

Passed by both Houses



New South Wales

Civil Liability Amendment (Organisational Child Abuse Liability) Bill 2018

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I certify that this public bill, which originated in the Legislative Assembly, has finally passed the Legislative Council and the Legislative Assembly of New South Wales.

*Clerk of the Legislative Assembly.
Legislative Assembly,
Sydney,*

, 2018



New South Wales

Civil Liability Amendment (Organisational Child Abuse Liability) Bill 2018

Act No , 2018

An Act to amend the *Civil Liability Act 2002* to make organisations liable in certain circumstances for child abuse perpetrated by persons associated with the organisation and vicariously liable for child abuse perpetrated by employees and persons akin to employees and to permit plaintiffs to bring civil child abuse proceedings against unincorporated organisations.

I have examined this bill and find it to correspond in all respects with the bill as finally passed by both Houses.

Assistant Speaker of the Legislative Assembly.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018*.

2 Commencement

- (1) This Act commences on the date of assent to this Act except as provided by subsection (2).
- (2) Schedule 1 [4], to the extent that it inserts Division 4 of Part 1B, commences on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Civil Liability Act 2002 No 22

[1] Section 3B Civil liability excluded from Act

Insert before section 3B (1) (a) (i):

- (ia) Part 1B (Child abuse—liability of organisations), and

[2] Section 3B (1) (f)

Insert “(other than Part 1B)” after “the whole Act”.

[3] Section 3B (1) (f), note

Insert after section 3B (1) (f):

Note. Section 151E (2A) of the *Workers Compensation Act 1987* provides that Division 3 of Part 5 of that Act does not apply to an award of damages that arises from abuse against a child (whether arising under Part 1B of this Act or the common law).

[4] Part 1B

Insert after Part 1A:

Part 1B Child abuse—liability of organisations

Division 1 Preliminary

6A Definitions

In this Part:

child means a person under the age of 18 years.

function includes a power, authority or duty, and **exercise** a function includes perform a duty.

organisation means any organisation, whether incorporated or not, and includes a public sector body but does not include the State.

public sector body means the following:

- (a) a government sector agency within the meaning of the *Government Sector Employment Act 2013*,
- (b) a service of the Crown in which persons excluded from the *Government Sector Employment Act 2013* by section 5 of that Act are employed,
- (c) a statutory body representing the Crown that is authorised by legislation to employ staff,
- (d) a statutory body representing the Crown that at any time received funding from the State for a public purpose,
- (e) a body (however described) that has been superseded by a body listed in paragraphs (a)–(d),
- (f) a body (however described) of a kind referred to in paragraphs (a)–(d) that has been abolished.

6B Application of Part

- (1) Nothing in section 5Q or Part 2A or 5 protects a person from civil liability arising under this Part or places any restriction or limitation on an award of damages made pursuant to this Part.
- (2) A person is not prevented from seeking compensation under Divisions 2 and 3 in respect of the same child abuse but in such a case, an award of damages

under either of those Divisions must take into account any award already made under the other Division.

6C Successor organisations

An organisation and any successor of that organisation are, for the purposes of this Part, taken to be the same organisation.

Division 2 Duty of organisations to prevent child abuse

6D Organisations that are responsible for a child

In this Division:

- (a) an organisation is *responsible* for a child if it (including any part of it) exercises care, supervision or authority over the child (or purports to do so or is obliged by law to do so), and
- (b) if an organisation (including any part of it) delegates the exercise of care, supervision or authority over a child to another organisation (in whole or in part), each organisation is *responsible* for the child.

6E Individuals who are associated with organisations

- (1) In this Division, an *individual* associated with an organisation without limitation includes an individual who is an office holder, officer, employee, owner, volunteer or contractor of the organisation and also includes the following:
 - (a) if the organisation is a religious organisation—a religious leader (such as a priest or a minister) or member of the personnel of the organisation,
 - (b) if the organisation or part of the organisation is a designated agency within the meaning of the *Children and Young Persons (Care and Protection) Act 1998*—an individual authorised by the designated agency (under that Act) as an authorised carer,
 - (c) an individual, or an individual belonging to a class of individuals, prescribed by the regulations.
- (2) An individual is not associated with an organisation solely because the organisation wholly or partly funds or regulates another organisation.
- (3) An individual associated with an organisation to which the exercise of care, supervision or authority over a child has been delegated, in whole or in part, is also taken to be an individual associated with the organisation from which the exercise of care, supervision or authority was delegated.

