Parliamentary Committees



Civil Liability and Other Legislation Amendment Bill 2018

Report No. 29, 56th Parliament
Legal Affairs and Community Safety Committee
February 2019

Legal Affairs and Community Safety Committee

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Acknowledgements

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Abbreviations

ALA	Australian Lawyers Alliance
Bill	Civil Liability and Other Legislation Amendment Bill 2018
CL Act	*Civil Liability Act 2003*
CLAN	Care Leavers Australasia Network
CL(ICA)A Bill	Civil Liability (Institutional Child Abuse) Amendment Bill 2018
committee	Legal Affairs and Community Safety Committee
CP Act	*Civil Proceedings Act 2011*
department	Department of Justice and Attorney-General
ISQ	Independent Schools Queensland
Issues Paper	Department of Justice and Attorney-General, *The civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse: Redress and Civil Litigation Report – understanding the Queensland context*, 2016
LID Act (Vic)	*Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic)
LSA	*Legislative Standards Act 1992*
NGO	Non-government organisation
QCEC	Queensland Catholic Education Commission
QLS	Queensland Law Society
Redress and Civil Litigation Report	Australian Government, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report,* 2015
Royal Commission	Royal Commission into Institutional Responses to Child Sexual Abuse

Chair's foreword

This report presents a summary of the Legal Affairs and Community Safety Committee's examination of the Civil Liability and Other Legislation Amendment Bill 2018.

The committee's task was to consider the policy to be achieved by the legislation and the application of fundamental legislative principles – that is, to consider whether the Bill has sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

The amendments proposed by the Bill continue actions already begun in Queensland, in acknowledging the impact of institutional child sexual abuse, and providing fair access and outcomes to survivors.

Queensland, unlike many jurisdictions of Australia, had a redress scheme for survivors of institutional child abuse, which commenced in May 2007, following the Forde Inquiry (the Commission of Inquiry into Abuse of Children in Queensland Institutions). The Queensland Government established the $100 million Redress Scheme to acknowledge the abuse or neglect suffered by children placed in Queensland institutions by providing ex-gratia payments to those who were harmed.

More recently, the Palaszczuk Government delivered on its commitment to participate in the National Redress Scheme as proposed by the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission), with Queensland's participation commencing on 19 November 2018.

There have also been further reforms in response to the Royal Commission's recommendations in its Redress and Civil Litigation Report. In 2017, the government removed the limitation period for commencing an action for civil damages in relation to child sexual abuse, to enable people who have experienced child sexual abuse to bring actions for personal injury damages, despite the amount of time which has passed since the abuse occurred.

The Civil Liability and Other Legislation Amendment Bill 2018 seeks to improve the capacity of the justice system to provide fair access and outcomes to people who have experienced child sexual abuse and who wish to pursue a claim for civil damages for personal injury arising from the abuse.

On behalf of the committee, I thank those individuals and organisations who made written submissions on the Bill and provided further evidence to the committee, and acknowledge the difficult and personal experiences which were shared. I also thank our Parliamentary Service staff and the Department of Justice and Attorney-General who assisted the committee at its public briefing.

I commend this report to the House.

Peter Russo MP

Chair

Recommendations

The committee recommends the Civil Liability and Other Legislation Amendment Bill 2018 be passed.

1 Introduction

1.1 Role of the committee

The Legal Affairs and Community Safety Committee (committee) is a portfolio committee of the Legislative Assembly which commenced on 15 February 2018 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.[1]

The committee's primary areas of responsibility include:

- Justice and Attorney-General, and
- Police, Fire and Emergency Services, and Corrective Services.

Section 93(1) of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles, and
- for subordinate legislation – its lawfulness.

The Civil Liability and Other Legislation Amendment Bill 2018 (Bill) was introduced into the Legislative Assembly and referred to the committee on 15 November 2018. The committee is to report to the Legislative Assembly by 28 February 2019.

1.2 Inquiry process

On 21 November 2018, the committee invited stakeholders and subscribers to make written submissions on the Bill. Eleven submissions were received.

The committee received a public briefing about the Bill from the Department of Justice and Attorney-General (the department) on 3 December 2018. A transcript is published on the committee's web page; see Appendix B for a list of officials in attendance.

The committee received written advice from the department in response to matters raised in submissions.

The committee held a public hearing on 11 February 2019 (see Appendix C for a list of witnesses).

The submissions, correspondence from the department and transcripts of the briefing and hearing are available on the committee's webpage.

1.3 Policy objectives of the Bill

The main objective of the Bill is to amend the *Civil Liability Act 2003* (CL Act) in response to recommendations 91 to 94 of the *Redress and Civil Litigation Report* of the Royal Commission into Institutional Responses to Child Sexual Abuse (the Redress and Civil Litigation Report).[2]

This includes amendments to the CL Act to:

- require an institution to prove it took reasonable steps to prevent the sexual abuse of a child in its care by a person associated with the institution to avoid legal liability for the abuse (reverse onus)
- introduce a framework for the nomination of a 'proper defendant' by an unincorporated institution to meet any liability incurred by the institution

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1 *Parliament of Queensland Act 2001*, s 88 and Standing Order 194.

