DRAFT SECOND READING SPEECH

HON ELISE ARCHER MP

Justice Legislation Amendment (Organisational Liability for Child Abuse) Bill 2019

check Hansard for delivery

Madam Speaker, I move that the Bill now be read a second time.

The Justice Legislation Amendment (Organisational Liability for Child Abuse) Bill 2019 fulfils the Tasmanian Government's commitment to implement the Royal Commission into Institutional Responses to Child Sexual Abuse's recommendations aimed to improve civil litigation outcomes for survivors of child sexual abuse.

The Tasmanian Government is committed to providing improved avenues for justice and in turn, creating institutional environments that protect our vulnerable children. The work of the Royal Commission continues to help shape future reforms to achieve organisational change both within government but also in non-government settings.

This Bill is just one of many significant systemic and legislative reforms we will implement to continue to work towards a safer Tasmania for our children.

On 15 December 2017, the Royal Commission handed down its Final Report which was the culmination of the Royal Commission's work over its five-year inquiry. Comprising 17 volumes and its earlier reports on specific areas, the Final Report contains a total of 409 recommendations and provides a road map for implementing reforms that will prevent and respond to child sexual abuse in institutions.

On 20 June 2018, I tabled the Government's response to the Royal Commission's Final Report and earlier Working with Children Checks, Redress and Civil Litigation and Criminal Justice reports. This included the Government's commitment to implement recommendations to strengthen institutional liability for child sexual abuse.

On 1 November 2018, the Tasmanian Government commenced participation in the National Redress Scheme for Institutional Child Sexual Abuse.

The National Redress Scheme is an important pathway for some survivors to achieve justice without the need to undertake the complexity of civil law proceedings if they wish, and the Government has committed $70 million towards the State's involvement in the Scheme.

Many Tasmanian survivors of institutional child sexual abuse have already made applications to the National Redress Scheme and the Tasmanian Government is responding to those applications within the statutory timeframes set by the Australian Government to ensure that those survivors' applications can be progressed as quickly as possible.

The National Redress Scheme, however, applies only to past abuse. It does not provide a framework for organisational liability for child abuse that may occur in the future. The Royal

Commission therefore concluded that reforms to civil litigation are required in Australian jurisdictions to provide justice to survivors past, present and future.

These civil law reforms will ensure that survivors have a number of pathways to access justice.

This Government is committed to ensuring that all survivors of child abuse are able to seek justice. Every survivor of child sexual abuse addresses their abuse in different ways and at different times. A decision to attempt to seek justice either in a criminal or civil proceeding is incredibly courageous and a personal decision which must be supported.

In the Redress and Civil Litigation Report, the Royal Commission noted –

> *Because of the nature and impact of the abuse they have suffered, many victims of child sexual abuse have not had the opportunity to seek compensation for their injuries that many Australians generally take for granted. While it cannot now be made feasible for many of those who have experienced institutional child sexual abuse to seek common law damages, there is a clear need to provide avenues for survivors to obtain effective redress for this past abuse.*

However, it is also clear that reform is needed to reduce the current barriers to individuals in seeking damages for child abuse through civil litigation, as the very nature and impact of institutional child sexual abuse can work against the survivors' ability to seek damages through existing avenues.

The Royal Commission conducted extensive work to consider this area of the law. Its findings and recommendations are the result of issues papers, roundtable consultations, the *Redress and Civil Litigation Consultation Paper* and submissions to it, and a specific public hearing.

A statement of Justice McHugh, *'The Law-making function of the Judicial Process – Part II'* (1988) 62 Australian Law Journal 116 adopted by the Royal Commission in its *Redress and Civil Litigation Report* illustrates the need for laws to be under constant review -

> *Law is a social instrument – a means, not an end. As society changes, so must the instruments which regulate it. The unprecedented rate of change in Australian society in recent years has meant many of the rules of law and, indeed, wider principles that lie at the back of them are unjust or inefficient. Moreover, rapid change means that conflicts arising from novel situations and which call for adjustments by the judicial process are often not covered by existing rules. If law is to serve its purpose, its rules and principles must be periodically examined and, if necessary, amended.*

Madam Speaker, the work of the Royal Commission has unequivocally demonstrated that it is time for such examination and amendment.

