

Legislative Council

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South Australia

Civil Liability (Institutional Child Abuse Liability) Amendment Bill 2021

A BILL FOR

An Act to amend the *Civil Liability Act 1936*.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Civil Liability (Institutional Child Abuse Liability) Amendment Act 2021*.

2—Commencement

This Act comes into operation on a day to be fixed by proclamation.

3—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

Part 2—Amendment of *Civil Liability Act 1936*

4—Insertion of Parts 7A and 7B

After Part 7 insert:

Part 7A—Child abuse—liability of institutions

Division 1—Preliminary

50A—Interpretation

(1) In this Part—

abuse, of a child, includes any of the following:

- (a) sexual abuse of the child;
- (b) serious physical abuse of the child;
- (c) psychological abuse of the child related to sexual abuse or serious physical abuse of the child;

abuse claim means a claim arising from the abuse of a child by a person associated with an institution while the child was under the care, supervision, control or authority of the institution;

akin to an employee—see subsections (2) and (3);

associated trust, of an institution—see section 50B;

associated with, an institution—see section 50C;

child means a person under 18 years of age;

current office holder—see section 50I;

designated carer means a person in whose care a child is placed under the *Children and Young People (Safety) Act 2017* but excludes a person who provides care at or on behalf of—

- (a) a children's residential facility (within the meaning of the *Children and Young People (Safety) Act 2017*); or
- (b) a residential facility established or licensed under the *Family and Community Services Act 1972*; or
- (c) any other facility that provides non-family based care to children or young people;

employee, of an institution, includes a person who is akin to an employee of the institution;

function includes a power, authority or duty;

head, of an institution, means the person who—

- (a) is acknowledged by the institution as its head; or
- (b) if paragraph (a) does not apply—has overall responsibility for the institution;

institution—

- (a) means an entity (whether private or public) that is responsible for a child and provides an activity, program or service of a kind that gives an opportunity for a person to have contact with a child; and
- (b) does not include a family;

nominee, for an institution, means a person who is the institution's nominee because of a nomination or court order under section 50J;

office of authority, in an institution, includes—

- (a) a position as a member of a management committee of the institution; and
- (b) a position in which the holder is concerned with, or takes part in, the management of the institution.

- (2) For the purposes of the definition of **employee**, a person is **akin to an employee** of an institution if the person carries out activities as an integral part of the activities carried on by the institution and does so for the benefit of the institution, but a person is not **akin to an employee** if—

- (a) the activities are carried out for a recognisably independent business of the person or of another person or institution; or
- (b) the activities carried on by the person are the activities of a designated carer carried on in the person's capacity as a designated carer.

- (3) The regulations may, despite subsection (2), prescribe circumstances in which a person will be akin to an employee or not akin to an employee.

50B—Meaning of associated trust

- (1) For the purposes of this Part, a trust is an *associated trust* of an institution if the institution uses the trust to carry out its functions or activities and—
 - (a) the institution has, directly or indirectly, any of the following powers:
 - (i) a power to control the application of income of the trust or the distribution of property of the trust;
 - (ii) a power to obtain the beneficial enjoyment of the property or income of the trust, with or without the consent of another entity;
 - (iii) a power to appoint or remove a trustee or beneficiary of the trust;
 - (iv) a power to determine the outcome of any other decision about the trust's operations; or
 - (b) a member or manager of the institution has, under the trust deed for the trust, a power mentioned in paragraph (a); or
 - (c) a trustee is accustomed to acting, or is under a formal or informal obligation to act, according to the directions, instructions or wishes of the institution or a member or manager of the institution.
- (2) A reference in Division 5 or Division 6 to an associated trust of an institution includes a trust in relation to which an order is in force under section 50J(5) (in relation to any abuse claim against the institution).

