

Explanatory Statement

PERSONAL INJURIES (LIABILITIES AND DAMAGES) AMENDMENT BILL 2022

SERIAL NO. 48

LEGISLATIVE ASSEMBLY OF THE
NORTHERN TERRITORY

ATTORNEY-GENERAL AND MINISTER FOR JUSTICE

EXPLANATORY STATEMENT

GENERAL OUTLINE

The Bill amends the *Personal Injuries (Liabilities and Damages) Act 2003* to give effect to civil litigation reforms recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse (RCIRCSA) in its Redress and Civil Litigation Report (Report); to introduce a scheme to govern civil claims brought by offenders in custody against the Territory; and to make changes to the annual declaration of the maximum amount of damages for non-pecuniary losses.

NOTES ON CLAUSES

Part 1 **Preliminary matters**

Clause 1. **Short title**

This is a formal clause which provides for the citation of the Bill. The Bill, when passed, may be cited as the *Personal Injuries (Liabilities and Damages) Amendment Act 2022*.

Clause 2. **Commencement**

This is a formal clause which provides that the *Personal Injuries (Liabilities and Damages) Amendment Act 2022* will commence on the day after the day on which the Administrator's assent to the Act is declared, except Parts 3, 4 and 5. Part 3 (Miscellaneous amendments to Personal Injuries (Liabilities and Damages) Act 2003) will commence on 30 September 2022. Part 4 (Amendments to Personal Injuries (Liabilities and Damages) Act 2003 related to institutional liability for child abuse) and Part 5 (Further amendments to Personal Injuries (Liabilities and Damages) Act 2003 related to damages awarded to offenders) will commence on the day fixed by the Administrator by Gazette notice.

Clause 3. **Act amended**

This is a formal clause which provides that the Act being amended is the *Personal Injuries (Liabilities and Damages) Act 2003*.

Part 2 Amendments to Personal Injuries (Liabilities and Damages) Act 2003 related to damages awarded to offenders

Clause 4. Section 3 amended (Definitions)

Clause 4 amends section 3 of the *Personal Injuries (Liabilities and Damages) Act 2003* to insert definitions of terms used under new Parts 3A and 4A which are inserted by the Bill. This includes the term 'child abuse' which is defined to mean sexual abuse and serious physical abuse perpetrated against a child and psychological abuse that arises from either of the above. This definition is consistent with the *Limitation Act 1981*.

Clause 5. New Part 4A inserted

Clause 5 inserts a new Part 4A into the Act titled 'Damages awarded to offenders'.

New Part 4A is based on a similar scheme which exists in NSW under Part 2A of the *Civil Liability Act 2002* (NSW) (the NSW scheme), with differences to account for the Territory context in which it will exist.

Division 1 of new Part 4A (Preliminary matters) covers preliminary matters including the application of the scheme. Section 32B(1) provides that new Part 4A applies to an award of damages to an individual for a civil wrong sustained when the individual was an offender within the meaning of section 5 of the *Correctional Services Act 2014*, or a detainee as defined in section 5(1) of the *Youth Justice Act 2005*. This mirrors the application of the NSW scheme.

Section 32B(2) clarifies how new Part 4A works with the *Return to Work Act 1986*.

Section 32B(3) provides that new Part 4A applies to a civil liability incurred by a public entity defendant because of a civil wrong sustained by an offender that was caused by a person the public entity defendant is vicariously liable for.

Section 32C provides a definition of a 'public entity defendant' to apply in new Part 4A.

Section 32D provides that nothing in new Part 4A of the Act affects a claim for a civil wrong arising from child abuse of an offender. Child abuse is defined as sexual abuse, serious physical abuse and psychological abuse that arises from either of the above. This definition is consistent with the *Limitation Act 1981*.

Division 2 of new Part 4A (Limit to damages) provides for the limitation of damages that a court can award for civil wrongs to which new Part 4A applies. Section 32E provides a maximum amount that can be awarded for each of the torts of battery, assault and false imprisonment. The limitation of damages differs to that in the NSW scheme. Under the NSW scheme, no damages are payable unless the offender suffered at least 15 per cent whole person impairment and where this threshold is met, damages are capped at the maximum amount under relevant workers compensation legislation. Section 32F provides that a court must not award aggravated or exemplary damages in respect of a civil wrong to which new Part 4A applies. This is consistent with the NSW scheme.