The Justice Legislation Amendment (Organisational Liability for Child Abuse) Bill 2019 addresses a number of recommendations made by the Royal Commission, particularly in the area of civil litigation. It also makes an amendment that complements the work of the Royal Commission regarding previous settlements.

This Bill enacts significant reforms that remove legal barriers identified by the Royal Commission, and enables and enhances access to justice for survivors of child abuse.

Specifically, the Bill amends the *Civil Liability Act 2002* and the *Limitation Act 1974*. I will now address the proposed amendments in turn.

The Bill amends the *Civil Liability Act 2002* to impose a statutory non-delegable duty upon all organisations who exercise care, supervision or authority over children to prevent an individual associated with their organisation perpetrating child abuse.

The rationale for this amendment arises from the Royal Commission's findings which identified that survivors of child sexual abuse have significant difficulty in bringing civil law actions against organisations as a claimant must establish that the organisation owed them a duty of care and the breach of that duty caused their damage.

To mitigate this issue faced by survivors of child abuse, the Royal Commission specifically recommended that:

> "*State and territory governments should introduce legislation to impose a non-delegable duty on certain organisations for institutional child sexual abuse despite it being the deliberate criminal act of a person associated with the organisation*"
>
> - Recommendation 89, *Redress and Civil Litigation Report*.

This Bill imposes a clear duty of care that survivors can point to as forming part of a cause of action in negligence. It is a fault-based duty and is 'non-delegable', meaning that where a child's care has been delegated to another organisation, each organisation retains responsibility for the child.

The statutory duty applies to 'child abuse', which is defined in the *Civil Liability Act 2002* to mean sexual abuse, or physical abuse, of the child; and any psychological abuse of the child that arises from the sexual abuse or physical abuse – but does not include an act that is lawful at the time at which it occurs.

The *Civil Liability Act 2002* now includes a specific definition of child abuse. Child abuse includes all types of abuse, all physical abuse and all psychological abuse that arises from physical abuse. This definition now makes clear the scope of an organisation's duty to protect children.

Our Government is committed to a consistent application of the law. This Bill will now ensure that the definition of child abuse is consistent with the *Limitation Act 1974* – which was previously amended by this Government to remove the limitation period in relation to child abuse.

The duty itself requires an organisation to prevent an individual associated with the organisation perpetrating child abuse against a child for whom they are responsible. An individual 'associated with an organisation' includes, but is not limited to including, an individual who is an office holder, officer, employee, owner, volunteer or contractor of the organisation and also includes –

- if the organisation is a religious organisation – a religious leader (such as a priest or minister) or member of the personnel of the organisation; and

- any individual that is prescribed or who is within a class of organisation that is prescribed.

The categories of individuals associated with an organisation draws on recommendation 92 of the Royal Commission's *Redress and Civil Litigation Report* which is as follows:

> *For the purposes of both the non-delegable duty and the imposition of liability with a reverse onus of proof, the persons associated with the institution should include the institution's officers, office holders, employees, agents, volunteers and contractors. For religious organisations, persons associated with the institution also include religious leaders, officers and personnel of the religious organisation.*
>
> - Recommendation 92, *Redress and Civil Litigation Report*

Under the duty, an organisation that has responsibility for a child must take reasonable precautions to prevent an individual associated with the organisation who, by virtue of being associated with the organisation, has –

- authority, power or control over a child; or
- the trust of a child; or
- the ability to achieve intimacy with a child –

from being able, by virtue of that authority, power, control, trust or ability, to perpetrate child abuse on the child.

The Bill allows an organisation to rebut the duty by establishing that the organisation took 'reasonable precautions' to prevent the abuse, which was specifically recommended by the Royal Commission, specifically:

> *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.*
>
> - Recommendation 91, *Redress and Civil Litigation Report.*

The Royal Commission recommended shifting the onus of proving reasonable precautions to organisations to ensure organisations implement the current best practice to prevent and respond to allegations of child sexual abuse.

