

TASMANIA

JUSTICE LEGISLATION AMENDMENT (ORGANISATIONAL LIABILITY FOR CHILD ABUSE) BILL 2019

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**JUSTICE LEGISLATION AMENDMENT
(ORGANISATIONAL LIABILITY FOR CHILD
ABUSE) BILL 2019**

This Public Bill originated in the House of Assembly, and, having this day passed, is now ready for presentation to the Legislative Council for its concurrence.

SHANE DONNELLY, *Clerk of the House*
24 September 2019

*(Brought in by the Minister for Justice, the Honourable Elise
Nicole Archer)*

A BILL FOR

An Act to amend the *Civil Liability Act 2002* in relation to the liability of organisations for child abuse and to amend the *Limitation Act 1974* in relation to settlements of certain actions in respect of child abuse, and for related purposes

Be it enacted by Her Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:

PART 1 – PRELIMINARY

1. Short title

This Act may be cited as the *Justice Legislation Amendment (Organisational Liability for Child Abuse) Act 2019*.

2. Commencement

This Act commences on a day to be proclaimed.

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Child Abuse) Act 2019*
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Part 2 – Civil Liability Act 2002 Amended

PART 2 – CIVIL LIABILITY ACT 2002 AMENDED

3. Principal Act

In this Part, the *Civil Liability Act 2002** is referred to as the Principal Act.

4. Section 3B amended (Civil liability excluded from Act)

Section 3B of the Principal Act is amended by inserting after subsection (1) the following subsection:

- (1A) Despite subsection (1), Part 10C applies in respect of an intentional act that is child abuse, within the meaning of section 49J(3).

5. Section 4 amended (Application of Act)

Section 4 of the Principal Act is amended by inserting after subsection (6) the following subsections:

- (7) Section 49H applies only in respect of child abuse perpetrated after the commencement of that section.
- (8) Section 49J applies only in respect of child abuse perpetrated after the commencement of that section.

*No. 54 of 2002

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- (9) Division 4 of Part 10C extends to child abuse proceedings in respect of child abuse perpetrated before the commencement of that Division.
- (10) In this section –
- child abuse* has the same meaning as in section 49J(3);
- child abuse proceedings* has the same meaning as in section 49L.

6. Part 10C inserted

After section 49B of the Principal Act, the following Part is inserted:

PART 10C – CHILD ABUSE – LIABILITY OF ORGANISATIONS
Division 1 – Preliminary

49C. Interpretation of Part 10C

In this Part –

- child* means a person who has not attained the age of 18 years;
- exercise* includes perform;
- function* includes a power, authority or duty;
- organisation* means any organisation, whether incorporated or not, and

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includes a public sector body but
does not include the State;

public sector body means –

- (a) an Agency within the meaning of the *State Service Act 2000*; and
- (b) a Government Business Enterprise within the meaning of the *Government Business Enterprises Act 1995*; and
- (c) a State-owned company; and
- (d) a statutory authority; and
- (e) a council; and
- (f) a single authority, controlling authority or joint authority established under Part 3 of the *Local Government Act 1993*; and
- (g) a body (however described) that has been superseded by a body referred to in paragraph (a), (b), (c), (d), (e) or (f); and

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- (h) a body (however described) that is referred to in another paragraph of this definition and that has been abolished;

State-owned company means a company that is incorporated under the Corporations Act and that is controlled –

- (a) by the Crown, a Minister of the Crown, a Government Business Enterprise or a statutory authority; or
- (b) by another company that is so controlled;

statutory authority means a body or authority, whether incorporated or not, that is established or constituted by or under an Act or under the royal prerogative, being a body or authority which, or of which the governing authority, wholly or partly comprises a person or persons appointed by the Governor, a Minister or another statutory authority.

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49D. Application of Part

- (1) Nothing in Part 9 protects a person from civil liability arising under this Part or places any restriction or limitation on an award of damages made in pursuance of this Part.
- (2) A person is not prevented from seeking compensation under Divisions 2 and 3 in respect of the same child abuse, within the meaning of section 49J(3), 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.

