



New South Wales

Civil Liability Amendment (Institutional Child Abuse) Bill 2017

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to impose a duty of care on certain institutions to make them liable for institutional child abuse by persons associated with the institution, unless the institution proves it took reasonable steps to prevent the abuse.

The Bill implements recommendation 91 of the *Redress and Civil Litigation Report of the Royal Commission into Institutional Responses to Child Sexual Abuse*. Recommendation 91 is as follows:

Irrespective of whether state and territory parliaments legislate to impose a non-delegable duty upon institutions, state and territory governments should introduce legislation to make institutions liable for institutional child sexual abuse by persons associated with the institution unless the institution proves it took reasonable steps to prevent the abuse. The ‘reverse onus’ should be imposed on all institutions, including those institutions in respect of which we do not recommend a non-delegable duty be imposed.

The Bill achieves this object by inserting provisions reflecting that recommendation. The proposed Act imposes a duty of care on various organisations as a part of the civil law of negligence.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act 3 months after the date of assent unless it is commenced sooner by proclamation.

Schedule 1 Amendment of Civil Liability Act 2002 No 22

Item [1] of Schedule 1 to the Bill inserts proposed Part 13 into the *Civil Liability Act 2002*, consisting of proposed sections 74–80. The proposed Part 13 is broadly consistent with the *Wrongs Amendment (Organisational Child Abuse) Act 2017* of Victoria.

Proposed section 74 contains definitions of terms used in the proposed Part 13, including:

- (a) a definition of **abuse**, which covers sexual abuse or physical abuse (or both) of a child and connected abuse, and
- (b) a definition of **relevant organisation**, which refers to the entities (whether public or otherwise) to which the proposed Part applies and covers any entity that exercises care, supervision or authority over children.

Proposed section 75 provides an extended meaning of an **individual associated with a relevant organisation**. This term is defined for the purposes of the proposed Part 13, and is particularly relevant for the duty of care imposed by proposed section 76.

Proposed section 76 imposes a duty of care on relevant organisations for child abuse committed by individuals associated with the organisation (see proposed section 76 (2)). The Bill provides for a “reverse onus of proof”, so that the organisation is presumed to have breached the duty of care, unless it proves on the balance of probabilities that it took reasonable precautions to prevent the abuse (see section 76 (3)).

Proposed section 77 provides that section 5E (Onus of proof) does not apply to a claim brought in reliance on the duty in section 76. Section 5E provides “In proceedings relating to liability for negligence, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation”, which is inconsistent with proposed section 76.

Proposed section 78 provides that section 5Q (Liability based on non-delegable duty) does not apply to a claim brought in reliance on the duty in section 76.

Proposed section 79 provides that Division 5 (Recreational activities) of Part 1A does not apply to a claim brought in reliance on the duty in section 76 to the extent it relates to the abuse of a child during the course of or in connection with a recreational activity.

Proposed section 80 provides that Part 5 (Liability of public and other authorities) does not apply to a claim brought in reliance on the duty in section 76, as it is not in keeping with the purpose of the proposed Part 13 for different standards to apply based on whether or not the relevant organisation is a public or other authority.

Items [2] and [3] of Schedule 1 to the Bill insert savings and transitional provisions. Item [2] enables savings or transitional regulations to be made. Item [3] makes it clear the proposed Part 13 applies to child abuse only if the abuse occurs after the commencement of the proposed Act.



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New South Wales

Civil Liability Amendment (Institutional Child Abuse) Bill 2017

No. , 2017

A Bill for

An Act to amend the *Civil Liability Act 2002* to make institutions liable for the sexual or physical abuse of children committed by persons associated with those institutions; and for other purposes.

The Legislature of New South Wales enacts:

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1 Name of Act

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This Act is the *Civil Liability Amendment (Institutional Child Abuse) Act 2017*.

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2 Commencement

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This Act commences 3 months after the date of assent unless commenced sooner by proclamation.