2 Australian Government, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report,* 2015 (Redress and Civil Litigation Report).

The Bill also proposes amendment to s 64 of the *Civil Proceedings Act 2011* (CP Act) to ensure that a person under a legal incapacity may recover the cost of trustee management fees in the award of damages for wrongful death of a member of the person's family.

1.4 Government consultation on the Bill

The explanatory notes state consultation on the Bill included a publicly available issues paper, and targeted stakeholder consultation on draft provisions of the Bill.[3]

The government issues paper *The civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse: Redress and Civil Litigation Report – understanding the Queensland context* (Issues Paper) was released by the department on 16 August 2016, and canvassed issues related to the reverse onus and proper defendant recommendations of the Redress and Civil Litigation Report (recommendations 91 to 94).[4] Twenty-three submissions were received from stakeholders 'including private citizens, a small number of legal professionals, a number of support and advocacy providers, a few religious organisations and private education institutions'.[5] The department advised the committee that the submissions had not been published.[6]

A consultation draft of the CL Act amendments in the Bill was provided to a range of stakeholders including government, legal, church, educational, victims' representatives and community organisations. Feedback was incorporated in the finalisation of the drafting of the Bill.[7]

The department advised that draft Bill provisions which would displace the operation of the *Corporations Act 2001* (Cth), were provided to the Legislative and Governance Forum for Corporations.[8]

1.5 Should the Bill be passed?

Standing Order 132(1) requires the committee to determine whether or not to recommend that the Bill be passed.

Recommendation 1

The committee recommends the Civil Liability and Other Legislation Amendment Bill 2018 be passed.

3 Explanatory notes, p 5.

4 The issues paper can be accessed on the Tabled Papers database on the Queensland Parliament website: https://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2016/5516T1233.pdf

5 Hon Yvette D'Ath MP, Attorney-General and Minister for Justice and Minister for Training and Skills, Queensland Parliament, Record of Proceedings, 8 November 2016, p 4265.

6 Department of Justice and Attorney-General (DJAG), correspondence dated 14 January 2019, attachment, p 9.

7 Explanatory notes, p 5.

8 Explanatory notes, p 5.

2 Background to the Bill

This section provides background to the amendments proposed in the Bill.

2.1 Royal Commission Redress and Civil Litigation Report

The Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) was announced on 12 November 2012. The Royal Commission was directed to inquire into and report on 'institutional responses to allegations and incidents of child sexual abuse and related matters'.[9]

Before publishing its final report in December 2017, the Royal Commission released an interim report and three reports focusing on different aspects of its inquiry.

The Redress and Civil Litigation Report was published in 2015. It was informed by consultation conducted through private sessions, public hearings, issues papers, private roundtables, expert consultations and information gained through summons.[10]

The Redress and Civil Litigation Report highlighted the importance of fairness to survivors of institutional child sexual abuse, for equal treatment and access to redress processes, and acknowledged the 'civil litigation systems and past and current redress processes have not provided justice for many survivors.'[11] The report made 99 recommendations including the establishment of a national redress scheme and changes to processes for pursing civil liability claims. These recommendations were included in the Royal Commission's final report which made 409 recommendations.[12]

The Queensland Government passed legislation on 9 November 2016 to retrospectively remove limitation periods that would apply to claims for damages brought by a person where that claim is founded on the personal injury of the person resulting from sexual abuse of the person when the person was a child, and the sexual abuse occurred in an institutional context.[13] Before the amendments, a survivor of child sexual abuse had to commence civil litigation before turning 21 years of age. The changes to legislation mean that a time limit no longer applies, which previously prevented survivors from bringing a civil action regarding institutional child sexual abuse.[14] These amendments responded to recommendations 85 to 86 and 88 of the Royal Commission.

2.2 Other proposed legislation

The Civil Liability (Institutional Child Abuse) Amendment Bill 2018 (CL(ICA)A Bill), introduced on 31 October 2018 by Mr Michael Berkman MP, Member for Maiwar, proposes amendments to respond to recommendations 89 to 94 of the Redress and Civil Litigation Report. The CL(ICA)A Bill is also being considered by the committee. Some submissions to the Bill include reference to the CL(ICA)A Bill. The committee is required to report on the CL(ICA)A Bill by 30 April 2019.

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9 Australian Government, Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, 2017, p 7.

10 Australian Government, Redress and Civil Litigation Report, p 3.

11 Australian Government, Redress and Civil Litigation Report, pp 4-5.

12 Australian Government, Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, 2017.

13 Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill 2016, explanatory notes, p 2.

14 Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill 2016, explanatory notes, pp 2-3.