49E. 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

49F. Organisations responsible for children

In this Division –

- (a) an organisation is responsible for a child if it (including any part of it) exercises care, supervision or authority in respect of the child,

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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, care, supervision or authority in respect of the child to another organisation (in whole or in part), each organisation is responsible for the child.

49G. Individuals associated with organisations

- (1) In this Division, a reference to 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 –
 - (a) 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
 - (b) an individual who is prescribed or who is a member of a class of organisations that is prescribed.
- (2) An individual is not associated with an organisation solely because the organisation wholly or partly funds or regulates another organisation.

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- (3) An individual associated with an organisation to which the exercise of care, supervision or authority in respect of the 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.

49H. 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 who, by virtue of being associated with the organisation, has –
- (a) authority, power or control over a child; or
 - (b) the trust of a child; or
 - (c) 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.

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- (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 of care if the plaintiff establishes that an individual associated with the organisation –
- (a) perpetrated child abuse on a child; and
 - (b) had, by virtue of being associated with the organisation –
 - (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
 - (c) was able, by virtue of that authority, power, control, trust or ability, to perpetrate the child abuse on 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

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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 delegated in whole or in part the exercise of care, supervision or authority in respect of the child to another organisation;
- (e) the role in the organisation of the individual who perpetrated the child abuse;
- (f) the level of control that the organisation had in respect of 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 that the court considers relevant.

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(5) In this section –

child abuse, in relation to a child,
means –

- (a) sexual abuse, or physical abuse, of the child; and
- (b) 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.

Division 3 – Vicarious liability of organisations

49I. Employees include persons exercising functions akin to employees

(1) In this Division –

employee, in relation to 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's role within the organisation –
 - (a) is for the aims or purpose of the organisation; and

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- (b) gives the individual authority, power or control over a child or enables the individual to achieve intimacy with, or the trust of, a child.
- (3) Despite subsection (2), 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.
- (4) The regulations may, despite subsections (2) and (3) but without limiting the application of those subsections, prescribe additional circumstances in which an individual will be akin to the employee or not akin to an employee.

49J. Organisations vicariously liable for child abuse perpetrated by employees

- (1) 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 at which the abuse was perpetrated –
 - (a) the person, by virtue of being such an employee, had –
 - (i) authority, power or control over the child; or

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- (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 the child.
- (2) This section does not affect, and is in addition to, the common law as it applies with respect to vicarious liability.
- (3) In this section –
- child abuse***, in relation to a child, means –
- (a) sexual abuse, or physical abuse, of the child; and
 - (b) 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.

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***Division 4 – Proceedings against unincorporated
organisations***

49K. 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.

49L. Definitions

In this Division –

associated trust – see section 49P(3);

child abuse, in relation to a child, means –

- (a) sexual abuse, or physical abuse, of the child; and
- (b) any psychological abuse of the child that arises from the sexual abuse or physical abuse –

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but does not include an act that is lawful at the time at which it occurs;

child abuse proceedings means proceedings for a civil claim arising from child abuse, whether the claim arises under this Part or the common law;

entity includes the trustees of a trust;

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

management member, in relation to 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;

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proper defendant means a person appointed as a proper defendant under this Division;

suitable proper defendant means an entity that is, in accordance with section 49O, an entity that is suitable to be appointed as a proper defendant;

unincorporated organisation means an organisation that is not incorporated.

49M. 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 that it thinks fit for the purposes of this Division, in particular to further the objects of this Division.

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- (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.

49N. 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 of a defendant as a proper defendant for an unincorporated organisation is to be made in accordance with the *Supreme Court Rules 2000* or, if other rules of the Supreme Court are prescribed for the purposes of this subsection, those other rules.
- (3) If the unincorporated body is a Government department established under section 11 of the *State Service Act 2000* –
- (a) the State is taken to be appointed as the proper defendant in relation to the organisation; and
 - (b) subsection (1) does not apply in relation to the organisation.