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| Schedule 1 | Amendment of Civil Liability Act 2002 No 22 | 1 |
| [1] Part 13 | | 2 |
| Insert after Part 12: | | 3 |
| Part 13 | Liability of organisations for child abuse | 4 |
| Division 1 | Preliminary | 5 |
| 74 | Definitions | 6 |
| (1) | In this Part: | 7 |
| | <i>abuse</i> of a child means any of the following perpetrated against a person when the person is under 18 years of age: | 8 |
| | (a) sexual abuse, | 9 |
| | (b) physical abuse, | 10 |
| | (c) any other abuse (<i>connected abuse</i>) perpetrated in connection with sexual abuse or physical abuse of the person (whether or not the connected abuse was perpetrated by the person who perpetrated the sexual abuse or physical abuse). | 11 |
| | <i>authority</i> , in relation to a relevant organisation, includes any authority or ostensible authority that an individual associated with the relevant organisation derives from the individual's association with the relevant organisation. | 12 |
| | <i>care order</i> means a care order under the <i>Children and Young Persons (Care and Protection) Act 1998</i> . | 13 |
| | <i>child</i> means a person who is under the age of 18 years. | 14 |
| | <i>delegation</i> includes sub-delegation. | 15 |
| | <i>individual associated with a relevant organisation</i> —see section 75. | 16 |
| | <i>physical abuse</i> does not include an act or omission committed in circumstances that constitute: | 17 |
| | (a) a lawful justification or excuse to the tort of battery, or | 18 |
| | (b) any other lawful exercise of force. | 19 |
| | <i>relevant organisation</i> means an entity (other than the State) organised for some end, purpose or work that exercises care, supervision or authority over children, whether as part of its primary functions or activities or otherwise, and is: | 20 |
| | (a) capable in law of being sued, or | 21 |
| | (b) the holder of an office established by or under an Act to which the right to appoint is vested in the Governor or a Minister, or | 22 |
| | (c) an entity forming part of the government sector within the meaning of the <i>Government Sector Employment Act 2013</i> , or | 23 |
| | (d) a body corporate established for public purposes. | 24 |
| | <i>specified carer</i> means: | 25 |
| | (a) a foster carer of a child, or | 26 |
| | (b) an individual who is a family member of, or other person of significance to, a child with whom the child is currently placed in out-of-home care under the <i>Children and Young Persons (Care and Protection) Act 1998</i> . | 27 |

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| (2) | To remove doubt, connected abuse is abuse of a person only if both the connected abuse and the sexual abuse or physical abuse in connection with which it is perpetrated are perpetrated when the person is under 18 years of age. | 1 2 3 4 |
| 75 | Extended meaning of an “individual associated with a relevant organisation” | 5 |
| (1) | An <i>individual associated with a relevant organisation</i> : | 6 |
| (a) | includes but is not limited to an individual who is an officer, office holder, employee, owner, volunteer or contractor of the relevant organisation, and | 7 8 9 |
| (b) | if the relevant organisation is a religious organisation—includes but is not limited to a minister of religion, a religious leader, an officer or a member of the personnel of the religious organisation, and | 10 11 12 |
| (c) | if the relevant organisation has delegated (the <i>delegator organisation</i>), by means of contract or otherwise, the care, supervision or authority over the child to whom the claim relates to any other organisation (the <i>delegate organisation</i>)—includes but is not limited to an individual who is referred to in paragraph (a) or (b) in relation to the delegator organisation or the delegate organisation, and | 13 14 15 16 17 18 |
| (d) | if the relevant organisation has delegated, by means of contract or otherwise, the care, supervision or authority over the child to whom the claim relates to a specified carer and a final care order in respect of the child has not been made—includes but is not limited to: | 19 20 21 22 |
| (i) | an individual who is referred to in paragraph (a) or (b) in relation to the relevant organisation, and | 23 24 |
| (ii) | the specified carer. | 25 |
| (2) | An individual is not associated with a relevant organisation solely because the relevant organisation wholly or partly funds or regulates another organisation. | 26 27 |
| Division 2 | Liability of organisations | 28 |
| 76 | Liability of organisations | 29 |
| (1) | This section imposes a duty of care that forms part of a cause of action in negligence. | 30 31 |
| (2) | A relevant organisation owes a duty to take the care that in all the circumstances of the case is reasonable to prevent the abuse of a child by an individual associated with the relevant organisation while the child is under the care, supervision or authority of the relevant organisation. | 32 33 34 35 |
| | Note. See section 75 as to when an individual is associated with a relevant organisation. In particular, section 75 (1) (c) and (d) extend the meaning of that concept in the case of delegation of the care, supervision or authority over a child to include another organisation or a specified carer. | 36 37 38 39 |
| (3) | In proceedings on a claim against a relevant organisation for damages in respect of the abuse of a child under its care, supervision or authority, on proof: | 40 41 |
| (a) | that abuse has occurred, and | 42 |
| (b) | that the abuse was committed by an individual associated with the relevant organisation, | 43 44 |
| | the relevant organisation is presumed to have breached the duty of care referred to in subsection (2) unless the relevant organisation proves on the balance of probabilities that it took reasonable precautions to prevent the abuse in question. | 45 46 47 48 |