Division 3 of new Part 4A (Application of damages to certain payments) provides for outstanding debts to the Territory to be deducted from any damages payable to an offender, or monies payable under a settlement agreement, under the scheme. Section 32G provides that relevant debts to be deducted are:

- an amount the Territory may recover in accordance with an order made under section 56 of the *Victims of Crime Assistance Act 2006*;
- an outstanding fine imposed by a court under Part 3 of the *Fines and Penalties (Recovery) Act 2001* and enforcement costs under that Act for the fine;
- a penalty under an infringement notice, within the meaning of the *Fines and Penalties (Recovery) Act 2001*, issued under a law that was not paid within the time specified in the infringement notice

or in accordance with the requirements of the *Fines and Penalties (Recovery) Act 2001* for the recovery of the penalty, and enforcement costs under that Act for the penalty.

Clause 6. Long title amended

This is a formal clause which provides for the amendment of the long title of the Act to reflect the matters dealt with under new Part 4A, namely 'to introduce a scheme limiting payments to certain offenders'.

Part 3 Miscellaneous amendments to Personal Injuries (Liabilities and Damages) Act 2003

Clause 7. Section 27 amended (Damages for non-pecuniary loss)

Clause 7 amends section 27(1) of the Act in relation to the annual declaration of maximum damages for non-pecuniary loss under the Act. Clause 7 removes section 27(1) which provides for the annual review and declaration of this amount by the Minister before 1 October each year and instead provides that the maximum amount of damages a court may award for non-pecuniary loss under the Act is 680 000 monetary units.

Clause 8. Section 28 repealed (Declaration of maximum amount of damages for non-pecuniary loss)

Clause 8 repeals section 28 of the Act. This section is no longer necessary given the process for annual review and declaration will no longer be used.

Part 4 Amendments to Personal Injuries (Liabilities and Damages) Act 2003 related to institutional liability for child abuse

Clause 9. Section 3 amended (Interpretation)

Clause 9 amends section 3 of the *Personal Injuries (Liabilities and Damages) Act 2003* to insert definitions of terms used under new Part 3A which is inserted by the Bill.

Clause 10. New Part 3A inserted

Clause 10 inserts a new Part 3A into the Act titled 'Institutional liability for child abuse'.

Division 1 of new Part 3A (Preliminary) covers preliminary matters.

Section 17B provides that new Part 3A applies to an institution that exercises care, supervision or authority over a child and whether the institution is incorporated or not.

Section 17B(5) provides that Divisions 1, 4, 5 and 6 will apply to a cause of action arising before or after Part 3A commences. Divisions 4, 5 and 6 of Part 3A of the Bill (relating to nomination of proper respondents, continuity of institutions, and proceedings against unincorporated institutions) are intended to ensure that there is, as far as possible, a respondent available in institutional child abuse proceedings who is able to be sued and has sufficient assets to meet the claim. These amendments will implement recommendation 94 of the RCIRCSA Report and are designed to address certain legal loopholes which have historically prevented litigation including, for example, unincorporated bodies not having legal personality and historical institutions no longer existing at the time litigation is brought. Divisions 4, 5 and 6 are intended to apply both prospectively and retrospectively to causes of action that accrued prior to commencement, so that no matter when the abuse occurred, survivors will be able to sue a proper defendant with sufficient assets to satisfy a claim. Retrospective application is particularly necessary for Division 5 (continuity of institutions) to ensure that historical claims against institutions that no longer exist can be brought against current (successor) institutions.

Section 17C provides for the meaning of an ‘individual associated with an institution’, which includes an office holder, officer, owner, trustee, employee, volunteer or contractor of the institution, members of religious institutions and members of another institution or individuals that the original institution has made responsible for the care, supervision or authority of the child by arrangement, contract or delegation.

Division 2 of new Part 3A (Liability of institutions) imposes a duty of care on relevant institutions to take reasonable care 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. This will implement recommendations 91 to 93 of the Report in relation to making institutions liable for institutional child sexual abuse by individuals associated with the institution unless the institution proves it took reasonable steps to prevent the abuse. This duty is imposed by section 17D(1) and so varies the common law position for this situation. The duty of care will operate prospectively only, so will only impact institutions’ liability for abuse that takes place after the amendments commence.

Section 17D(2) imposes a similar duty to section 17D(1) on institutions in relation to taking reasonable steps to prevent abuse of a child by another child under care, supervision or authority of institution. This varies the common law position for this situation.

Section 17E(2) provides that where abuse is committed by an individual associated with the institution, the duty of care will be taken to have been breached by the institution unless the institution can prove that it took reasonable steps or precautions to prevent the abuse from occurring. This will reverse the usual onus of proof in these matters.

Section 17E(3) provides for matters that a court may take into account in determining whether an institution took reasonable steps to prevent the abuse, including *inter alia* 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.