In determining whether an organisation took 'reasonable precautions' to prevent child abuse, a court may take into account a variety of factors. These are:

- the nature of the organisation;
- the resources reasonably available to the organisation;
- the relationship between the organisation and the child;

- whether the organisation has delegated in whole or in part the exercise of care, supervision or authority in respect of a child to another organisation;

- the role in the organisation of the individual who perpetrated the child abuse;

- the level of control the organisation had in respect of the individual who perpetrated the child abuse;

- whether the organisation complied with any applicable standards (however described) in respect of child safety;

- any matter prescribed by the regulations; and

- any other matter the court considers relevant.

An organisation's resources and level of supervision over the individual that perpetrates the child abuse will be taken into account by the Court in determining what precautions are 'reasonable' for that organisation to take.

A reversal of the onus of proof means that an organisation must demonstrate its policies and procedures that ensure it is a child safe organisation. Therefore, this reform has the capacity to effect much needed cultural change. On this point the Royal Commission noted that:

> *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.*
>
> - Page 494, *Redress and Civil Litigation Report*.

In particular, the Royal Commission argued that insurance requirements and reduction of premiums will assist to promote and regulate better practice in organisations.

> *The significant financial consequences that may flow if the standard is not met create powerful incentives for institutions and their insurers to take steps to ensure that abuse is prevented.*
>
> - Page 494, *Redress and Civil Litigation Report*.

It is important to note that the new statutory non-delegable duty is prospective only, which is a specific recommendation of the Royal Commission's *Redress and Civil Litigation Report* (Recommendation 93).

This recognises the great difficulty that organisations would face in attempting to prove that reasonable steps were taken if the duty was to have retrospective application. It would be extremely difficult for an organisation to defend their practices in relation to historical claims where the need to retain records or implement policies to prevent abuse was not anticipated. On this point, the Royal Commission noted that:

> *If the liability was left to the development of the common law and applied retrospectively, in combination with the removal of limitation periods we recommended in Chapter 14, relevant institutions would face potentially large and effectively new liability for abuse that has already*

occurred, potentially over many previous decades. Even if it were possible to obtain insurance in respect of retrospective liability on such a scale, the insurance would likely be unaffordable for many institutions. No institution could now improve its practices or take steps to prevent abuse that has already occurred.

- Page 492, *Redress and Civil Litigation Report.*

The Bill also amends the *Civil Liability Act 2002* to extend vicarious liability for organisations for the perpetration of child abuse by individuals that are 'akin to employees', as well as regular employees.

An individual is 'akin to an employee' of an organisation if their role within the organisation:

- is for the aims or purpose of the organisation; and
- gives the individual authority, power or control over a child or enables the individual to achieve intimacy with, or the trust of, a child.

However, an individual is not 'akin to an employee' if the individual's role within the organisation is carried out for a recognisably independent business of the individual or of another person or organisation.

Vicarious liability reforms in other Australian jurisdictions have sought to codify the High Court's approach in the case of *Prince Alfred College Incorporated v ADC* (2016) 258 CLR 134. This approach analyses the apparent performance by the employee of a role in which the organisation placed the employee supplying the occasion for the perpetration of the child abuse by the employee. The employee must then take advantage of that occasion to perpetrate the child abuse on the child.

This test was included in the consultation version of the Bill and was met with some confusion by stakeholders. Given this feedback, the test in section 49J of the Bill was modified to provide for greater clarity while achieving the same policy intent.

The Bill provides that an organisation is vicariously liable for child abuse perpetrated against a child by a person who is an employee of the organisation if, at the time the abuse was perpetrated –

(a) the person, by virtue of being such an employee, had –

(i) authority, power or control over the child: or

(ii) the trust of the child; or

(iii) the ability to achieve intimacy with the child; and

(b) the person was able, by virtue of that authority, power, control, trust or ability, to perpetrate the child abuse on that child.

This new test makes it clear that an organisation will be vicariously liable for an individual that perpetrates child abuse if their offending is facilitated by their employment with the organisation.

It should be noted that new statutory duty and vicarious liability are distinct causes of action:

- The statutory duty is the basis of a claim of negligence and is fault-based, allowing an organisation to discharge a presumption based on the reasonable precautions test and applies to a broad range of individuals associated with the organisation.

