TASMANIA
LAW REFORM
INSTITUTE

Faculty of Law, Private Bag 89, Hobart, TAS 7001
phone: +61 3 6226 2069, fax: +61 3 6226 7623
law.reform@utas.edu.au
www.utas.edu.au/law-reform

Ms Amber Mignot
Director
Child Abuse Royal Commission Response Unit
Department of Justice
GPO Box 825,
Hobart TAS 7001

Email: amber.mignot@justice.tas.gov.au

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Justice Legislation (Organisational Liability for Child Abuse) Amendment Bill 2019

Dear Ms Mignot

Thank you for the opportunity to comment on this important Bill.

The Bill seeks to enact the recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse in its Report, *Redress and Civil Litigation* (the Report). Generally, the Bill achieves its aim. Nevertheless, there are some aspects of the Bill that warrant further consideration and revision. They are:

- the way in which organisations' liability for child abuse under s 49H(2) is expressed/couched;
- the definition of 'child abuse' in the Bill wherever occurring;
- the meaning of s 49G(2);
- the references to the State in ss 49C and 49N(3).

Organisations' liability for child abuse under s49H(2)
Clause 49H(2) states:

> An organisation that has responsibility for a child must take reasonable precautions to prevent an individual associated with the organisation from perpetrating child abuse of the child in connection with the organisation's responsibility for the child.

This provision is problematic because it imposes liability on an organisation only where an associated individual perpetrates child abuse of a child *in connection with the organisation's responsibility for the child.* This is a complicated expression of the duty. In particular, the meaning of the phrase 'in connection with the organisation's responsibility for the child' could give rise to considerable interpretative difficulties. It could occasion similar problems and inconsistent interpretations to those that have occurred in relation to the phrase, 'in the course of employment' in the context of vicarious liability at common law (see pp 464-467 of the Report). Section 91(2) of the Victorian *Wrongs*

Amendment (Organisational Child Abuse) Act 2017 avoids such difficulties by constructing this duty and consequent liability in a much simpler and more comprehensible way. It provides:

> **91 LIABILITY OF ORGANISATIONS**
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> (2) A relevant organisation owes a duty to take the care that in all the circumstances of the case is reasonable to prevent the abuse of a child by an individual associated with the relevant organisation while the child is under the care, supervision or authority of the relevant organisation.

Importantly, this provision does not use the problematic 'in connection with' phrasing employed in s 49H(2) of the Tasmanian Bill. Because of its relative clarity, s 91(2) of the Victorian Act provides a helpful model for Tasmania. It is, therefore, suggested that the s 49H(2) be revised and replaced with a provision that maintains uniformity with s 91(2) of the Victorian *Wrongs Amendment (Organisational Child Abuse) Act 2017*.

The definition of 'child abuse' in the Bill wherever occurring

The definition of 'child abuse' in the Bill is problematic for a number of reasons. First, the definition is contained in three different sections created by the Bill – s 49H(5), s 49J(3) and s 49L. All these sections are in Part 10C and all the definitions are the same. It is not clear why the Bill departs from the usual legislative structure of providing one definition of 'child abuse' at the outset of Part 10C for application to the entirety of that Part. While the Bill replicates the approach of the NSW *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018,* the insertion of the same definition in three different locations in the Bill adds unnecessary complexity to it and, therefore, to the Principal Act. It is suggested that this structure be reconsidered and revised.

Second, the definition of 'child abuse' uses terms that are ambiguous and inadequately defined. The definition is:

> ***child abuse***, in relation to a child, means –
>
> (a) sexual abuse, or serious physical abuse, of the child; and
>
> (b) any psychological abuse of the child that arises from the sexual abuse or serious physical abuse –
>
> but does not include an act that is lawful at the time at which it occurs.

Neither 'sexual abuse' nor 'serious physical abuse' are defined. These terms are vague, uncertain and consequently open to inconsistent interpretation. To begin with, the word 'abuse' may be interpreted by some as importing notions of continuous conduct, a course of conduct or systematic conduct. Because this is not the Bill's legislative intent, it would be wise to provide further definition or interpretive guidance of what is meant by sexual and physical abuse. With regard to 'sexual abuse' it is suggested that the definition used in the Victorian *Wrongs Act 1958* be adopted:

> '"sexual abuse" means sexual assault or other sexual misconduct'.