50C—When persons are associated with institution

- (1) For the purposes of this Part, the persons *associated with* an institution include—
 - (a) an officer, office holder, representative, leader, owner, employee, agent, volunteer or contractor of the institution; and
 - (b) for an institution that is a religious organisation—a minister of religion, religious leader or member of the personnel of the organisation; and
 - (c) if the institution has delegated the care, supervision, control or authority over a child to another entity (the *delegate*)—
 - (i) if the delegate is an individual—the delegate; and

- (ii) a person who would be a person mentioned in paragraph (a) or (b) if the delegate were the delegating institution; and
 - (d) a designated carer (other than a designated carer who is the parent or guardian of the child (within the meaning of the *Children and Young People (Safety) Act 2017*)); and
 - (e) a person, or person of a class, prescribed by regulation.
- (2) A person is not associated with an institution only because the person is associated with an entity that is funded or regulated by the institution.

50D—Application of Part

- (1) This Part, other than Division 2 and Division 3, applies in relation to a cause of action whether it arose before or after the commencement of this Part.
- (2) This Part binds the Crown not only in right of South Australia but also, so far as the legislative power of the Parliament permits, the Crown in all its other capacities.

Division 2—Duty of institutions to prevent child abuse

50E—Duty to prevent child abuse

- (1) An institution has a duty to take all reasonable steps to prevent the 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.
- (2) Subsection (1) does not apply to abuse of a child by a person associated with an institution in circumstances wholly unrelated to that person's association with the institution.
- (3) If an institution has delegated, by means of contract or otherwise, the care, supervision, control or authority over a child to whom the claim relates to another institution, subsection (1) does not apply to abuse of the child by a person associated with the delegate institution in circumstances wholly unrelated to that person's association with the delegator institution or the delegate institution.

50F—Proof of whether duty was breached

- (1) This section applies if a person associated with an institution abuses a child while the child is under the care, supervision, control or authority of the institution.
- (2) The institution is taken to have breached its duty under section 50E unless the institution proves it took all reasonable steps to prevent the abuse.

- (3) In deciding whether the institution took all reasonable steps to prevent the abuse, the matters that are relevant include—
- (a) the nature of the institution; and
 - (b) the resources that were reasonably available to the institution; and
 - (c) the relationship between the institution and the child; and
 - (d) the position in which the institution placed the person in relation to the child, including the extent to which the position gave the person—
 - (i) authority, power or control over the child; or
 - (ii) an ability to achieve intimacy with the child or gain the child's trust; and
 - (e) the probability that the abuse would occur if precautions against a risk of abuse were not taken; and
 - (f) the burden of taking precautions to avoid the risk of abuse; and
 - (g) the social utility of the activity that creates the risk of abuse; and
 - (h) whether the institution complied with any applicable standard (however described) in respect of child safety; and
 - (i) any matter prescribed by the regulations; and
 - (j) any other matter a court considers relevant.

Division 3—Vicarious liability of institutions

50G—Institutions vicariously liable for abuse of child by employee

- (1) An institution is vicariously liable for abuse of a child by an employee of the institution if—
- (a) the apparent performance by the employee of a role in which the institution placed the employee supplies the occasion for the abuse of the child by the employee; and
 - (b) the employee takes advantage of that occasion to abuse the child; and
 - (c) the abuse occurred while the child was under the care, supervision, control or authority of the institution.
- (2) In determining if the apparent performance by the employee of a role in which the institution placed the employee supplied the occasion for the abuse of a child, a court is to take into account whether the institution placed the employee in a position in which the employee has 1 or more of the following:
- (a) authority, power or control over the child;

- (b) the trust of the child;
 - (c) the ability to achieve intimacy with the child.
- (3) This section does not affect, and is in addition to, the common law as it applies with respect to vicarious liability.

