Civil Litigation Reform recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse (RCIRCSA)

Fact sheet 1: New Statutory Duty of Care to prevent child abuse

# Who should read this?

* All institutions that exercise care, supervision or authority over a child.
* ‘Institution’ includes a body, an entity, a body corporate, a group of persons, an association and an organisation but does not include a family or individual.
* The information in this fact sheet is not legal advice and is provided as information to assist institutions in understanding a new law and if steps are needed to comply with the law.

# What is an institution?

* Examples of institutions that exercise care, supervision or authority over children include, but are not limited to:
  + community service organisations providing services to children
  + out-of-home care services
  + religious bodies
  + government agencies or departments providing services for children (including youth detention facilities)
  + education and care services (such as childcare centres, family day care services, kindergartens and outside school hours care services)
  + schools and other educational institutions
  + sporting groups
  + youth organisations
  + local councils
  + charities and benevolent organisations providing services for children
  + housing services and homeless services
  + health services including public and private hospitals
  + drug and alcohol treatment services
  + disability services providers.

# Why has a new Statutory Duty of Care been created?

* In January 2013, the Commonwealth Government established the Royal Commission into Institutional Reponses to Child Sexual Abuse (RCIRCSA). The RCIRCSA inquired into how institutions such as schools, churches, sports clubs and government organisations, have responded to allegations and instances of child sexual abuse.
* On 14 September 2015, the RCIRCSA released its Report on Redress and Civil Litigation relating to allegations and instances of child sexual abuse. The RCIRCSA found that victims of sexual abuse were not able to easily seek damages from institutions that had cared for the victims as children and sexual abuse was perpetrated through the institutions. The Report on Redress and Civil Litigation made 99 recommendations for reforms to the civil law to make it easier for victims of sexual abuse where the sexual abuse occurred in an institution to sue for damages.
* The Northern Territory Government passed legislation to implement a number of recommendations in the Report on Redress and Civil Litigation. The *Personal Injuries (Liabilities and Damages) Amendment Act 2022* (the Amendment Act) was passed in the Northern Territory Legislative Assembly on 19 May 2022 and received assent on 2 June 2022.
* The Amendment Act inserts a new Part 3A into the *Personal Injuries (Liabilities and Damages) Act 2003* (PILDA) which provides for institutional liability for child abuse, and creates the new statutory duty of care and provides for vicarious liability of institutions.
* Under the amendments, institutions will be liable for the deliberate criminal act of a person associated with the institution in certain circumstances.
* RCIRCSA found that the problem for survivors of abuse who sue institutions is that their claims are generally founded upon the deliberate criminal acts of the perpetrator. There is no fault by the institution for the perpetrators’ conduct. Without this fault, Australian courts have been reluctant to hold an institution liable to compensate survivors of child sexual abuse for deliberate criminal acts by members or employees of the institution.

# What is the new Statutory Duty of Care?

* A statutory duty of care to prevent child abuse is being established through amendment to the *Personal Injuries (Liabilities and Damages) Act 2003* (PILDA). A new section 17D will be added to PILDA which provides a duty for institutions to prevent child abuse.
* This duty will apply to institutions that exercise care, supervision or authority over children.
* The duty is to take all reasonable steps to prevent child abuse by individuals associated with the institution (such as employees and volunteers) and by children in the care of the institution. This means that there is a duty to prevent abuse by a child in the care of the institution against another child in the care of the institution.
* If abuse occurs, institutions will be presumed to have breached the duty and held liable for the abuse unless they can prove that reasonable precautions have been taken to prevent abuse. This reverses the onus of proof, which means that institutions must prove that they took reasonable precautions to prevent the abuse.

# When will the Statutory Duty of Care commence?

* It is proposed that the new duty will commence on 1 January 2023. This is the proposed date for commencement to be fixed by Gazette notice by the Administrator.
* The deferred commencement date is to provide institutions time to assess and make any changes to operations, policies and procedures that ensure best practice outcomes for children in their care before the new duty of care commences.