Section 17E(5) provides that if a court awards damages to an individual in respect of liability of an institution for a breach of the duty of care under section 17D(1) that is established in accordance with this section, the court must take into account any award of damages to the individual in respect of liability of the institution established in accordance with section 17G in determining the amount of damages the court awards for liability established under this section. This means that a survivor cannot be compensated for the same abuse twice under the two separate causes of action established under sections 17D (negligence) and section 17G (vicarious liability).

Section 17F provides for similar institutional liability for abuse of a child by another child under care, supervision or authority of institution. In addition section 17F(5) provides that, in a proceeding brought under this section, the child that perpetrated the child abuse must not be named and, if that child is now an adult and gives evidence, the court must be closed while that evidence is given. Similarly to section 17E(5), section 17F(7) confirms that a survivor cannot be compensated for the same abuse twice under the two separate causes of action established under section 17D (negligence) and section 17G (vicarious liability).

Division 3 of new Part 3A (Vicarious liability of institutions for child abuse) imposes vicarious liability on institutions for child abuse carried out by an employee, or an individual who is akin to an employee. This will implement recommendations 89 and 90 of the Report in relation to imposing strict liability on institutions for child abuse despite it being the deliberate criminal act of an employee. The imposition of vicarious liability will operate prospectively only, so will only impact institutions’ liability for abuse that takes place after the amendments commence.

Section 17G(1) provides that an institution is vicariously liable for child abuse if the employee or an individual akin to an employee performs a role which supplies the occasion for the perpetration of child abuse and the employee or an individual akin to an employee takes advantage of that occasion to commit child abuse.

Section 17G(2) provides that in determining whether the institution caused the employee or individual who is akin to an employee to be in a position that gives occasion for the abuse, a court is required to look at whether the institution placed the person in a position where they had authority, power or control over the child; the trust of the child or the ability to achieve intimacy with the child. This codifies the common law test as clarified by the High Court in *Prince Alfred College Incorporated v ADC* [2016] HCA 37. Section 17G(3) confirms that this is in addition to the common law position for this situation.

Section 17G(4) provides that if a court awards damages to an individual in respect of liability of an institution established in accordance with this section, the court must take into account any award of damages to the individual in respect of liability of the institution established in accordance with section 17E or 17F in determining the amount of damages the court awards for liability established under this section. Again, this ensures that a survivor cannot be compensated for the same abuse twice under the two separate causes of action established under sections 17E and F (negligence) and section 17G (vicarious liability).

Section 17G(5) provides a definition for an 'individual akin to an employee', which does not include an individual who carries out activities in accordance with a placement arrangement under section 78 of the *Care and Protection of Children Act 2007* in respect of a child, or activities carried under a contract for services by an individual or corporation that is independent from the institution. This would include, for example, a gardener attending school grounds for the purposes of conducting a gardening business.

Division 4 of new Part 3A (Nomination of proper respondent) provides a statutory framework for the nomination of a 'proper respondent' by an institution to meet child abuse claims and liabilities. This will implement recommendation 94 of the Report in relation to requiring institutions to nominate a proper respondent to sue that has sufficient assets to meet liability arising from child abuse proceedings.

Section 17H(1) allows an institution to nominate a proper respondent for the proceeding. Section 17H(2) provides that a court must not accept the nomination unless 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.

Section 17J(1) provides that, if the nomination is accepted by the court, the nominated person or entity is appointed as proper respondent to the proceeding. Section 17J(2) provides that a proper respondent appointed under subsection (1) assumes liability of the institution for the child abuse claim and is joined as respondent in the proceeding. Section 17J(2) also provides that:

- the proper respondent is taken to be the respondent in the proceedings against the institution on behalf of the institution and is responsible for conducting the proceedings as the respondent, and
- anything done by the institution is taken to have been done by the proper respondent and a duty or obligation of the institution in relation to the proceedings is a duty or obligation owed by the proper respondent, and
- the proper respondent incurs any liability from the claim in the proceedings on behalf of the institution that the institution would have incurred if the organisation had legal personality (including any costs awarded), and
- the proper respondent may rely on any defence or immunity that would be available to the institution as a respondent in the proceedings if the institution had legal personality, and
- any right of the institution to be indemnified (including under a policy of insurance) in respect of damages awarded in a claim in child abuse proceedings extends to, and indemnifies, the proper respondent.

Section 17J(3) provides that nothing in the section prevents the court making any order, direction or finding solely in respect of the institution against which the claim is brought. This means that the institution must continue to participate in proceedings and the court may make substantive findings against the institution as if the institution had legal capacity.