6F Liability of organisation for child abuse by associated individuals

- (1) This section imposes a duty of care that forms part of a cause of action in negligence.
- (2) 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.
- (3) In proceedings against an organisation involving a breach of the duty of care imposed by this section, 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, unless the organisation establishes that it took reasonable precautions to prevent the child abuse.

- (4) In determining, for the purposes of this section, whether an organisation took reasonable precautions to prevent child abuse, a court may take into account any of the following:
- (a) the nature of the organisation,
 - (b) the resources reasonably available to the organisation,
 - (c) the relationship between the organisation and the child,
 - (d) whether the organisation has delegated in whole or in part the exercise of care, supervision or authority over a child to another organisation,
 - (e) the role in the organisation of the individual who perpetrated the child abuse,
 - (f) the level of control the organisation had over the individual who perpetrated the child abuse,
 - (g) whether the organisation complied with any applicable standards (however described) in respect of child safety,
 - (h) any matter prescribed by the regulations,
 - (i) any other matter the court considers relevant.
- (5) In this section:
child abuse, of a child, means sexual abuse or physical abuse of the child but does not include an act that is lawful at the time it takes place.

Division 3 Vicarious liability of organisations

6G Employees include persons exercising functions akin to employees

- (1) In this Division:
employee of an organisation includes an individual who is akin to an employee of the organisation.
- (2) An individual is **akin to an employee** of an organisation 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.
- (3) However, an individual is not **akin to an employee** if:
- (a) the activities are carried out for a recognisably independent business of the individual or of another person or organisation, or
 - (b) the activities carried on by the individual are the activities of an authorised carer carried on in the individual's capacity as an authorised carer.
- (4) The regulations may, despite subsections (2) and (3), prescribe circumstances in which an individual will be akin to an employee or not akin to an employee.
- (5) In this section:
authorised carer means a person who is an authorised carer within the meaning of the *Children and Young Persons (Care and Protection) Act 1998* other than a person who is an authorised carer only because the person is the principal officer of a designated agency.

6H Organisations vicariously liable for child abuse perpetrated by employees

- (1) An organisation is vicariously liable for child abuse perpetrated against a child by an employee of the organisation if:

- (a) 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
 - (b) the employee takes advantage of that occasion to perpetrate the child abuse on the child.
- (2) In determining if the apparent performance by the employee of a role in which the organisation placed the employee supplied the occasion for the perpetration of child abuse on a child, a court is to take into account whether the organisation placed the employee in a position in which the employee has one or more of the following:
- (a) authority, power or control over the child,
 - (b) the trust of the child,
 - (c) the ability to achieve intimacy with the child.
- (3) This section does not affect, and is in addition to, the common law as it applies with respect to vicarious liability.
- (4) In this section:
child abuse means 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 Proceedings against unincorporated organisations

6I Objects of Division

The objects of this Division are:

- (a) to enable child abuse proceedings to be brought against unincorporated organisations, and
- (b) to enable an organisation to pay liabilities arising from child abuse proceedings from the assets of an associated trust in certain circumstances.

6J Definitions

In this Division:

associated trust—see section 6N (3).

child abuse proceedings means proceedings for a civil claim arising from abuse (including sexual abuse) against a child, whether arising under this Part or the common law.

entity includes the trustees of a trust.

legal personality, in respect of an organisation, means the organisation is incorporated and capable of being sued and found liable.

management member of an unincorporated organisation means:

- (a) a member of any management committee of the organisation, or
- (b) if the organisation does not have a management committee, a person who is concerned with, or takes part in, the management of the organisation, regardless of the person's title or position.

suitable proper defendant—see section 6M.

unincorporated organisation means an organisation that is not incorporated.