Where physical abuse is concerned, redress and liability should not be limited to cases of 'serious' physical abuse. This limitation is out of step with the approach taken in New South Wales and Victoria (see ss 6F(5) and 6H(4) of the *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018* (NSW) and s 88 of the *Wrongs Amendment (Organisational Child Abuse Liability) Act 2017* (Vic).) In this regard, Tasmanian law should maintain consistency with that in NSW and Victoria. Further, and most importantly, Tasmanian law should not condone any form of physical abuse of children. Additionally, the term '*serious* physical abuse' is vague and thus open to inconsistent interpretations. It is indeterminate and open to highly subjective interpretations. What is serious physical abuse to one person may seem trivial to another. No guidance with respect to the meaning of this term is provided in the Bill, for example, whether seriousness attaches to the degree of force used, the nature of any injuries caused, or both.

For all these reasons and particularly because no form of physical abuse of children is justifiable, the word 'serious' should be removed from the definition of child abuse wherever occurring. Instead it is suggested that the approach in NSW and Victoria be adopted and 'child abuse' be defined as 'sexual abuse or physical abuse perpetrated against a child'.

It may be that redress and liability for physical abuse have been limited in the Bill to '*serious'* physical abuse in an attempt to exclude liability for reasonable physical correction of children (see s 50 *Criminal Code 1924* (Tas)) or other lawful applications of force, such as that used in effecting a lawful arrest. Such applications of physical force are covered by the exclusion contained in the proviso in ss 49H(5), 49J(3) and 49L that child abuse 'does not include an act that is lawful at the time at which it occurs'. This proviso obviates the need to limit child abuse to 'serious' physical abuse. Nevertheless, this exclusion is vague and unnecessarily broad. It applies to both sexual and physical abuse. A clearer, narrower and, accordingly, preferable limitation is provided in s 88 of the *Wrongs Amendment (Organisational Child Abuse Liability) Act 2017* (Vic), which limits the exclusion to physical abuse. This section provides that 'physical abuse':

> 'does not include an act or omission committed in circumstances that constitute —
> (a) a lawful justification or excuse to the tort of battery; or
> (b) any other lawful exercise of force'.

It is recommended that the definition of 'child abuse' in the Tasmanian Bill be revised to conform more closely to the Victorian and NSW approaches. Such a definition might be:

> ***child abuse*** means sexual abuse or physical abuse perpetrated against a child but 'physical abuse' does not include an act or omission committed in circumstances that constitute —
> (a) a lawful justification or excuse to the tort of battery; or
> (b) any other lawful exercise of force.

This definition limits the exclusionary proviso to 'physical abuse'. Currently, the general exception in the Tasmanian Bill applies to both physical and sexual abuse. In this regard it excludes liability for sexual acts that were 'lawful at the time' at which they occurred. The meaning of lawfulness 'at the time of the conduct' in this context is likely to be highly contestable. Of most concern is that it may be arguable in historic cases of child sexual abuse and, where found to be applicable, defeat the Bill's exclusion of limitation periods for such conduct. The lack of certainty in the operation of the exclusion where child sexual abuse is concerned supports the revision of the definition of 'child abuse' in the terms suggested.

The meaning of s 49G(2)

This provision is very difficult to understand. In fact, I admit that I don't actually know what it means though I could possibly guess. I am not able to identify what aspect of the Royal Commission recommendations it addresses. I note that it replicates provisions in the NSW and Victorian reforms (see s 6E(2) of the NSW Act and s 90(2) of the Victorian Act). However, these provisions are not elucidatory. Laws that are not readily comprehensible, particularly those that affect rights and liabilities, are not human rights compliant. It is therefore suggested that some thought be given to revising s 49G(2) to make its meaning less opaque.

The References to the State in ss 49C and 49N(3)

Whilst the exclusion of the State in s 49C from the operation of the Act is a common legislative convention, it is not clear what effect, if any, this will have, on the operation of s 49N(3). It is suggested that s 49C may require some minor revision to preserve the operation of s 49N(3).

Again, many thanks for the opportunity to comment on this Bill. Should you wish to discuss any of the comments made here or require further information, please do not hesitate to contact me or Jemma Holt and Dylan Richards who also provided substantial input to these comments.

Best regards,

Associate Professor Terese Henning
Director, Tasmania Law Reform Institute