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49O. 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 Australia to satisfy any judgment or order that may arise out of child abuse proceedings against the unincorporated organisation.

49P. 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 as a proper defendant for the organisation by the end of the period of 60 days after the unincorporated organisation (or a management member of the unincorporated organisation) is served with notice of the commencement of the proceedings; or

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- (b) after the end of that period, the proper defendant that is 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 to be a proper defendant of an organisation if the trustees are a suitable 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 –
 - (i) 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
 - (ii) 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

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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

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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 in relation to the trust, a power of a kind referred to in paragraph (a), (b), (c), (d), (e) or (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) Within 28 days after the making of an application by a plaintiff under this section, the unincorporated organisation must identify to the court any associated trusts of the organisation, including by identifying the financial capacity of those trusts.

49Q. 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

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- (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

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- (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.

49R. 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;

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- (b) supply any information about the trust that may be required under this Division, including identifying the financial position 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 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 that 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 in

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relation to the provisions of the Corporations legislation generally.

(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.

49S. Rules of court

- (1) The Supreme Court 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) Without limiting the generality of subsection (1), the rules may make provision for or in respect of 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;

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- (b) the protection of the privacy of the plaintiffs;
- (c) the duties of registrars and other officers of court in relation to or for the purposes of the operation of this Part;
- (d) the forms to be used in connection with the operation of this Part.

PART 3 – LIMITATION ACT 1974 AMENDED

7. Principal Act

In this Part, the *Limitation Act 1974** is referred to as the Principal Act.

8. Section 5C inserted

After section 5B of the Principal Act, the following section is inserted in Division 2:

5C. Previously settled causes of action relating to child abuse

(1) In this section –

child abuse means –

- (a) sexual abuse, or serious physical abuse, of a child; and
- (b) 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;

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previously settled relevant right of action means a relevant right of action that was settled before the day on which section 5B commenced but after a limitation period applying before that day to the right of action had expired;

relevant court, in relation to a relevant right of action, means a court which, but for an agreement settling the relevant right of action, would have jurisdiction to deal with the action;

relevant right of action means a right of action in respect of child abuse.

- (2) An action may be brought on a previously settled relevant right of action if a relevant court, by order on application, sets aside the agreement effecting the settlement, on the grounds that it is in the interest of justice to do so.
- (3) Without limiting the matters to which a court 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, the Court is to have regard to the following:
 - (a) the amount of the agreement;

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- (b) the relative strengths of the bargaining positions of the parties;
 - (c) any conduct, by or on behalf of the organisation to which the agreement relates, that –
 - (i) relates to the cause of action; and
 - (ii) occurred before the settlement was made; and
 - (iii) the court considers to have been oppressive.
 - (4) If a court orders under subsection (2) that an agreement effecting a settlement be set aside, so much of the agreement, and any other agreement (apart from a contract of insurance) relating to the settlement, is, despite any Act, law or rule of law, void to the extent to which it relates to the child abuse to which the cause of action relates.
 - (5) A party to an agreement that is wholly or partly void under subsection (4) cannot seek to recover an amount paid by or in respect of the party under the agreement on the basis that the agreement is void to that extent.
 - (6) A court hearing an action on a previously settled relevant right of action may, if it

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is satisfied that it is just and reasonable to do so when awarding damages in relation to the action, take into account any amount, paid under an agreement that is wholly or partly void under subsection (4), to the extent to which the amount relates to the child abuse to which the cause of action relates.

- (7) For the purposes of subsection (6), half of the total of all amounts paid under an agreement is taken to be the amount relating to the child abuse to which the cause of action relates, if the agreement –
 - (a) does not relate solely to the child abuse; and
 - (b) does not expressly indicate the extent to which the agreement and amounts paid under it relate to the child abuse.
- (8) This section does not apply in relation to an agreement effecting a settlement that is an offer of redress accepted under section 42 of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* of the Commonwealth.

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Part 4 – Repeal of Act

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PART 4 – REPEAL OF ACT

9. Repeal of Act

This Act is repealed on the first anniversary of the day on which it commenced.