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

Fact sheet 2: Vicarious liability for child abuse

# Who should read this?

* All institutions that exercise care, supervision or authority over 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.
* The information in this fact sheet is not legal advice and is provided as information to assist institutions in understanding a new 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 has a Vicarious Liability provision been introduced?

* 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, and creates the new statutory duty of care and provides for vicarious liability of institutions.
* Under the amendments, institutions will be liable for the deliberate criminal act of a person associated with the institution in certain circumstances.
* RCIRCSA found that the problem for survivors of abuse who sue institutions is that their claims are generally founded upon the deliberate criminal acts of the perpetrator. There is no fault by the institution for the perpetrators’ conduct. Without this fault, Australian courts have been reluctant to hold an institution liable to compensate survivors of child sexual abuse for deliberate criminal acts by members or employees of the institution.

# What is Vicarious Liability?

* Vicarious liability is a situation where one party is held responsible for unlawful actions of a third party.
* New section 17G to be added to PILDA imposes vicarious liability on institutions for child abuse by an employee, or an individual who performs a function / role that is similar to an employee in specific circumstances.
* This means that an institution can be held legally responsible for abuse committed by an individual if the institution placed that person in a situation that enabled the abuse to occur (that is, the abuse occurs in the institution or in connection with the institution and the care of children by the institution).

# When will the Vicarious Liability provision commence?

* It is proposed that the new vicarious liability provision 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 is to provide institutions time to assess and make any changes to operations, policies and procedures that ensure best practice outcomes for children in their care before the vicarious liability provision commences.

# When does Vicarious Liability arise?

* Vicarious liability will apply to institutions for child abuse carried out by an employee, or an individual who performs a function / role that is similar to an employee.
* An institution can be held vicariously liable for child abuse if:
	+ the employee or individual akin to an employee performs a role which allows for child abuse to occur; and
	+ the employee or an individual akin to an employee takes advantage of this to commit child abuse.
* The extension to individuals who are ‘akin to employees’ means that institutions may be liable for individuals who are not strictly employees.
* To determine if the individual is in a position that allows the abuse, a court will 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.

# Who is ‘an individual akin to an employee’?

* An ‘individual akin to employee’ is defined in the legislation as an individual who:
	+ carries out an activity (whether a series of activities or a single act) that enables the institution to perform its functions, and
	+ carries out that activity with the intention to benefit the institution.
* The legislation makes it clear that an ‘individual akin to employee’ will not include foster carers conducting activities for the purpose of a placement arrangement under section 78 of the *Care and Protection of Children Act 2007* in respect of a child. This is consistent with the application of vicarious liability in other jurisdictions.
* An ‘individual akin to employee’ will also not include an individual carrying out activities under a contract for services 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. This is consistent with other jurisdictions.

# How will the Statutory Duty of Care and Vicarious Liability provisions interact? Why is it necessary to have both provisions?

* Fact Sheet 1 provides information on the new statutory duty of care.
* There are separate causes of action with the statutory duty of care and vicarious liability. This reflects the existing position under the common law for duties of care and vicarious liability. A victim is able to decide which cause of action to pursue for abuse within an institution and may make a claim under either or both causes of action, but cannot be compensated twice for the same abuse.

# What is ‘child abuse’ for the new vicarious liability provisions? 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?

* No. The introduction of vicarious liability on institutions for the conduct of employees will apply prospectively only.
* This means that it applies only to abuse by employees or individuals akin to an employee that occurs after the provisions commence.

# What do you need to do?

* Institutions should make appropriate assessments based on the nature of their institutions and develop internal policies or protocols to minimise the risks of child abuse occurring in the institution. This includes making employees and individuals associated with the institution aware of their responsibilities.
* Existing regulatory measures may assist to guide in preventing, and responding to, child abuse. This includes measures such as the Child Safe Standards, the reportable conduct scheme, and the Working with Children Clearance Scheme.