# When does the Statutory Duty of Care arise?

* A stand-alone statutory duty of care has been created. This will mean an institution may be held liable for child abuse occurring in or as a result of care of children by the institution.
* Other duties under the law of negligence, vicarious liability, or non-delegable duties continue to apply.
* Institutions must take all reasonable steps to prevent the abuse of a child by any individual associated with the institution while the child is under the care, supervision or authority of the institution.
* The duty of care also extends to preventing abuse of a child by another child in the care or under the supervision or authority of the institution. This applies when both the children are under the care, supervision or authority of the institution.
* The reverse onus of proof means that where abuse is committed by an individual associated with the institution, or by another child in the institution’s care, the duty of care will be taken to have been breached unless the institution can prove that it took ‘reasonable steps’ to prevent the abuse from occurring.
* This means that it is the institution, not the victim, who must prove that the institution has met all its obligations to prevent child abuse occurring.

# What are ‘reasonable steps’? What must institutions do?

* 'Reasonable steps’ are not defined in the new section 17D, however the following information may help.
* Reasonable steps will depend on the institution, and what is suitable for the institution. The matters that a court may take into account when determining if an institution took reasonable steps are set out in the legislation.
* This includes:
  + the nature of the institution,
  + the size and organisational capacity of the institution,
  + the resources reasonably available to the institution to prevent child abuse, and
  + the relationship between the institution and the child.
* By way of example, a court might expect a commercial institution to have more resources available than a community‑based voluntary institution. Similarly, a court might expect institutions to take more steps for employees than for contractors.
* Institutions need to consider what steps are suitable and necessary.
* Courts have previously considered the following to be reasonable precautions in the context of institutional child abuse:
  + employment screening and reference checking;
  + supervision and training;
  + implementing systems to provide early warning of possible offences;
  + random and unannounced inspections to deter misconduct, and
  + encouraging children and adults to notify authorities or parents about any signs of aberrant or unusual behaviour.
* These are examples only. A court will interpret how an institution has taken steps depending upon the facts of each individual claim.

# Who is an ‘individual associated with the institution’?

* The duty relates to child abuse committed by an individual associated with the institution.
* Individuals associated with the institution can include, but are not limited to:
  + an office holder, officer, owner, trustee, employee, volunteer or contractor of the institution; and
  + if the institution is a religious institution – a religious leader or a member of the religious institution.
* Institutions cannot avoid the duty by delegating their care, supervision or authority of children to other institutions. For example, if a school sends its students to a privately run camp and a member of the camp’s staff abuses a student, the school is required to prove that it took reasonable precautions to prevent that abuse.
* The legislation makes clear that an individual is not an individual associated with an institution solely because the institution wholly or partly funds or regulates another institution that the individual is associated with.

# What is ‘child abuse’ for the new Statutory Duty of Care? Is it more than sexual abuse?

* ‘Child abuse’ is defined to mean sexual abuse, serious physical abuse of a child and psychological abuse that arises from either sexual abuse or serious physical abuse.
* Serious physical abuse can cause similar damage to sexual abuse and often the two types of abuse co‑occur.
* The definition of ‘child abuse’ is consistent with the definition in the *Limitation Amendment (Child Abuse) Act 2017*.

# Will the amendments apply to historical abuse?

* No. The new statutory duty of care to prevent child abuse will apply prospectively only.
* This means that it applies only to abuse that occurs after the provisions commence.

# What do you need to do?

* Institutions should make appropriate assessments based on the nature of their institutions and develop internal policies or protocols to minimise the risk of child abuse occurring in the institution. This includes making employees and individuals associated with the institution aware of the new statutory duty of care.
* Existing regulatory measures may assist to guide in preventing, and responding to, child abuse. This includes measures such as the Child Safe Standards, the reportable conduct scheme, and the Working with Children Clearance Scheme.