

CLAUSE NOTES

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

PART 1 – Preliminary

Clause 1: Short title

Specifies the name of the proposed Act.

Clause 2: Commencement

Provides for the commencement of the proposed Act on the date of proclamation.

PART 2 – *Civil Liability Act 2002* Amended

Clause 3: Principal Act

Provides that the Principal Act being amended in this Part is the *Civil Liability Act 2002*.

Clause 4: Section 3B amended

Amends section 3B of the Principal Act by inserting proposed section 3B(1A) which states that Part 10C applies in respect of an intentional act that is *child abuse* as defined in section 49J(3) of the Act.

Clause 5: Section 4 amended

Amends section 4 of the Principal Act by providing that sections 49H and 49J apply in relation to child abuse that occurs after commencement of the amendment.

The clause makes clear that the reforms to proceedings against unincorporated organisations apply to claims of historical child abuse.

The clause clarifies that the definition of *child abuse* has the same meaning as in section 49J(3) and that the definition of *child abuse proceedings* has the same meaning as section 49L.

Clause 6: Part 10C inserted

Provides that Part 10C, which deals with liability of organisations for child abuse, is inserted after section 49B of the Principal Act.

Division 1 – Preliminary

Addresses preliminary matters. This Division comprises sections 49C-49E.

Section 49C: Interpretation of Part 10C

Sets out a number of definitions used in the proposed Part 10C 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 49D: Application of Part

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 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 49E: Successor organisations

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 – Duty of organisations to prevent child abuse

Sets out a new duty of organisations to prevent child abuse perpetrated by persons associated with the organisations against a child for which the organisation is responsible. The Division comprises of sections 49F-49H.

Section 49F: Organisations responsible for children

Provides that an organisation is responsible for a child, if the organisation exercises care, supervision or authority over the child.

It also provides that this responsibility is not able to be delegated.

Section 49G: Individuals associated with organisations

Provides guidance as to which individuals are associated with an organisation.

Section 49H: Liability of organisation for child abuse by associated individuals

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 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 by virtue of being associated with the organisation. This presumption is displaced if the organisation establishes that it took reasonable precautions to prevent the child abuse.

The term *child abuse* is defined (for the purposes of the proposed section) as sexual abuse or physical abuse of the child and any psychological abuse of the child that arises from the sexual 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

Deals with vicarious liability of organisation for child abuse perpetrated by employees and individuals akin to employees. The Division comprises sections 49I and 49J.

Section 49I: Employees include persons exercising functions akin to employees

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's 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.

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.

Section 49J: Organisations vicariously liable for child abuse perpetrated by employees

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, at the time the abuse was perpetrated, the person, by virtue of being an employee, had authority, power or control over the child or the trust of the child or the ability to achieve intimacy with the child and was able to perpetrate the child abuse on the child by virtue of that authority, power, control, trust or ability.

The term **child abuse**, of a child, is defined (for the purposes of the proposed section) as sexual abuse or physical abuse of the child and any psychological abuse of the child that arises from the sexual or physical abuse but does not include an act that is lawful at the time at which it occurs.

Additionally, the section preserves the common law as it applies to vicarious liability.

Division 4: Proceedings against unincorporated organisations

This Division provides an avenue for child abuse proceedings to be brought against unincorporated organisations. The Division comprises sections 49K-49S.

Section 49K: Objects of Division

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

Section 49L: Definitions

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 child abuse (whether arising under the

proposed Part or the common law) and *legal personality*, in respect of an organisations, which means that the organisation is incorporated and capable of being sued and found liable.

Section 49M: Child abuse proceedings may be commenced against unincorporated organisations

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 one or more management members to exercise any specified function.

Section 49N: Unincorporated organisation may appoint proper defendant

Permits an unincorporated organisation to appoint an entity as a proper defendant at any time with the consent of the entity.

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 49O: Entities suitable to be appointed as proper defendant

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 in Australia.

Section 49P: Court may appoint proper defendant

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 60 days after the commencement of the proceedings or, if after that time, the proper defendant appointed ceases to be a suitable proper defendant. It also provides the circumstances in which a trust is considered to be an associated trust of an organisation for the purposes of the Division.

Section 49Q: Effect of appointment of proper defendant

Sets out the effect of the appointment of a proper defendant. Specifically:

- 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; and

- 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 findings against the organisation.

Section 49R: Special provisions applying when trustees of associated trust appointed

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.

Section 49S: Rules of court

Permits the Supreme Court to make rules for the purposes of the proposed Part.

PART 3 – *Limitation Act 1974* amended

Clause 7: Principal Act

Provides that the Principal Act being amended in this Part is the *Limitation Act 1974*.

Clause 8: Section 5C Inserted

Provides that section 5C, which deals with previously settled causes of action relating to child abuse, is inserted after section 5B of the Principal Act.

Section 5C: Previously settled causes of action relating to child abuse

Sets out a number of definitions used in the section including that the term *child abuse*, of a child, is defined (for the purposes of the proposed section) as sexual abuse or *serious* physical abuse of the child and any psychological abuse of the child that arises from the sexual or *serious* physical abuse but does not include an act that is lawful at the time at which it occurs.

It also provides that an action may be brought on a previously settled right of action if a relevant court sets aside the agreement on the grounds that it is in the 'interests of justice to do so'.

The section provides a non-exhaustive list of matters to which a court may have regard in determining whether it is in the interests of justice to set aside an agreement. This includes:

- the amount of the agreement,
- the relative strengths of the bargaining position of the parties, and
- any conduct that the court considers to have been oppressive by or on behalf of the organisation.

The effect of a court setting aside such an agreement is that the agreement is void to the extent to which it relates to child abuse and that a party cannot recover an amount on the basis that the agreement is void to that extent.

If a court awards damages in relation to the action, it may take into account any paid under an agreement if it 'just and reasonable' to do so.

If the amount paid under an agreement does not relate solely to the child abuse and the agreement does not express the amount attributable to the child abuse, the court may take into account half of the total of all amounts paid under an agreement.

This section does not apply to an agreement effecting a settlement that is an offer of redress accepted under the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* of the Commonwealth.

PART 4 – Repeal of Act

Clause 9: Repeal of Act

Provides that this Act is to be repealed one year after the day on which it commenced.