




Speech By
Hon. Yvette D'Ath

MEMBER FOR REDCLIFFE

Record of Proceedings, 15 November 2018

CIVIL LIABILITY AND OTHER LEGISLATION AMENDMENT BILL

Introduction

 **Hon. YM D'ATH** (Redcliffe—ALP) (Attorney-General and Minister for Justice) (11.53 am): I present a bill for an act to amend the Civil Liability Act 2003 and the Civil Proceedings Act 2011 for particular purposes. I table the bill and the explanatory notes. I nominate the Legal Affairs and Community Safety Committee to consider the bill.

Tabled paper: Civil Liability and Other Legislation Amendment Bill 2018 [1911](#).

Tabled paper: Civil Liability and Other Legislation Amendment Bill 2018, explanatory notes [1912](#).

This bill is in response to the civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse in its *Redress and civil litigation report*. The purpose of the amendments to the Civil Liability Act 2003 in the bill is to improve the capacity of the justice system to provide fair access and outcomes to survivors of child sexual abuse wishing to pursue a claim for civil damages for personal injury arising from the abuse. As members are aware, Queensland has already acted on a number of the commission's report recommendations.

The Limitation of Actions Act 1974 has been amended to remove the limitation period in which to commence an action for damages relating to the personal injury of a person resulting from the sexual abuse of the person as a child. The government has also adopted whole-of-government guidelines which set out how the state of Queensland and its agencies should respond to civil litigation against the state brought by claimants who have been sexually abused as children. The guidelines are intended to ensure a compassionate and consistent approach by government and to make civil litigation less traumatic for victims.

More importantly, Queensland will soon be participating in the national redress scheme. The amendments to the Civil Liability Act in the bill relate to the commission's recommendations concerning the reverse onus of proof and the proper defendant. I note the commission recommended the imposition of a non-delegable duty that would make institutions strictly liable for child abuse perpetrated against a child by a person associated with the institution in connection with stated facilities or services facilities. While I appreciate that there are differences of opinion on this issue, the government's position is that it would not be appropriate to adopt a strict liability approach where abuse occurs despite an institution having taken all reasonable steps to prevent such abuse. However, the government will continue to monitor the operation of the reverse onus amendments in this bill and legislative developments in other jurisdictions.

The bill imposes a duty on institutions—applied prospectively—to take all reasonable steps to prevent sexual abuse of a child by a person associated with the institution while the child is under the care, supervision, control or authority of the institution. This is intended to address the power imbalance between the victim and the institution, ensuring that a victim does not have the burden of establishing liability and recognising that an institution should be liable where it has failed to put in place safe systems or failed to act. The institution will be taken to have breached its duty unless it can prove it took all reasonable steps to prevent the abuse, reversing the usual onus of proof.

Factors that would be taken into consideration in determining whether an institution took all reasonable steps include the nature of the institution, the resources that were reasonably available to the institution, the relationship between the institution and the child, and the position in which the institution placed the person in relation to the child such as authority, power, trust, control and the ability to achieve intimacy with the child.

The definition of a person associated with an institution for the purpose of the reverse onus amendments is inclusive. While it specifically mentions certain classes of person—for example, an officer, representative, leader, member, employee, contractor, volunteer of an institution and a minister of religion—it is not intended to limit persons who may be regarded as associated with that institution according to its ordinary meaning. The definition also includes a person prescribed by regulation to allow for prompt clarification should there be uncertainty about whether a particular class of person should be recognised as being associated with an institution. The bill also clarifies that a person is not a delegate of an institution only because a child protection order is made granting long-term guardianship of a child to the person. This is appropriate where the administering department has no ongoing responsibility for the care, supervision or authority over the child.

To overcome the difficulties that a victim may face in identifying a proper defendant to sue, the bill provides a statutory framework for the nomination of a proper defendant by an unincorporated institution. If the institution does not nominate a proper defendant or does not nominate a suitable person and at least 120 days have passed since the proceeding started, the court may order that the trustee of an associated trust of the institution is the institution's nominee, if satisfied the order is appropriate. The bill provides for how a proceeding applies in respect of the nominee and the institution respectively, including for the liability of the institution on the abuse claim to accrue to the nominee; things done by the institution are taken to be done by the nominee; and any right of the institution to be indemnified, including under an insurance policy, in respect of damages awarded in an abuse claim extends to, and indemnifies, the nominee.