Section 17K provides that where an institution does not nominate a proper respondent or a suitable person and at least 120 days have passed since the proceeding started, the court may order, on application by the claimant, that the trustee of an associated trust of the institution, as defined in the section, is substituted as proper respondent.

Section 17L provides that if the court is satisfied that the associated trust has financial capacity to satisfy the child abuse claim, the court must appoint the trust as proper respondent in the proceeding.

Section 17M permits the trustee of an associated trust to consent to be appointed as a proper respondent, to supply information about the trust and to apply trust property to satisfy any liability arising from child abuse proceedings. This section protects the trustees from liability for breach of trust for taking those actions.

Section 17N declares section 17M as a *Corporations Act 2001* (Cth) displacement provision. The note for section 17N clarifies that section 5G of the *Corporations Act 2001* (Cth) allows a provision of a State or Territory Act to displace the operation of the Commonwealth Corporations legislation if it is declared a Corporations legislation displacement provision. The declaration allows a State or Territory provision that would otherwise be inconsistent to have effect to the extent of the inconsistency.

Division 5 of new Part 3A (Continuity of institutions) deals with the situation where former institutions that would be liable for child abuse no longer exist. Section 17P provides that a current institution is 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.

Division 6 of new Part 3A (Proceedings against unincorporated institutions) allows for proceedings to be brought against unincorporated institutions. This is enabled by section 17Q. Section 17R 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.

Division 7 of new Part 3A (Court rules) allows the Supreme and Local Courts to make rules and practice directions in respect of any matter under new Part 3A, including the practice and procedure of the court.

Clause 11. Long title amended

This is a formal clause which provides for the amendment of the long title of the Act to reflect the matters dealt with under new Part 3A, namely 'to clarify liability of institutions for child abuse'.

Part 5 Further amendments to Personal Injuries (Liabilities and Damages) Act 2003 related to damages awarded to offenders

Clause 12. Part 4A, Divisions 4 and 5 inserted

Clause 12 inserts Divisions 4 and 5 of new Part 4A.

Division 4 of new Part 4A (Damages made available for victim payments) provides for damages payable to an offender, or monies payable under a settlement agreement, by a public entity defendant for a civil wrong to which new Part 4A applies to be paid to the Public Trustee and held on trust in order to give any victims of the offender the opportunity to make a civil claim against the funds.

Section 32H provides for payment of the damages, or monies payable under a settlement agreement, to the Public Trustee following the deduction of any amounts under section 32G. Section 32H(2) provides that damages are to be held on trust for a period beginning on the day the court awards the damages or the civil wrong settlement is agreed to ending on the later of:

- (a) the day 12 months after the day the court awards the damages or the civil wrong settlement is agreed to; or

- (b) the day a court finally determines any victim claim that is commenced against the offender before the day the court awards the damages or the civil wrong settlement is agreed to; or within 12 months after the day the court awards the damages or the settlement is agreed to.

Section 32H(5) provides that the Part does not displace any obligation under Commonwealth or Territory laws to another person. An example might be to a trustee in bankruptcy.

Section 32J provides a process for victims to be notified of the offender's award of damages, or monies payable under a settlement agreement, held in trust so that they can then decide to make a victim claim against the offender, which must be commenced within 12 months of the offender damages being awarded.

Section 32K provides that where a victim makes a victim claim as defined, within the 12 months of the damages being awarded, or where the claim was commenced before the damages were awarded, the court may order that the claim be satisfied from the damages held on trust. This means the trust can be used to satisfy claims made by victims within the 12 months of damages being awarded, or victims who had a claim on foot against the offender at the time the damages were awarded, or victims who have an outstanding default judgement against the offender.

In making such an order, the court must take into account a range of factors including any other victim claims and the amount of damages likely to be awarded if it is successful. Section 32K(6) provides that the court may decide a victim claim on the papers without conducting a hearing.

Section 32L(1) provides that any interest earned on the money held on trust on behalf of an offender by the Public Trustee accrues to the offenders balance. Section 32L(2) provides that any fees and charges associated with monies held on trust for an offender are payable out of the monies held on trust for the offender.

Section 32M provides that the Public Trustee must release any remaining damages held on trust to the offender after all victims' claims have been determined.

Section 32N protects an employee of the public entity defendant or the Public Trustee from liability for an act done or omitted to be done by the person in good faith in the exercise of a power or performance of a function under this Division.

Division 5 of new Part 4A (Extension of limitation period for victims) provides that the limitation period under the *Limitation Act 1981* in relation to civil claims does not apply to victim claims as defined under new Part 4A.

Part 6 Repeal of Act

Clause 13. Repeal of Act

This is a standard clause which provides that the Act is repealed on the day after it commences.