6K Child abuse proceedings may be commenced against unincorporated organisation

- (1) Child abuse proceedings may be commenced or continue against an unincorporated organisation in the name of the organisation or in a name reasonably sufficient to identify the organisation as if the organisation had legal personality.
- (2) For the purposes of this Division, a function that may be exercised by an unincorporated organisation may be exercised by a management member of the organisation.
- (3) A court may make the orders and directions it sees fit for the purposes of this Division, in particular to further the objects of this Division.
- (4) Without limiting subsection (3), a court may direct one or more management members of an unincorporated organisation to exercise a specified function of the organisation under this Division.

6L Unincorporated organisation may appoint proper defendant

- (1) An unincorporated organisation may, with the consent of an entity, appoint the entity as a proper defendant for the organisation at any time.
- (2) An appointment is to be made in accordance with the *Uniform Civil Procedure Rules 2005*.
- (3) However, if the unincorporated organisation is a public sector body, the State is taken to be appointed as the proper defendant.

6M Entities suitable to be appointed as proper defendant

For the purposes of this Division, an entity is suitable to be appointed as a proper defendant for an organisation if:

- (a) the entity is able to be sued in this State, and
- (b) the entity (or, if the entity is a trustee of a trust, the trust) has sufficient assets in this State to satisfy any judgment or order that may arise out of child abuse proceedings against the unincorporated organisation.

6N Court may appoint proper defendant

- (1) This section applies if:
 - (a) child abuse proceedings are commenced against an unincorporated organisation and no suitable proper defendant is appointed for the organisation by the end of 120 days after the unincorporated organisation (or a management member of the unincorporated organisation) is served with notice of the commencement of the proceedings, or
 - (b) after that time, the proper defendant appointed ceases to be a suitable proper defendant.
- (2) The court in which the child abuse proceedings are commenced may, on the application of the plaintiff, appoint the trustees of one or more of the following trusts if the trustees are suitable to be appointed as a proper defendant for the organisation:
 - (a) an associated trust of the organisation,
 - (b) a trust that was formerly an associated trust of the organisation if the court considers that the trust ceased to be an associated trust in an attempt to avoid trust property being applied to satisfy any liability that

may be incurred in child abuse proceedings and it would be unjust not to appoint the trustees of the trust.

- (3) A trust is an *associated trust* of an unincorporated organisation, for the purposes of this Division, if one or more of the following apply:
- (a) the organisation has, either directly or indirectly, the power to control the application of the income, or the distribution of the property, of the trust,
 - (b) the organisation has the power to obtain the beneficial enjoyment of the property or income of the trust with or without the consent of another entity,
 - (c) the organisation has, either directly or indirectly, the power to appoint or remove the trustee or trustees of the trust,
 - (d) the organisation has, either directly or indirectly, the power to appoint or remove beneficiaries of the trust,
 - (e) the trustee of the trust is accustomed or under an obligation, whether formal or informal, to act according to the directions, instructions or wishes of the organisation,
 - (f) the organisation has, either directly or indirectly, the power to determine the outcome of any other decisions about the trust's operations,
 - (g) a member of the organisation or a management member of the organisation has, under the trust deed applicable to the trust, a power of a kind referred to in paragraphs (a)–(f) but only if the trust has been established or used for the activities of the organisation or for the benefit of the organisation.
- (4) On the making of an application by a plaintiff under this section, the unincorporated organisation must, within 28 days after the application is made, identify to the court any associated trusts of the organisation, including by identifying the financial capacity of those trusts.

60 Effect of appointment of proper defendant

On the appointment of a proper defendant for an unincorporated organisation:

- (a) the proper defendant is taken to be the defendant in the child abuse proceedings against the organisation on behalf of the organisation and is responsible for conducting the proceedings as the defendant, and
- (b) anything done by the unincorporated organisation is taken to have been done by the proper defendant and a duty or obligation of the unincorporated organisation in relation to the proceedings is a duty or obligation owed by the proper defendant, and
- (c) the unincorporated organisation must continue to participate in the child abuse proceedings and a court may make orders or directions in respect of the organisation as if the organisation had legal personality, and
- (d) a court may make substantive findings in the child abuse proceedings against an unincorporated organisation as if the organisation had legal personality, and
- (e) the proper defendant incurs any liability from the claim in the proceedings on behalf of the organisation that the organisation would have incurred if the organisation had legal personality (including any costs awarded), and

- (f) the proper defendant may rely on any defence or immunity that would be available to the organisation as a defendant in the proceedings if the organisation had legal personality, and
- (g) any right of the unincorporated organisation to be indemnified (including under a policy of insurance) in respect of damages awarded in a claim in child abuse proceedings extends to, and indemnifies, the proper defendant, and
- (h) if more than one proper defendant is appointed, the proper defendants must file a single defence and proceed as a single defendant.

