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**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**CIVIL LAW (WRONGS) (CHILD ABUSE CLAIMS AGAINST UNINCORPORATED BODIES)
AMENDMENT BILL 2018**

EXPLANATORY STATEMENT

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CIVIL LAW (WRONGS) (CHILD ABUSE CLAIMS AGAINST UNINCORPORATED BODIES) AMENDMENT BILL 2018

This explanatory statement relates to the Civil Law (Wrongs) (Child Abuse Claims Against Unincorporated Bodies) Amendment Bill 2018 (the Bill) as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The statement is to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill.

Overview

Purpose of the Bill

The Bill will amend the *Civil Law (Wrongs) Act 2002* to implement recommendation 94 of the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) in its *Report on Redress and Civil Litigation*.

The Bill:

- enables an unincorporated body to nominate an entity to act as the defendant in a proceeding for a child abuse claim
- allows a court to make an order to appoint a related trust as defendant to a child abuse claim
- allows trustees to apply trust property to meet liability for child abuse.

The Bill is intended to ensure that survivors are able to sue a readily identifiable entity ('a proper defendant') that has the financial capacity to meet claims in relation to a personal injury that arises from institutional child abuse. These proper defendant reforms are consistent with the Royal Commission's recommendation 94 in its *Report on Redress and Civil Litigation*. They are similar to provisions enacted for the same purpose in Victoria in the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic).

Human rights implications

The Bill supports several rights under the *Human Rights Act 2004* (HRA), including:

- protection from degrading treatment (section 10 HRA)
- protection of the family and children (section 11 HRA)
- the right to state-supported recovery for child victims of abuse – article 39 of the Convention on the Rights of the Child
- the right to health – article 12 of the *International Covenant on Economic Social and Cultural Rights 1966*
- the freedom from unlawful attack on honour and reputation – article 17 of the *International Covenant on Civil and Political Rights 1966*.

The Bill does not limit or adversely engage any human rights.

Regulatory impact analysis

The Bill provides for the application of trust assets where a trust is related to an unincorporated organisation and the trust has been nominated or appointed as the proper defendant for the organisation in relation to a proceeding for a child abuse claim brought against the organisation. This is an enabling provision, which will support the provision of an avenue for survivors of child abuse to seek compensation for institutional child abuse.

CLAUSE NOTES

Clause 1 Name of Act

This clause provides that the name of the Act is the *Civil Law (Wrongs) (Child Abuse Claims Against Unincorporated Bodies) Amendment Bill 2018*.

Clause 2 Commencement

This clause provides that the Act will commence on the day after it is notified on the Legislation Register.

Clause 3 Legislation Amended

This clause identifies the legislation amended by the Bill is the *Civil Law (Wrongs) Act 2002*.

Clause 4 New chapter 8A Institutional child abuse

This clause inserts a new chapter into the *Civil Law (Wrongs) Act 2002*, after chapter 8 which is about the liability of public and other authorities.

New section 114A - Meaning of child abuse and child abuse claim – ch 8A

New section 114A defines child abuse as physical or sexual abuse of a child for the purposes of new chapter 8A. This definition is not as broad as the definition of child sexual abuse used in section 21C of the *Limitation Act 1985* and section 51(10) of the *Civil Law (Wrongs) Act 2002*, as it does not include related emotional and psychological abuse. The more limited definition is based on well-known and clearly defined concepts and minimises uncertainty. However, it would remain open to a court to award damages for personal injury resulting from related emotional or psychological abuse.

New section 114A(3) has the effect of applying new Chapter 8A in relation to claims of child abuse or alleged child abuse irrespective of whether the abuse occurred before or after the provisions of Chapter 8A come into effect. Retrospective application of these reforms was recommended by the Royal Commission, to ensure that all survivors are able to sue unincorporated associations for child abuse, regardless of when the abuse occurred.

New section 114B - Meaning of related trust – ch 8A

New section 114B sets out the circumstances in which a trust will be a related trust for the purposes of the Chapter 8A. A trust is a related trust where it controlled by the unincorporated body and used by the body to conduct its activities. Sections (2) (a) to (g) set out the circumstances in which a related trust is controlled by an unincorporated body.

New section 114C - Unincorporated bodies

New section 114C provides that an unincorporated body does not need to have a written constitution, fixed membership or any other particular attribute to be a body to which Chapter 8A applies. An unincorporated body could include secular, religious or community-based organisations, volunteer-based organisations, unfunded or government funded organisations and local, national or international organisations.

New sections 114C(2) and (3) provide that anything an unincorporated body may do, or is required to do under Chapter 8A, may be done by any management member of the body.

New section 114D - Unincorporated body may nominate defendant

New section 114D provides that an unincorporated body may nominate an entity to act as the defendant for the unincorporated body in a proceeding against the body for a child abuse claim, and sets out how this may occur.

New section 114D(1) provides that the section applies if a person brings or wishes to bring a child abuse claim against an unincorporated body that would be capable of being sued, but for the body being unincorporated. Examples of the types of child abuse claim that may be brought could be actions in negligence or vicarious liability.

New section 114D(2) provides that, the unincorporated body may nominate an entity that is capable of being sued to act as the defendant for the unincorporated body in a proceeding for the child abuse claim. The nominee must consent to being nominated by the unincorporated body. It will not matter what legal form the nominated entity takes (for example, natural person, company or trust) as long as the nominated entity is capable of being sued. New section 114G facilitates the nomination of a trust.

New section 114D(3) provides that an unincorporated body may nominate an entity at any time within 120 days after the commencement of proceedings against the unincorporated body unless the court orders otherwise.