- The test for vicarious liability is confined to employment or 'akin to employment' relationships and is a strict liability (liability despite fault or criminal intent on behalf of the organisation). It allows a Court to conduct a qualitative assessment of the case before them by examining the employee's role within an organisation and whether that role facilitated their offending. It cannot be definitively stated whether certain categories of employees will or will not be captured under vicarious liability, instead, the assessment, will appropriately be determined by the Court on a case by case basis.

The Bill also amends the *Civil Liability Act 2002* to enable child abuse proceedings to be brought against unincorporated organisations, such as church groups, that were previously unable to be sued due to a lack of 'legal personality'.

The Royal Commission identified that one of the key challenges faced by claimants is identifying a proper defendant to sue. This can be because the relevant organisation no longer exists or, if unincorporated, does not possess legal personality and therefore, cannot be sued at common law.

Unincorporated organisations have previously escaped liability for child abuse because they lack what is called 'legal personality'. This is a technical argument that prevents these organisations being brought before the Court as, unlike corporations for example, they are not legally acknowledged entities that can be sued.

This is commonly known as the 'Ellis Defence' and this Bill will abolish that defence in Tasmania.

The Ellis Defence arose in the difficult case of Mr John Ellis who was abused as an altar boy at Christ the King Catholic Church at Bass Hill in Sydney by Father Aidan Duggan. Mr Ellis sued Father Duggan, the Archbishop of Sydney and the Trustees for the Roman Catholic Church Trust for the Archdiocese of Sydney.

The abuse occurred in the 1970s and proceedings stared in 2004. Father Duggan died during the proceedings, and the Court held that the Archbishop was not responsible for predecessor's actions. The Court found that the Trustees were not liable as they had no powers over priests within the Archdiocese.

In 2007 the New South Wales Court of Appeal found that the Church did not legally exist because its assets were in a legally protected trust.

These findings prevented Mr Ellis from seeking justice and prevented him from seeking compensation, even though the Church did not dispute that Mr Ellis was the victim of terrible abuse and had suffered profound damage.

Mr Ellis' action could not proceed because there was no proper defendant for the proceedings.

In response to this legal barrier, the Royal Commission specifically recommended that:

> *State and territory governments should introduce legislation to provide that, where a survivor wishes to commence proceedings for damages in respect of institutional child sexual abuse where the institution is alleged to be an institution with which a property trust is associated, then unless the institution nominates a proper defendant to sue that has sufficient assets to meet any liability arising from the proceedings:*
>
> *a. the property trust is a proper defendant to the litigation*
>
> *b. any liability of the institution with which the property trust is associated that arises from the proceedings can be met from the assets of the trust.*
>
> - Recommendation 94, *Redress and Civil Litigation Report*.

The Bill allows an unincorporated organisation to, with the consent of an entity, appoint an entity or an associated trust with sufficient assets to satisfy the claim as a proper defendant for the organisation at any time. However, where an unincorporated organisation fails to appoint a proper defendant within 60 days of the initiation of proceedings, the plaintiff may ask the court to appoint a proper defendant for the unincorporated organisation.

A trust is an 'associated trust' of an unincorporated organisation if one or more of the following apply:

- 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;
- 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;
- the organisation has, either directly or indirectly, the power to appoint or remove the trustee or trustees of the trust;
- 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;
- the organisation has, either directly or indirectly, the power to determine the outcome of any other decisions about the trust's operations;
- a member of the organisation or a management member of the organisation has, under the trust deed in relation to the trust, a power of a kind referred to above, but only if the trust has been established or used for the activities of the organisation or for the benefit of the organisation.

Once appointed by either the Court or the unincorporated organisation, a proper defendant acts on behalf of the unincorporated organisation and is responsible for conducting the proceedings as the defendant.

The Bill also amends the *Limitation Act 1974* to allow Courts to set aside a previous settlement between an organisations and a survivor if "it is in the interests of justice to do so", enabling a

survivor to commence civil litigation against the organisation. Though not a recommendation of the Royal Commission, this important reform complements work that is being undertaken in response to other recommendations, particularly relating to limitations reform.

The Royal Commission observed that survivors of child sexual abuse are unlikely to report their abuse for a significantly longer period than other victims. In 2018, the Tasmanian Government removed the limitation periods in relation to actions for child abuse in recognition of those findings.