Division 4—Liability of particular institutions and office holders

50H—Liability of incorporated institution that was unincorporated at time of abuse

- (1) This section applies if—
- (a) a person (the *claimant*) suffered abuse as a child by a person associated with an institution (the *associated person*) while the claimant was under the care, supervision, control or authority of the institution; and
 - (b) the claimant has or had a cause of action against—
 - (i) a person (the *former office holder*) who held an office of authority in the institution (the *relevant office*) when the cause of action accrued, founded on the former office holder's responsibility for the institution or for the associated person; or
 - (ii) the institution, in accordance with section 50J; and
 - (c) the institution was an unincorporated body when the cause of action accrued; and
 - (d) the institution is an incorporated body; and
 - (e) —
 - (i) if the cause of action is against the former office holder—the claimant is able to maintain proceedings on the cause of action, or would be able to maintain proceedings on the cause of action if the former office holder still held the relevant office; or
 - (ii) if the cause of action is against the institution—the claimant is able to maintain proceedings on the cause of action, or would be able to maintain proceedings on the cause of action if the institution was still an unincorporated body.
- (2) A proceeding for the claimant's cause of action may be commenced or continued against the institution.

- (3) The following apply for the purposes of a proceeding commenced or continued under subsection (2) if the cause of action is against the former office holder:
- (a) any liability that the former office holder has or would have had in relation to the cause of action is taken to be a liability of the institution;
 - (b) anything done by the former office holder is taken to have been done by the institution;
 - (c) a duty or obligation that the former office holder would have had in relation to the proceeding is a duty or obligation of the institution;
 - (d) the institution may rely on any defence or immunity that would have been available to the former office holder as a defendant in the proceeding;
 - (e) any right of the former office holder to be indemnified (including under an insurance policy) in respect of damages awarded in an abuse claim extends to, and indemnifies, the institution.

50I—Liability of current office holder of unincorporated institution

- (1) This section applies if—
- (a) a person (the *claimant*) suffered abuse as a child by a person associated with an institution (the *associated person*) while the claimant was under the care, supervision, control or authority of the institution; and
 - (b) the claimant has or had a cause of action against a person (the *former office holder*) who held an office of authority in the institution (the *relevant office*) when the cause of action accrued, founded on the former office holder's responsibility for the institution or for the associated person; and
 - (c) the institution was an unincorporated body when the cause of action accrued; and
 - (d) the institution is an unincorporated body; and
 - (e) the former office holder no longer holds the relevant office; and
 - (f) the claimant would be able to maintain an action on the cause of action if the former office holder still held the relevant office.
- (2) A proceeding for the claimant's cause of action may be commenced or continued against the current holder of the relevant office (the *current office holder*) in the name of the office.

- (3) The following apply for the purposes of a proceeding commenced or continued under subsection (2):
- (a) any liability that the former office holder has or would have had in relation to the cause of action is taken to be a liability of the current office holder;
 - (b) anything done by the former office holder is taken to have been done by the current office holder;
 - (c) a duty or obligation that the former office holder would have had in relation to the proceeding is a duty or obligation of the current office holder;
 - (d) the current office holder may rely on any defence or immunity that would have been available to the former office holder as a defendant in the proceeding;
 - (e) any right of the former office holder to be indemnified (including under an insurance policy) in respect of damages awarded in an abuse claim extends to, and indemnifies, the current office holder.

50J—Claim against unincorporated institution and nomination of appropriate defendant

- (1) This section applies in relation to an institution that is an unincorporated body.
- (2) A proceeding for an abuse claim may be commenced against the institution.
- (3) A notice of a claim must be given to the head of the institution in accordance with any requirements prescribed by the regulations.
- (4) The institution may nominate a person, with the person's consent, to be the appropriate defendant for the purposes of an abuse claim against the institution.
- (5) On application by the claimant, a court may order that the trustee of a trust is the institution's nominee if the court is satisfied—
 - (a) the trust is, or used to be, an associated trust of the institution; and
 - (b) for a trust that is no longer an associated trust of the institution—a reason for causing the trust to cease to be an associated trust was to try to avoid trust property being applied to satisfy a liability that may be found under a decision on an abuse claim; and
 - (c) the order would be appropriate.
- (6) Subsection (5) applies if—
 - (a) at least 120 days have passed since a proceeding for an abuse claim was commenced against the institution; and
 - (b) either—

