g) of the LSA).

The proposed departure is justified because it is intended to overcome the difficulties that a victim may face in identifying a proper defendant due to the lack of perpetual succession in unincorporated institutions. Further, the legislation clarifies that the holder of the office is being sued in the name of the office only and not in a personal capacity and that personal assets of the holder of the office cannot be used to satisfy the liability. Equally, liability will not attach to the current office holder if a cause of action against a former official of the association cannot be established.

No proper defendant nominated or insufficient assets to satisfy liability

The amendment giving a court the authority, on application by the claimant, to order a claim to proceed against the trustees of an associated trust of the institution if, after 120 days, there is no nominee for the institution or the nominee does not have sufficient assets to satisfy liability that may be found under a decision on the abuse claim, could be viewed as a breach of the FLP that legislation should 'not adversely affect rights and liberties, or impose obligations, retrospectively' (section 4(3)(g) of the LSA).

The proposed departure is justified because it is intended to overcome the difficulties that a victim may face if the institution does not nominate a proper defendant or if the assets of the institution are held, not by the institution itself, but in an associated trust of the institution (e.g. a trust in which the institution has, directly or indirectly, the power to control the application of income of the trust or the distribution of property of the trust).

Court can appoint trustee as proper defendant and trustee use of assets

The proposal to allow for current property in a trust associated with an institution to be used to pay a successful claim, even in circumstances where the abuse has no connection to the current members or property, could be viewed as a potential breach of the FLP requirement that legislation provides for the compulsory acquisition of property only with fair compensation (section 4(3)(i) of the LSA).

Further, proposed provisions conferring immunity on a trustee for use of trust assets held by or for the office or the institution to satisfy the liability incurred from a claim could be viewed as a breach of the FLP that legislation does not confer immunity from proceedings or prosecution without adequate justification (section 4(3)(h) of the LSA).

The Commission highlighted the difficulties claimants face with identifying a ‘proper defendant’ to sue in respect of institutions as a consequence of an entity being unincorporated or, as in the case of *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis [2007] NSWCA 117*, establishing a sufficient link between the alleged damage and a property trust associated with the defendant that has sufficient assets to meet any liability arising from proceedings.

The departures are therefore justified 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 departure is also seen as a more balanced approach to alternatives such as introducing legislation requiring the incorporation of organisations. Given the complicated structure of some organisations, the Commission was hesitant to recommend such an approach.

Person associated with institution – prescribed class

The proposal for a person associated with an institution (associated person) to include a person prescribed by regulation could be viewed as a potential breach of the FLP requirement that legislation allows for the delegation of legislative power only in appropriate cases (section 4(4)(a) of the LSA).

An associated person is defined for the purposes of the reverse onus amendment and includes relationships specifically identified by the Commission for this purpose. While the definition is inclusive and is not intended to be exhaustive of persons who may be regarded as being associated with an institution according to its ordinary meaning, the provision is new and it is appropriate to allow for the prompt prescription of other classes of person should there be uncertainty about whether a particular class of person should be recognised as being associated with an institution.

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* (Issues Paper) which canvassed issues relating to the Commission's reverse onus and proper defendant recommendations. Public submissions closed on 25 October 2016 and further targeted consultation occurred in May and June 2017.

A wide range of stakeholders (government, legal, church, educational, victims' representatives and community organisations) have been consulted on a consultation draft of the CL Act amendments in the Bill and were invited to a roundtable to discuss these amendments. Comments from stakeholders' submissions and at the roundtable were taken into account in finalising the drafting of the Bill.

The Legislative and Governance Forum for Corporations has been provided with copies of provisions in the Bill which would displace the operation of the *Corporations Act 2001* (Cth), as provided for in the Corporations Agreement 2002.

Consistency with legislation of other jurisdictions

In drafting the reverse onus amendments in the Bill regard has been had to the *Wrongs Act 1958* (Vic) and the *Civil Liability Amendment (Organisational Child Abuse Liability Act 2018* (NSW).

In drafting the CL Act proper defendant provisions the *Wrongs Act 1958* (Vic), the *Civil Liability Amendment (Organisational Child Abuse Liability Act 2018* (NSW), the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* (WA) and the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic) have been considered.

Notes on provisions

Part 1 Preliminary

Clause 1 provides that the short title of the Bill is the *Civil Liability and Other Legislation Amendment Act 2018*.

Clause 2 provides that part 2 of the Bill commences on a day to be fixed by proclamation.

Part 2 Amendment of Civil Liability Act 2003

Clause 3 provides that the part amends the CL Act.

Clause 4 inserts a new part 2A (Liability of institutions for child sexual abuse) in chapter 2 (Liability for harm) of the CL Act.

New section 33A provides the definitions (of abuse claim, associated trust, associated with, current office holder, head, institution, and nominee) for new part 2A.