One of the impacts of limitation periods is that survivors of child sexual abuse were generally prevented from pursuing civil law claims for their abuse. Given the operation of limitation periods, the settlement payments that were offered survivors of child sexual abuse were low. This amendment seeks to remove these barriers for survivors, allowing the commencement of civil litigation in pursuit of a settlement.

In the amendment to the *Limitation Act 1974,* the definition of 'child abuse' differs slightly to the same definition used in relation to the organisational liability introduced under the *Civil Liability Act 1974*. Here, child abuse means sexual abuse or serious physical abuse, of a child and any psychological abuse of the child that arises from the sexual abuse or serious physical abuse of a child – but does not include an act that is lawful at the time at which it occurs.

This definition is consistent with the existing reforms to the *Limitation Act 1973* and ensures that organisations are not liable for actions that were considered appropriate discipline at the time they occurred.

To be clear, it is intended to operate as a threshold for previous settlements for physical child abuse so that they are only set aside where the physical abuse was serious physical discipline beyond the community standards of the time.

The Bill provides the Court with a non-exhaustive list of matters to which it may have regard in determining whether it is in the interests of justice to set aside an agreement effecting a settlement in respect of a relevant right of action. These matters are:

- the amount of the agreement;
- the relative strengths of the bargaining positions of the parties; and
- any conduct, by or on behalf of the organisation to which the agreement relates, that –
    - relates to the cause of action; and
    - occurred before the settlement was made; and
    - the court considers to have been oppressive.

It should be emphasised that this list of matters is not exhaustive and enables a court to regard any other factor that it determines to be relevant in the specific case.

During consultation, it was suggested by some stakeholders that the "interests of justice" test for setting aside a previous settlement should be amended to mirror the approaches of Queensland and Western Australia.

These two jurisdictions allow a previously settled cause of action to be set aside by a court on the grounds that it is "just and reasonable to do so". In Western Australia, the "just and reasonable" test has been interpreted narrowly as being satisfied by the existence and removal of a limitation period in relation to child sexual abuse.

This interpretation of what is "just and reasonable" for the purposes of setting aside a previous settlement is considered to be far too simplistic and may not account for other relevant factors that a Court should consider on a case by case basis. The proposed approach of setting aside a previous settlement "if it is in the interests of justice to do so" allows a Court to maintain appropriate flexibility to take into account factors it deems to be relevant, in addition to those factors provided in the Bill.

This Bill represents another important step made by the Tasmanian Government to implement a number of the Royal Commission's recommendations, and in doing so, provides a number of important reforms to assist some of the most vulnerable Tasmanians finally achieve justice, as well as protections that will ensure organisations take better steps to protect children in the future.

The Bill was previously the subject of extensive consultation, and I would like to take this opportunity thank to those that took the time to provide a submission on the draft Bill. The valuable feedback provided by stakeholders resulted in a number of amendments to the draft Bill that led to simpler drafting and a clarified approach to the subject matter of the Bill.

The Royal Commission's recommendations recognise that governments, institutions and the broader community share responsibility for keeping children safe. All institutions providing services for, or functions involving, children must do everything they can to ensure that their institutions engage in the best practices to keep children safe from abuse.

The Justice Legislation Amendment (Organisational Liability for Child Abuse) Bill 2019 continues this Government's strong commitment to implementing the recommendations of the Royal Commission and follows the recent Criminal Code and Related Legislation Amendment (Child Abuse) Bill 2018 that I previously introduced. That Bill addressed a number of Royal Commission recommendations in the area of criminal justice, as well as mechanisms to improve child safety through the reporting of concerns relating to children at risk.

All Tasmanians have been appalled by the prevalence of child sexual abuse that have emerged from the Royal Commission into Institutional Responses to Child Sexual Abuse and equally dismayed by the significant difficulties that survivors have experienced trying to bring those responsible for their abuse to justice.

I again wish to acknowledge the enormous courage of people affected by institutional child sexual abuse who shared their stories with the Royal Commission. The bravery of those survivors and the families of victims and survivors cannot be quantified. Without their assistance and commitment to the truth, we would not have the benefit of the vast work of the Royal Commission. Not just that work contained in its final reports, but also that work that can assist

us to address the evils of child sexual abuse derived from the Royal Commission's case studies and enormous body of commissioned research.

I commend the Bill to the House.