- (i) there is no nominee for the institution; or
 - (ii) a court is satisfied the institution's nominee does not have sufficient assets to satisfy a liability that may be found under a decision on the abuse claim.
- (7) A court may—
 - (a) order the institution to do the following within 28 days or any other period the court considers appropriate:
 - (i) identify to the court any trusts that are, or used to be, associated trusts of the institution;
 - (ii) provide particular information about the financial capacity of the trusts; and
 - (b) make any other orders, and give the directions, it considers appropriate for the purposes of establishing—
 - (i) whether a trust is, or used to be, an associated trust of the institution; or
 - (ii) the financial capacity of a trust mentioned in subparagraph (i); or
 - (iii) whether a nominee of the institution has sufficient assets to satisfy a liability that may be found under a decision on the abuse claim; or
 - (iv) whether it would be appropriate to make an order in relation to a trustee under subsection (5).

50K—Proceeding against nominee of unincorporated institution

Despite any Act or other law or instrument (including any trust deed), the following apply if, under section 50J, there is a nominee for an institution:

- (a) a proceeding for an abuse claim may be commenced or continued against the nominee;
- (b) any liability of the institution under the court's decision on the abuse claim is incurred by the nominee;
- (c) anything done by the institution is taken to have been done by the nominee;
- (d) a duty or obligation of the institution in relation to the proceeding is a duty or obligation of the nominee;
- (e) the institution must continue to participate in the proceeding and a court may make an order or give a direction relating to the institution as if it were a person;
- (f) a court may make a substantive finding in the proceeding against the institution as if it were a person;

- (g) the nominee may rely on any defence or immunity that would be available to the institution as a defendant in the proceeding if the institution were a person;
- (h) 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;
- (i) if there is more than 1 nominee, the nominees must file a single defence and proceed as a single defendant.

Division 5—Satisfaction of liability

50L—Assets available to satisfy liability of institution

- (1) This section applies if an institution has a liability under a judgment in, or settlement of, an abuse claim.
- (2) The institution may satisfy the liability out of the assets of the institution and the assets of an associated trust of the institution.

50M—Assets available to satisfy liability of nominee

- (1) This section applies if an institution's nominee has a liability under a judgment in, or settlement of, an abuse claim.
- (2) If the nominee is the trustee of an associated trust of the institution, the nominee may satisfy the liability out of the assets of the trust and the assets of the institution.
- (3) Otherwise, the nominee may satisfy the liability out of its assets and the assets of the institution.

50N—Assets available to satisfy liability of current office holder

- (1) This section applies if, under section 50I(3), a current office holder has a liability under a judgment in, or settlement of, an abuse claim.
- (2) The current office holder is not personally liable but may satisfy the liability out of the assets of the institution and the assets of an associated trust of the institution.

50O—Satisfaction of liability by trustee of associated trust

- (1) This section applies in relation to a liability that, under section 50L, 50M or 50N, may be satisfied out of the assets of an associated trust of an institution.
- (2) 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.
- (3) The satisfaction of the liability is a proper expense for which the trustee may be indemnified out of the trust property, irrespective of any limitation on any right of indemnity the trustee may have.
- (4) The liability of the trustee of the associated trust as the institution's nominee is limited to the value of the trust property.

- (5) The trustee is not liable for a breach of trust only because of doing anything authorised by this section.

50P—References to liability

A reference in this Division to a liability under a judgment in, or settlement of, an abuse claim includes any costs associated with a proceeding for the claim.

Division 6—Miscellaneous

50Q—Entities may act despite other laws and duties

An institution, an institution's nominee, a current office holder or the trustee of an associated trust of an institution may act under Division 5, and the trustee of an associated trust of an institution may consent to being the institution's nominee, despite—

- (a) another law; or
- (b) the terms of the associated trust (including a trust for a charitable purpose); or
- (c) a duty, whether as the current holder of an office in the institution or as trustee or otherwise.