New section 114D(4) sets out the effect of the nomination. It provides that the nominated entity is the defendant in the proceeding and it will incur the liability arising from the proceeding, that would otherwise have been borne by the unincorporated body had it been capable of being sued. Liability for acts that would have given rise to, for example, a finding of negligence on the part of the unincorporated body had it been incorporated, will be attributed to the nominated entity. The substantial determination of the proceeding will turn on the conduct of the unincorporated body itself.

New section 114E - Court may appoint related trust as defendant

New section 114E provides that a court may make an order to appoint a related trust as defendant, and sets out how this may occur.

New section 114E(1) provides that the section applies to a child abuse claim if an unincorporated body fails to nominate a defendant in accordance with new section 114D, or if the nominated entity is not capable of being sued or does not have sufficient assets or property to meet a judgement or order that may arise from the claim.

New section 114E(2) provides that where the conditions of new subsection 114E(1) are met, the plaintiff may apply to the court for an order that a related trust be appointed as the defendant for the unincorporated body in the proceeding.

New section 114E(3) requires the unincorporated body to notify the court about any related trust and the financial capacity of each trust within 28 days of the application being made.

New section 114E(4) provides that the court may appoint one or more related trusts in relation to the unincorporated body as the defendant for the unincorporated body in the proceeding. The related trust may either be notified under new subsection 114E(3) or be another related trust.

New section 114E(5) sets out the effect of the appointment under new subsection 114E(4). Similarly to new subsection 114D(4), the related trust is the defendant in the proceeding and it will incur any liability arising from the proceeding. For clarity, subsection 114E(5) provides that anything done by the unincorporated body is taken to have been done by the appointee (the related trust) and any duty or obligation of the unincorporated body in relation to the proceeding is a duty of obligation owed by the appointee (the related trust).

New section 114F - Proceeding may be commenced before nomination or appointment

New section 114F(1) provides that a proceeding for a child abuse claim may be commenced or continued against an unincorporated body in the name of the unincorporated body before a defendant is nominated under new section 114D or appointed under new section 114E. This means that the proceeding may be commenced, or continued, pending the nomination or appointment.

New section 114F(2) provides the Court with power to make interlocutory orders against the body as if the unincorporated body were incorporated and capable of being sued.

New section 114F(3) provides that obligations under subsection 114F(2) still apply following the nomination or appointment of an entity as a defendant.

New section 114G - Liability of trustee if appointed as defendant

New section 114G provides for a trustee nominated or appointed as a defendant under Part 8A to be able to accept liability and otherwise act as a proper defendant, in spite of other laws or anything in the relevant trust deed.

New sections 114G(2)(a) to (c) provide that the trustee of the related trust may take certain actions that may otherwise not be allowed by a territory law or the trust deed. The *Legislation Act 2001* (dictionary) defines law of the Territory as an Act, a subordinate law, any other statutory instrument of a legislative nature or the common law.

New section 114G(2)(a) provides that the trustee may accept liability in relation to the claim.

New section 114G(2)(b) provides that the trustee may consent to nomination as defendant.

New section 114G(2)(c) provides that the trustee may give the court any information about the trust that may be required for Chapter 8A.

New section 114G(2)(d) provides that the trustees of the related trust may apply trust property to satisfy any liability incurred in the claim and the satisfaction of any liability incurred in the claim is a proper expense for which a trustee of the related trust may be indemnified out of the trust property of the related trust, irrespective of any limitation of any trustee's right of indemnity. New section 114G(5) provides that the liability includes unpaid judgement debt arising from the claim, any amount paid in settlement of the proceedings or any costs associated with the proceeding. This means that a trustee is able to draw directly on trust assets to discharge any liability incurred on a claim and that the trustee has a right to be indemnified for doing so, even if the trustee's actions would otherwise be in contravention of the terms of the associated trust, or any act, law or other instrument.

New section 114G(3)(a) provides that the liability of a trustee of a related trust which is nominated or appointed as a defendant is limited to the value of the trust property.

New section 114G(3)(b) provides that a trustee of a related trust is not liable for a breach of trust only because of exercising a power under or complying with Chapter 8A. This means that a trustee is protected from liability for breach of trust for actions that would otherwise be in contravention of the terms of the trust.

New section 114G(4) declares that new section 114G is a corporations legislation displacement provision for the purpose of section 5G of the *Corporations Act 2001* of the Commonwealth. This means that any provision of the corporations legislation with which this section would otherwise be inconsistent does not apply, to the extent necessary to avoid the inconsistency.

New section 114H - Defences and immunities

New section 114H(1)(a) provides that a defendant nominated under section 114D or appointed under section 114E may rely on any defence or immunity the unincorporated body would have been able to rely on, had the unincorporated body been incorporated and capable of being sued.

New section 114H(1)(b) provides that a defendant nominated under section 114D or appointed under section 114E is entitled to be indemnified under any policy of insurance in relation to the claim that the unincorporated body would have been indemnified under. New section 114H(2) provides that nothing in 114H(1)(b) excludes an unincorporated body from any coverage or indemnity of the unincorporated body under such an insurance policy. This is intended to ensure that a right of the unincorporated body to be indemnified under an insurance policy is also available to the nominated or appointed defendant, without affecting the unincorporated body's coverage.

Clause 5 Dictionary, note 2

This clause amends the *Civil Law (Wrongs) Act 2002* dictionary to note that the *Legislation Act 2001* defines 'body' and 'child'.

Clause 6 Dictionary, new definitions

This clause inserts new definitions in the *Civil Law (Wrongs) Act 2002* dictionary.