



New South Wales

Civil Liability Amendment (Institutional Child Abuse) Bill 2017

Explanatory note

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

Overview of Bill

The object of this Bill is to impose a duty of care on certain institutions to make them liable for institutional child abuse by persons associated with the institution, unless the institution proves it took reasonable steps to prevent the abuse.

The Bill implements recommendation 91 of the *Redress and Civil Litigation Report of the Royal Commission into Institutional Responses to Child Sexual Abuse*. Recommendation 91 is as follows:

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.

The Bill achieves this object by inserting provisions reflecting that recommendation. The proposed Act imposes a duty of care on various organisations as a part of the civil law of negligence.

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 3 months after the date of assent unless it is commenced sooner by proclamation.

Schedule 1 Amendment of Civil Liability Act 2002 No 22

Item [1] of Schedule 1 to the Bill inserts proposed Part 13 into the *Civil Liability Act 2002*, consisting of proposed sections 74–80. The proposed Part 13 is broadly consistent with the *Wrongs Amendment (Organisational Child Abuse) Act 2017* of Victoria.

Proposed section 74 contains definitions of terms used in the proposed Part 13, including:

- (a) a definition of **abuse**, which covers sexual abuse or physical abuse (or both) of a child and connected abuse, and
- (b) a definition of **relevant organisation**, which refers to the entities (whether public or otherwise) to which the proposed Part applies and covers any entity that exercises care, supervision or authority over children.

Proposed section 75 provides an extended meaning of an **individual associated with a relevant organisation**. This term is defined for the purposes of the proposed Part 13, and is particularly relevant for the duty of care imposed by proposed section 76.

Proposed section 76 imposes a duty of care on relevant organisations for child abuse committed by individuals associated with the organisation (see proposed section 76 (2)). The Bill provides for a “reverse onus of proof”, so that the organisation is presumed to have breached the duty of care, unless it proves on the balance of probabilities that it took reasonable precautions to prevent the abuse (see section 76 (3)).

Proposed section 77 provides that section 5E (Onus of proof) does not apply to a claim brought in reliance on the duty in section 76. Section 5E provides “In proceedings relating to liability for negligence, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation”, which is inconsistent with proposed section 76.

Proposed section 78 provides that section 5Q (Liability based on non-delegable duty) does not apply to a claim brought in reliance on the duty in section 76.

Proposed section 79 provides that Division 5 (Recreational activities) of Part 1A does not apply to a claim brought in reliance on the duty in section 76 to the extent it relates to the abuse of a child during the course of or in connection with a recreational activity.

Proposed section 80 provides that Part 5 (Liability of public and other authorities) does not apply to a claim brought in reliance on the duty in section 76, as it is not in keeping with the purpose of the proposed Part 13 for different standards to apply based on whether or not the relevant organisation is a public or other authority.

Items [2] and [3] of Schedule 1 to the Bill insert savings and transitional provisions. Item [2] enables savings or transitional regulations to be made. Item [3] makes it clear the proposed Part 13 applies to child abuse only if the abuse occurs after the commencement of the proposed Act.