50R—Continuity of institutions

- (1) For the purposes of Division 4, it is sufficient that an institution (the *current institution*) is substantially the same as it was at the time when the cause of action accrued (the *relevant time*).
- (2) Without limiting the generality of subsection (1), the current institution is substantially the same as it was at the relevant time if the class or type of member and the primary purposes or work of the current institution are substantially the same as they were at the relevant time.
- (3) Subsections (1) and (2) have effect regardless of whether, after the relevant time—
 - (a) the name of the institution changed; or
 - (b) the organisational structure of the institution changed; or
 - (c) the institution became incorporated; or
 - (d) the geographic area in which the members of the institution carried out the purposes or work of the institution changed.
- (4) If there is no institution that is the same institution, or substantially the same institution, as the institution at the relevant time (the *old institution*), a relevant successor of the old institution is taken to be the same institution as the old institution.

- (5) For the purposes of subsection (4), an institution (also the ***current institution***) is a relevant successor of the old institution if—
- (a) all or part of the old institution merged into the current institution; or
 - (b) all or part of the old institution merged with 1 or more other entities to form the current institution; or
 - (c) the current institution is the remainder of the old institution after part of the old institution ceased to be part of the old institution; or
 - (d) in a case in which there is at least 1 institution interposed, over time, between the old institution and the current institution—at least 1 of the following circumstances applies to each link in the chain between the old institution and the current institution:
 - (i) all or part of an earlier institution merged into another institution;
 - (ii) all or part of an earlier institution merged with 1 or more other entities to form another institution;
 - (iii) an institution is the remainder of an earlier institution after part of the earlier institution ceased to be part of the earlier institution;
 - (iv) an institution as it is at a particular time is substantially the same as it was at an earlier time.
- (6) If more than 1 institution (a ***current institution***) is a relevant successor of the old institution the following applies:
- (a) each current institution is jointly and severally liable for the abuse of a child by a person associated with the old institution while the child was under the care, supervision, control or authority of the old institution;
 - (b) a current institution which is a relevant successor of the old institution may recover contribution from another current institution which is also a relevant successor of the old institution;
 - (c) an action for contribution may be brought—
 - (i) by way of third party proceedings, or proceedings between the parties, in an action in which damages are sought from the institution entitled to contribution; or
 - (ii) by way of a separate action brought against the institution from which contribution is sought;
 - (d) if it is fair and equitable to do so, a court may exempt an institution from liability to make contribution or order that the contribution to be recovered is to amount to a complete indemnity;

- (e) an action for contribution may be brought even though—
 - (i) judgment in an action in which damages are sought for the relevant abuse has not yet been given; or
 - (ii) the person who suffered the abuse has released the institution from which contribution is sought from liability or has obtained judgment against that institution; or
 - (iii) a notice that would be required if the person who suffered the abuse were to obtain a judgment against the institution from which contribution is sought has not been given; or
 - (iv) the time within which the person who suffered the abuse could have commenced an action against the contributory has expired;
- (f) despite paragraph (e)—
 - (i) if an institution is liable to indemnify another institution against that other institution's liability, the institution is (to the extent of the liability to indemnify) not entitled to contribution from the other institution under this section; and
 - (ii) a contractual limitation or exclusion of liability operates to limit or exclude an entitlement to contribution under this section if—
 - (A) it arises from a contract made before the occurrence of the act or omission that gave rise to the liability; and
 - (B) it would, assuming the institution who suffered primary harm had brought an action for damages against the institution from which contribution is sought, have limited or excluded that institution's right to recover damages;
- (g) a court may determine any action for contribution according to what is fair and equitable in all of the circumstances.

(7) In this section—

contributory means the institution (or institutions) seeking contribution under this section and the institution (or institutions) from which contribution is sought.

50S—Continuity of offices

- (1) This section applies for the purposes of section 50L.
- (2) It is sufficient that an office in the institution is substantially the same as it was when the relevant cause of action accrued.

- (3) If there is no current office in the institution that is the same or substantially the same as the relevant office mentioned in section 50I(1)(b), the current head of the institution is taken to be the current office holder.