6P Special provisions applying when trustees of associated trust appointed

- (1) Despite any Act or other law or instrument (including any trust deed), the trustees of an associated trust of an unincorporated organisation may do one or more of the following:
 - (a) consent to be appointed by the organisation as a proper defendant,
 - (b) supply any information about the trust that may be required under this Division, including identifying the financial capacity of the trust,
 - (c) apply trust property to satisfy any liability incurred by the trustee as a proper defendant in child abuse proceedings.
- (2) Liability of a trustee of an associated trust incurred by the trustee as a proper defendant in child abuse proceedings is limited to the value of the trust property.
- (3) The satisfaction of any liability incurred by a trustee of an associated trust as a proper defendant in child abuse proceedings is a proper expense for which the trustee may be indemnified out of the trust property, irrespective of any limitation on any right of indemnity a trustee may have.
- (4) A trustee of an associated trust is not liable for a breach of trust only because of doing anything authorised by this section.
- (5) The provisions of this section are declared to be Corporations legislation displacement provisions for the purposes of section 5G of the *Corporations Act 2001* of the Commonwealth in relation to the provisions of the Corporations legislation generally.

Note. Section 5G of the *Corporations Act 2001* of the Commonwealth enables a State to displace the operation of the provisions of the Corporations legislation of the Commonwealth in favour of provisions of State laws that are declared under State law to be Corporations legislation displacement provisions for the purposes of that section. See, in particular, section 5G (4) and (11) of the *Corporations Act 2001* of the Commonwealth in relation to the displacement effected by this section.
- (6) In this section:

liability incurred by the trustee as a proper defendant in child abuse proceedings includes any unpaid judgment debt arising from the proceedings, any amount paid in settlement of the proceedings and any costs associated with the proceedings.

Division 5 Rules

6Q Rules of court

- (1) The Uniform Rules Committee under the *Civil Procedure Act 2005* may make rules, not inconsistent with this Part, for or with respect to any matter that by this Part is required or permitted to be prescribed by rules or that is necessary

or convenient to be prescribed by rules for carrying out or giving effect to this Part.

- (2) In particular, the rules may make provision for or with respect to the following matters:
- (a) the practice and procedure to be followed in respect of proceedings under this Part and any matters incidental to or relating to that practice and procedure,
 - (b) the protection of the privacy of plaintiffs,
 - (c) the duties of registrars and other officers of a court in relation to or for the purpose of the operation of this Part,
 - (d) the forms to be used in connection with the operation of this Part.
- (3) Rules made by the Uniform Rules Committee for the purposes of this Part are to form part of the rules made by that Committee under the *Civil Procedure Act 2005*.

[5] Schedule 1 Savings and transitional provisions

Insert at the end of clause 1 (1):

any Act that amends this Act

[6] Schedule 1

Insert at the end of the Schedule, with appropriate Part and clause numbering:

Part Provisions consequent on enactment of Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018

Definition

In this Part:

amending Act means the *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018*.

Liability of organisation for child abuse by associated individuals

Section 6F, as inserted by the amending Act, applies only in respect of child abuse perpetrated after the commencement of that section.

Organisations vicariously liable for child abuse perpetrated by employees

Section 6H, as inserted by the amending Act, applies only in respect of child abuse perpetrated after the commencement of that section.

Proper defendant

Division 4 of Part 1B of this Act 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

Section 151E Application—modified common law damages

Insert after section 151E (2):

- (2A) This Division does not apply to an award of damages if the damages arise from abuse against a child (whether arising under Part 1B of the *Civil Liability Act 2002* or the common law).