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| Note. Reasonable precautions will vary depending on factors including but not limited to: | 1 |
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| (a) the nature of the relevant organisation, and | 3 |
| (b) the resources that are reasonably available to the relevant organisation, and | 4 |
| (c) the relationship between the relevant organisation and the child, and | 5 |
| (d) whether the relevant organisation has delegated the care, supervision or authority over the child to another organisation, and | 6 |
| (e) the role in the organisation of the perpetrator of the abuse. | 7 |
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| (4) If a claim names 2 or more relevant organisations as defendants, subsection (3) applies to each relevant organisation separately. | 9 |
| | 10 |
| (5) In the case of a relevant organisation that is an entity forming part of the government sector within the meaning of the <i>Government Sector Employment Act 2013</i> , or another person or body acting on behalf of the State: | 11 |
| | 12 |
| (a) if the relevant organisation is capable in law of being sued—the relevant organisation is the appropriate defendant for the purposes of a claim brought in reliance on the duty in subsection (2), and | 13 |
| | 14 |
| (b) if the relevant organisation is not capable in law of being sued—the State is the appropriate defendant for the purposes of a claim brought in reliance on the duty in subsection (2), and | 15 |
| | 16 |
| (c) any liability incurred by the relevant organisation by reason of subsection (2) is incurred by the State. | 17 |
| | 18 |
| (6) Subsection (2) does not apply to abuse of a child committed by an individual associated with a relevant organisation in circumstances wholly unrelated to that individual’s association with the relevant organisation. | 19 |
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| (7) If a relevant organisation has delegated, by means of contract or otherwise, the care, supervision or authority over a child to whom the claim relates to another organisation, subsection (2) does not apply to abuse of the child committed by an individual associated with the delegate organisation in circumstances wholly unrelated to that individual’s association with the delegator organisation or the delegate organisation. | 21 |
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| Division 3 Miscellaneous | 31 |
| 77 Application of section 5E | 32 |
| Section 5E (Onus of proof) does not apply to a claim brought in reliance on the duty in section 76. | 33 |
| | 34 |
| 78 Application of section 5Q | 35 |
| (1) Section 5Q (Liability based on non-delegable duty) does not apply to a claim brought in reliance on the duty in section 76. | 36 |
| | 37 |
| (2) The duty of care referred to in this Part owed by a relevant organisation extends to the abuse of a child by an individual associated with the relevant organisation to the extent (if any) that the duty is a non-delegable duty. | 38 |
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| | 40 |
| 79 Application of Division 5 of Part 1A | 41 |
| Division 5 (Recreational activities) of Part 1A does not apply to a claim brought in reliance on the duty in section 76 to the extent it relates to the abuse of a child by an individual associated with a relevant organisation during the course of or in connection with a recreational activity. | 42 |
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| 80 | Application of Part 5 | 1 |
| | Part 5 (Liability of public and other authorities) does not apply to a claim brought in reliance on the duty in section 76. | 2 3 |
| [2] | Schedule 1 Savings and transitional provisions | 4 |
| | Insert “ <i>Civil Liability Amendment (Institutional Child Abuse) Act 2017</i> ” at the end of clause 1 (1). | 5 6 |
| [3] | Schedule 1 | 7 |
| | Insert after Part 13: | 8 |
| | Part 14 Provision consequent on enactment of Civil Liability Amendment (Institutional Child Abuse) Act 2017 | 9 10 11 |
| 42 | Operation of Part 13 of this Act | 12 |
| | Part 13 of this Act applies to abuse of a child that occurs on or after, but not before, the day on which the <i>Civil Liability Amendment (Institutional Child Abuse) Act 2017</i> commences. | 13 14 15 |