The bill also provides that, if a claimant has or had a cause of action against a former office holder of the institution when the cause of action accrued and the institution was unincorporated at the time but is now incorporated, the proceeding may be continued or started against the institution and any liability of the former office holder is a liability of the institution.

The bill provides that, if a claimant has or had a cause of action against a former office holder, who no longer holds office, and the institution was at the time the cause of action accrued and is currently unincorporated, the action may be started or continued against the current holder and any liability of the former office holder is the liability of the current office holder.

The bill provides that liability may be satisfied by the institution out of the assets of the institution and the assets of an associated trust that the institution uses to carry out its functions or activities; the nominee, if the nominee is the trustee of an associated trust of the institution, out of the assets of the trust and the assets of the institution or, otherwise, out of its assets and the assets of the institution; and the current office holder, who is not personally liable, out of the assets of the institution and the assets of an associated trust that the institution uses to carry out its functions or activities.

As 'associated trust' is widely defined, this is appropriate for the purposes of allowing an unincorporated institution to nominate the trustees of an associated trust as a proper defendant as the trustee must consent to being so nominated. It will also apply for the purposes of the court ordering the trustees of an associated trust as an institution's nominee where it is satisfied that the order is appropriate. However, in providing that an institution or current office holder may satisfy liability from the assets of an associated trust, it is appropriate to limit such access to the assets of an associated trust which it uses to carry out its functions or activities. This is to ensure the institution cannot access the assets of an associated trust with which the institution has only a tenuous connection.

Where liability may be satisfied out of the assets of an associated trust of an institution, the trustee of the associated trust may pay an amount in satisfaction of the liability and, for that purpose, may realise assets of the trust. The proper expenses of the trustee may be indemnified out of the trust property. The liability of the trustee of the associated trust, as the institution's nominee, is limited to the value of the trust property.

The bill provides that an institution, an institution's nominee, a current office holder or the trustee of an associated trust of an institution may act to achieve satisfaction of the liability out of the stated assets and the trustee of an associated trust of an institution may consent to being the institution's nominee. This is despite another law, or the terms of the associated trust, including a trust for a charitable purpose, or a duty, whether as the current holder of an office in the institution, or as trustee, or otherwise.

The bill also provides a current institution to be taken to be a former institution if it is substantially the same as when the cause of action accrued, even if it has changed its name, restructured, become incorporated, or its functions or activities are carried out at a different place. If there is no institution that is the same institution, or substantially the same, a relevant successor of the old institution is taken to be the same institution as the old institution. The relevant successor may be prescribed by regulation if the head of a current institution consents to the current institution being the successor.

The bill provides for the continuity of an office, for the liability of current office holders, where the office in an institution is substantially the same as it was when the relevant cause of action accrued. If there is no office that is the same or substantially the same, the head of the institution is taken to be the current office holder. Certain provisions are declared displacement provisions for the purposes of the Corporations Act 2001.

The reverse onus and proper defendant amendments have been the subject of considerable consultation through submissions on an issues paper and subsequent targeted face-to-face consultation. Regard has been had to developments in other jurisdictions, in particular corresponding provisions in Victoria, New South Wales and Western Australia. A wide range of stakeholders—government, legal, church, educational, victims' representatives and community organisations—have been consulted on a consultation draft of the amendments and were invited to a round table to discuss these amendments. Comments from stakeholders' submissions and at the round table were taken into account in finalising the drafting of the bill. I would like to thank all individuals and stakeholders who have contributed to the government's consideration of these issues.

In conclusion, the bill also amends section 64 of the Civil Proceedings Act 2011 to clarify that a person under a legal incapacity may recover the cost of trustee management fees in the award of damages for wrongful death of members of the person's family. This amendment will ensure that an amount awarded, for example, to the child for the loss of parents, will not be significantly depleted by the cost of managing the funds. I thank the Queensland Law Society and others who made representations on the need for this amendment following the decision in *Maggs v RACQ Insurance Ltd*.

These amendments to the Civil Liability Act are important steps forward in pursuing access to justice for those who have suffered child sexual abuse in institutions throughout Queensland. I commend the bill to the House.

First Reading

Hon. YM D'ATH (Redcliffe—ALP) (Attorney-General and Minister for Justice) (12.05 pm): I move—

That the bill be now read a first time.

Question put—That the bill be now read a first time.

Motion agreed to.

Bill read a first time.

Referral to Legal Affairs and Community Safety Committee

Mr DEPUTY SPEAKER (Mr Weir): Order! In accordance with standing order 131, the bill is now referred to the Legal Affairs and Community Safety Committee.