New section 33B provides for the meaning of an *associated trust* of an institution.

New section 33C provides for when a person is *associated with* an institution.

New part 2A, division 2 sets out the duties of an institution to prevent child sexual abuse.

New section 33D provides that an institution has a duty to take all reasonable steps to prevent the sexual abuse of a child by a person associated with the institution while the child is under the care, supervision, control or authority of the institution.

New section 33E provides a reverse onus, in that the institution is taken to have breached its duty under new section 33D unless the institution proves it took all reasonable steps to prevent the abuse. Matters that are relevant to determine if the institution took all reasonable steps to prevent the abuse are stated to include matters listed in subsection 3(a) to (d).

New part 2A, division 3 provides for the liability of particular institutions and office holders.

New section 33F provides for liability in situations where there is a cause of action against a former office holder of the institution, which was unincorporated at the time the cause of action accrued but is now incorporated.

New section 33G provides for liability of a current office holder for a cause of action against a former office holder of the institution (who no longer holds that office) and the institution was unincorporated at the time the cause of action accrued and is currently an unincorporated body.

New section 33H allows a proceeding for an abuse claim to be started against an institution that is an unincorporated body and allows the institution to appoint a nominee, with the nominee's consent, to be the appropriate defendant for the purposes of an abuse claim against the institution. If, after 120 days, there is no nominee for the institution, or the court is satisfied that the nominee does not have sufficient assets to satisfy a liability that may be found under a decision on the abuse claim, the court may, on application by the claimant, order that the trustee of an associated trust of the institution is the institution's nominee if the court is satisfied that the order would be appropriate. A court may give directions and make orders to establish whether: a trust is an associated trust of an institution; a nominee has sufficient assets to satisfy a liability that may be found; or it would be appropriate for the court to order the trustee of an associated trust of an institution as the institution's nominee.

New section 33I provides for how a proceeding applies in respect of the nominee and the institution, respectively, including: any liability of the institution under the court's decision on the abuse claim is incurred by the nominee; things done by the institution are taken to be done by the nominee; and any right of the institution to be indemnified (including under an insurance policy) in respect of damages awarded in an abuse claim extends to, and indemnifies, the nominee.

New part 2A, division 4 allows assets to be made available to satisfy liability.

New section 33J will allow the institution to satisfy liability out of the assets of the institution and the assets of an associated trust that the institution uses to carry out its functions or activities.

New section 33K will allow the nominee, if the nominee is the trustee of an associated trust of the institution, to satisfy liability out of the assets of the trust and the assets of the institution. Otherwise, the nominee may satisfy the liability out of its assets and the assets of the institution.

New section 33L will allow the current office holder to satisfy the liability out of the assets of the institution or an associated trust that the institution uses to carry out its functions or activities.

New section 33M applies in relation to a liability under section 33J, 33K or 33L that may be satisfied out of the assets of an associated trust of an institution and provides that the trustee of the associated trust may pay an amount in satisfaction of the liability and, for that purpose, may realise assets of the trust. It also provides for the proper expenses of the trustee to be indemnified out of the trust property and limits the liability of the trustee of the associated trust, as the institution's nominee, to the value of the trust property.

New part 2A, division 5 provides for miscellaneous issues.

New section 33N provides that an institution, an institution's nominee, a current office holder or the trustee of an associated trust of an institution may act under division 4, and the trustee of an associated trust of an institution may consent to being the institution's nominee, despite: (a) another law; or (b) the terms of the associated trust

(including a trust for a charitable purpose); or (c) a duty, whether as the current holder of an office in the institution or as trustee or otherwise.

New section 33O provides for continuity of the institution for the purposes of new sections 33D, 33F(1)(a) and 33G(1)(a) where the current institution is substantially the same as it was when the relevant cause of action accrued, or if it is not the same or substantially the same, where the current institution is the relevant successor of the old institution.

New section 33P provides for continuity of an office for the purposes of new section 33G where the office in an institution is substantially the same as it was when the relevant cause of action accrued, or if there is no office that is the same or substantially the same, the head of the institution is taken to be the current office holder.

New section 33Q provides that new sections 33I to 33N are declared displacement provisions for the purposes of the *Corporations Act 2001* (Cth).

Clause 5 inserts a new part 8 in chapter 5 of the CL Act which will have the effect of ensuring that the reverse onus in new part 2A, division 2 applies only after commencement of the Bill.

Clause 6 provides for consequential amendments to Schedule 2 (Dictionary) to the CL Act.

Part 3 Amendment of Civil Proceedings Act 2011

Clause 7 provides that the Bill amends the CP Act.

Clause 8 amends section 64 of the CP Act by inserting a new subsection (4) to clarify that a person under a legal incapacity may recover the cost of trustee management fees in the award of damages for wrongful death of a member of the person's family.