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

Fact sheet 3: Proper Respondent and Continuity of Institutions for liability for institutional child abuse claims

# Who should read this?

* All institutions that exercise care, supervision or authority of 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. See below ‘what is an institution’ for examples.
* This fact sheet is particularly relevant for institutions that are unincorporated, have an associated property trust or are successor institutions of previous institutions which have changed name, restructured, become incorporated, or changed location.
* The information in this fact sheet is not legal advice and is provided as information to assist institutions in understanding changes to 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 have the amendments been made?

* 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. Divisions 4, 5 and 6 of new Part 3A are designed to address certain legal loopholes which have historically prevented litigation. This includes, for example, unincorporated bodies not being able to be sued and historical institutions no longer existing at the time of litigation due to a change of name or corporate structure.
* RCIRCSA found that while a survivor may also have the option of claiming directly against the perpetrator, that person may have no, or insufficient, assets to meet the claim. This means that survivors may try to sue the institution, which has more assets. Particularly in the case of religious institutions, assets are generally held in a property trust. The courts have upheld that property trusts cannot be held liable for child abuse as they are not closely enough associated with the management or oversight of the institution. In addition, some institutions (particularly religious institutions) are unincorporated, so are unable to be sued.

# What changes are being made to institutional child abuse proceedings?

* A new statutory framework is being established through amendment to PILDA. The new Part 3A is being inserted which includes Division 4 providing for nomination of a proper respondent, Division 5 providing for continuity of institutions, and Division 6 relating to proceedings for unincorporated institutions.
* New Division 4 will allow an institution that is a respondent in proceedings for personal injury arising from child abuse to nominate another person or entity as the proper respondent for the proceedings.
* This will allow an associated property trust of an institution to be nominated to meet liabilities arising from child abuse proceedings.
* New Division 5 will allow for recognition of current institutions as a successor for institutions which have changed legal status over time. This means that a current institution will be held responsible for / considered to be a former institution if it is substantially the same body as when the abuse occurred. This applies even if the institution has changed its name, restructured, become incorporated, or its functions or activities are carried out at a different place.
* New Division 6 will also allow child abuse proceedings to be brought against unincorporated institutions. This means that proceedings may be brought against institutions as if they were a legal person capable of being sued (in the same way incorporated institutions have legal status).

# When will the amendments commence?

* It is proposed that the provisions 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 allows institutions impacted by the reforms time to assess and make any changes to their operations, policies and procedures to ensure best practice outcomes for children in their care before the changes commence.

# How will the proper respondent provisions operate?

* The legislation provides a statutory framework for the nomination of a ‘proper respondent’ by an institution to meet child abuse claims and liabilities. A court must not accept the nomination unless it is satisfied that the nominated person or entity consents to the nomination, has the financial capacity to pay any damages awarded, and legal costs, and is capable of being sued.
* If the institution does not nominate a proper respondent or a suitable person within 120 days of the proceeding being commenced, the court may order that the trustee of an associated trust of the institution be substituted as the proper respondent.

# How will the provisions operate in relation to former institutions?

* The amendments will prevent an institution from avoiding a claim on a legal technicality where historical institutions no longer exist at the time of litigation proceedings (that would otherwise prevent a claim being considered by a court). The reforms provide that a current institution will be responsible for / considered to be a former institution for the purpose of a claim of abuse if it is substantially the same body as when the abuse occurred. This is the case even if the institution has changed its name, restructured, become incorporated, or its functions or relocated.
* The amendments also provide that a current office holder can be held liable for child abuse that took place in the past where the office in an institution is substantially the same as it was when the abuse occurred. 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.

# Why were amendments made in relation to liability of unincorporated institutions?

* Unincorporated institutions are presently unable to be sued. The amendments address this legal loophole and provides greater accountability for abuse.

# What is child abuse for the purpose of the amendments? 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?

* Yes. Divisions 4, 5 and 6 of new Part 3A of PILDA will apply to abuse that occurred in the past before the provisions commence, as well as any abuse that occurs after the provisions commence. The purpose of the amendments is to help survivors of child abuse no matter when the abuse occurred.

# What do you need to do?

* Institutions should make appropriate assessments based on the nature of their institutions to understand potential liabilities.
* If your institution has an associated property trust, you should be aware that the property trust can be appointed as a ‘proper respondent’ to meet liabilities arising from child abuse proceedings.
* If your institution is a successor of a previous institution that has changed its name, restructured, become incorporated, or changed location, you should be aware that this will not prevent your institution from being liable in child abuse proceedings for abuse that occurred in the past.
* If your institution is unincorporated, you should be aware that this will not prevent child abuse proceedings from being brought against your institution.