50T—Corporations Act displacement

Sections 50K to 50Q are declared to be Corporations legislation displacement provisions for the purposes of section 5G of the *Corporations Act 2001* of the Commonwealth in relation to the Corporations legislation generally.

50U—Proceedings despite previous judgment

- (1) Subject to subsection (2), proceedings on a cause of action may be commenced against a person or institution in accordance with this Part even though a judgment was given in relation to the cause of action before the commencement of this Part on the ground that the person or institution was not an appropriate defendant.
- (2) Proceedings on a cause of action in circumstances contemplated by subsection (1) may only be commenced if a court, being satisfied that it is just and reasonable to do so, grants leave for the action to be commenced.
- (3) In granting leave under subsection (2) for proceedings on a cause of action to be commenced, a court may make any order the court considers to be necessary for the proceedings to proceed or otherwise appropriate in the circumstances.

Part 7B—Child abuse—setting aside settlements

50V—Meaning of affected agreement

- (1) In this Part, *affected agreement* means an agreement—
- (a) that prevents the commencement or maintenance of proceedings on a cause of action to which section 3A of the *Limitation of Actions Act 1936* applies if—
- (i) the agreement occurred before the commencement of that section; and
- (ii) at the time of the agreement, a limitation period applying to the cause of action had expired; or
- (b) that prevents the commencement or maintenance of proceedings on a cause of action in respect of an abuse claim (within the meaning of Part 7A) if—
- (i) the agreement occurred before the commencement of Part 7A; and

- (ii) at the time of the agreement, proceedings on the cause of action could not be commenced or maintained against a person or institution that would have been liable under Part 7A for child abuse had the Part been in force.
- (2) For the purposes of this section, a limitation period is taken to have expired even if it were possible at the time to seek the leave of a court to extend the period.

50W—Court may set aside affected agreement

- (1) A person (the *applicant*) who, because of an affected agreement, is prevented from commencing or maintaining proceedings on a cause of action to which section 3A of the *Limitation of Actions Act 1936* applies, or in respect of an abuse claim (within the meaning of Part 7A), may—
 - (a) commence proceedings on the cause of action in a court with sufficient jurisdiction to hear the cause of action; and
 - (b) apply to the court to set aside the affected agreement.
- (2) The court may set aside an affected agreement if it is just and reasonable to do so.
- (3) The court may consider the following in making its decision to set aside the affected agreement:
 - (a) the extent to which the existence of the limitation period or barriers to identifying an appropriate defendant materially contributed to the applicant's decision to enter into the agreement;
 - (b) the circumstances in which the agreement was negotiated and entered into, including—
 - (i) whether negotiations were affected by an imbalance of power; and
 - (ii) whether the applicant was legally represented; and
 - (iii) whether the defendant (or other parties) engaged in unfair or oppressive conduct;
 - (c) any other matter the court considers relevant.
- (4) Section 67C(1) of the *Evidence Act 1929* does not prevent evidence being adduced in proceedings under this section, even if the evidence is of a communication made, or a document prepared, in connection with an attempt to negotiate a settlement of the dispute to which the affected agreement relates.
- (5) If the court decides to set aside an affected agreement it may also set aside any of the following that gives effect to the agreement:
 - (a) a contract, deed or other agreement;
 - (b) an order or judgment of the court or of a lower court.

- (6) However, the court must not set aside the following:
- (a) a deed of release signed by or on behalf of the applicant in acceptance of an offer under the National Redress Scheme and an agreement relating to a relevant prior payment that has been taken into account in the offer;
 - (b) a contract of insurance.

- (7) In this section—

National Redress Scheme means the National Redress Scheme for Institutional Child Sexual Abuse established under the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* of the Commonwealth.

50X—Effect of setting aside affected agreement

- (1) An affected agreement and anything else set aside under this Part is void.
- (2) An amount paid or other consideration given under the affected agreement—
 - (a) is not recoverable despite the agreement being void; and
 - (b) may be taken into account by the court in determining damages in proceedings for a cause of action to which the affected agreement related.