



New South Wales

Civil Liability Amendment (Organisational Child Abuse Liability) Bill 2018

Explanatory note

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

Overview of Bill

The objects of this Bill are:

- (a) to create a duty on organisations to prevent child abuse and to create a legal presumption that an organisation has breached the duty if a child for which it has responsibility is subjected to child abuse by an individual associated with the organisation, and
- (b) to make an organisation vicariously liable for child abuse committed by employees and persons akin to employees, and
- (c) to permit plaintiffs to bring civil child abuse proceedings against unincorporated organisations that may be liable for the abuse.

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 on the date of assent to the proposed Act other than provisions that permit victims of child abuse to bring civil proceedings against unincorporated organisations. Those provisions are to commence on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Civil Liability Act 2002 No 22

Schedule 1 [4] inserts proposed Part 1B (which comprises Divisions 1–5) into the *Civil Liability Act 2002* (the *principal Act*). **Schedule 1 [1]–[3]** make consequential amendments.

Division 1 of proposed Part 1B addresses preliminary matters. The Division comprises sections 6A–6C.

Section 6A sets out a number of definitions used in the proposed Part including *child* which means a person under the age of 18 years and *organisation* which means any organisation whether incorporated or not and includes a public sector body but does not include the State.

Section 6B provides that certain other provisions of the principal Act do not protect a person from civil liability arising under the proposed Part or place any restriction or limitation on an award of damages made pursuant to the proposed Part. It also makes it clear that proceedings may be brought under Divisions 2 and 3 of the proposed Part in respect of the same child abuse but this does not give rise to double compensation.

Section 6C provides that an organisation and any successor of that organisation are, for the purposes of the proposed Part, taken to be the same organisation.

Division 2 of proposed Part 1B deals with a new duty of organisations to prevent child abuse perpetrated by persons associated with the organisation against a child for which the organisation is responsible. The Division comprises sections 6D–6F.

Section 6D provides that an organisation is responsible for a child, if the organisation exercises care, supervision or authority over the child.

Section 6E provides guidance as to which individuals are associated with an organisation.

Section 6F imposes a duty on an organisation that forms part of a cause of action in negligence. An organisation that has responsibility for a child must take reasonable precautions to prevent an individual associated with the organisation from perpetrating child abuse of the child in connection with the organisation's responsibility for the child. In proceedings against an organisation for breach of the duty, the organisation is presumed to have breached its duty if the plaintiff establishes that an individual associated with the organisation perpetrated the child abuse in connection with the organisation's responsibility for the child. This presumption is displaced if the organisation establishes that it took reasonable precautions to prevent the child abuse. The term *child abuse*, of a child, is defined (for the purposes of the proposed section) as sexual abuse or physical abuse of a child but does not include any act that is lawful at the time that it takes place.

Division 3 of proposed Part 1B deals with vicarious liability of organisations for child abuse perpetrated by employees and persons akin to employees. The Division comprises sections 6G and 6H.

Section 6G sets out a definition of *employee* of an organisation that includes an individual who is akin to an employee. An individual is (subject to regulations made under the principal Act) akin to an employee if the individual carries out activities as an integral part of the activities carried on by the organisation and does so for the benefit of the organisation unless the activities are carried out for a recognisably independent business or the activities are the activities of an authorised carer.

Section 6H provides that an organisation is vicariously liable for child abuse perpetrated by an employee (which includes a person akin to an employee) of the organisation if the apparent performance by the employee of a role in which the organisation placed the employee supplies the occasion for the perpetration of the child abuse by the employee and the employee takes advantage of that position to perpetrate the child abuse. The term *child abuse* is defined (for the purposes of the proposed section) as sexual abuse or physical abuse perpetrated against a child but does not include any act that is lawful at the time that it takes place.

Division 4 of proposed Part 1B provides an avenue for child abuse proceedings to be brought against unincorporated organisations. The Division comprises sections 6I–6P.

Section 6I sets out the objects of the Division which are to enable child abuse proceedings to be brought against an unincorporated organisation and to enable an organisation to pay liabilities from child abuse proceedings from the assets of an associated trust in certain circumstances.

Section 6J sets out a number of definitions used in the Division including *child abuse proceedings* which are defined as proceedings for a civil claim arising from abuse against a child (whether arising under the proposed Part or the common law) and *legal personality*, in respect of an organisation, which means the organisation is incorporated and capable of being sued and found liable.

Section 6K provides that child abuse proceedings may be brought against an unincorporated organisation as if that organisation had legal personality. In such a case, the functions of the organisation may be exercised by a management member of the organisation. A court may make orders and directions for the purposes of this Division including directing management members to exercise any specified function.

Section 6L permits an unincorporated organisation to appoint an entity as a proper defendant for the organisation at any time with the consent of the entity. However, in the case of an unincorporated organisation that is a public sector body, the State is taken to be appointed as the proper defendant.

Section 6M provides that an entity is suitable to be appointed as a proper defendant if the entity is able to be sued in this State and the entity (or, if the entity is the trustee of a trust, the trust) has sufficient assets.

Section 6N permits a court to appoint the trustees of one or more associated trusts (or, in certain cases, former associated trusts) of an unincorporated organisation as a proper defendant if child abuse proceedings are commenced against the organisation and no suitable proper defendant is appointed by the end of 120 days after the commencement of the proceedings or, if after that time, the proper defendant appointed ceases to be a suitable proper defendant.

Section 6O sets out the effect of the appointment of a proper defendant. On the appointment, the proper defendant is taken to be the defendant in the child abuse proceedings and incurs any liability from the claim in the proceedings on behalf of the unincorporated organisation. Anything done by the unincorporated organisation is taken to have been done by the proper defendant and the proper defendant may rely on any defence or immunity that would be available to the organisation and is covered by any insurance that covers the organisation. The unincorporated organisation must continue to participate in the proceedings and a court may make orders or directions in respect of the organisation and substantive finding against the organisation.

Section 6P permits the trustees of an associated trust of an unincorporated organisation to consent to be appointed as a proper defendant, to supply information about the trust and to apply trust property to satisfy any liability arising from child abuse proceedings. The proposed section protects the trustees from liability for breach of trust for taking those actions and displaces the *Corporations Act 2001* of the Commonwealth.

Division 5 of proposed Part 1B (which comprises section 6Q) permits the Uniform Rules Committee to make rules for the purposes of the proposed Part.

Schedule 1 [5] permits regulations under the principal Act to contain provisions of a savings or transitional nature consequent on the enactment of any Act that amends the principal Act (including the proposed Act).

Schedule 1 [6] inserts a number of savings and transitional provisions for the purposes of proposed Part 1B. These provide that proposed sections 6F (Liability of organisation for child abuse by associated individuals) and 6H (Organisations vicariously liable for child abuse perpetrated by employees) apply only in respect of child abuse perpetrated after the commencement of those sections. However, proposed Division 4 (Proceedings against unincorporated organisations) of Part 1B extends to child abuse proceedings in respect of abuse perpetrated before the commencement of that Division.

Schedule 2 Amendment of Workers Compensation Act 1987 No 70

Schedule 2 provides that Division 3 of Part 5 of the *Workers Compensation Act 1987* does not apply to modify an award of damages if the damages arise from abuse against a child.