3 Examination of the Bill

The Bill's main objective is to amend the CL Act in response to recommendations 91 to 94 of the Redress and Civil Litigation Report.[15] These recommendations were proposed to improve the capacity of the justice system to provide fair access and outcomes to survivors of child sexual abuse who wish to pursue a claim for civil damages for personal injury arising from the abuse.[16]

Recommendations 91 to 94 of the Redress and Civil Litigation Report are as follows:

> ***Recommendation 91:*** *Irrespective of whether state and territory parliaments legislate to impose a non-delegable duty upon institutions, state and territory governments should introduce legislation to make institutions liable for institutional child sexual abuse by persons associated with the institution unless the institution proves it took reasonable steps to prevent the abuse. The 'reverse onus' should be imposed on all institutions, including those institutions in respect of which we do not recommend a non-delegable duty be imposed.*
>
> ***Recommendation 92:*** *For the purposes of both the non-delegable duty and the imposition of liability with a reverse onus of proof, the persons associated with the institution should include the institution's officers, office holders, employees, agents, volunteers and contractors. For religious organisations, persons associated with the institution also include religious leaders, officers and personnel of the religious organisation.*
>
> ***Recommendation 93:*** *State and territory governments should ensure that the non-delegable duty and the imposition of liability with a reverse onus of proof apply prospectively and not retrospectively.*
>
> ***Recommendation 94:*** *State and territory governments should introduce legislation to provide that, where a survivor wishes to commence proceedings for damages in respect of institutional child sexual abuse where the institution is alleged to be an institution with which a property trust is associated, then unless the institution nominates a proper defendant to sue that has sufficient assets to meet any liability arising from the proceedings:*
>
> *a. the property trust is a proper defendant to the litigation*
>
> *b. any liability of the institution with which the property trust is associated that arises from the proceedings can be met from the assets of the trust.*[17]

The majority of provisions in the Bill which propose amendments to the CL Act would take effect retrospectively.[18] This excludes the introduction of a duty of institutions to prevent child sexual abuse, which would only apply after commencement.

This section discusses the key provisions of the Bill, and issues and views raised during the committee's examination of the Bill.

3.1 Institutional child sexual abuse and the duty of institutions

An act of sexual abuse against a child in an institutional setting, in addition to raising a number of potential criminal offences, may also be subject to civil litigation. Civil litigation can provide an avenue for a survivor of child sexual abuse, to receive an amount of damages (such as damages for personal injury) from the institution, by order of a court.

A survivor of institutional child sexual abuse can bring a claim for damages against the institution or individual perpetrator(s) in a court, through civil actions such as battery (a type of intentional or

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15 Explanatory notes, p 1.

16 Explanatory notes, p 1; Australian Government, Redress and Civil Litigation Report, p 4.

17 Australian Government, Redress and Civil Litigation Report, pp 57, 59.

18 Clause 5, s 86.

reckless physical contact which results in harm to a person) and negligence (where a breach of duty to a person results in harm to the person).[19]

If a survivor brings a claim for damages, the survivor must prove a number of elements to the court, including that the abuse occurred and resulted in harm.[20] A survivor may bring a claim for negligence, based on an institution's breach of duty of care owed, if the survivor can prove that the institution should have taken reasonable care to prevent the abuse but did not.[21]

The Royal Commission noted, however, that there has been a reluctance by courts to determine that an institution has been liable for deliberate criminal acts of its members or employees (such as through the tort of battery), in the absence of negligence on behalf of the institution.[22] Similarly, the Royal Commission noted the difficulties in bringing a successful action for negligence for institutional child sexual abuse claims, and the uncertainty of existing case law.[23] The concept of holding an institution accountable through vicarious liability was discussed:

> *Under Australian law, a person (the employer) will be vicariously liable for another's tort if:*
>
> - *the person who committed the tort was an 'employee' of the employer (and not, for example, an independent contractor)*
> - *the tort was committed in the 'course of employment'.*
>
> *Both requirements can create difficulties for survivors of child sexual abuse.* [24]

The Redress and Civil Litigation report advised that for the purposes of vicarious liability, employees do not include 'independent contractors' and are unlikely to include volunteers. It further noted it is difficult to identify what is, and what is not, within 'the course of employment'.[25]

The Royal Commission reported its concern regarding the effectiveness of civil litigation systems across Australia,[26] and considered when an institution should be held responsible at law, for institutional child sexual abuse.[27] The Royal Commission recommended that legislation be introduced by state and territory governments to make institutions liable for institutional child sexual abuse by persons associated with the institution, unless the institution can prove it took reasonable steps to prevent the abuse.[28]

3.1.1 Duty of institutions and the reverse onus of proof

There is currently no statutory duty of care of institutions, regarding child sexual abuse. This means a survivor must go through the process of proving to a court that a duty of care (to prevent child sexual abuse) was owed to the person by the institution.

The Bill proposes to introduce a statutory duty of institutions to prevent child sexual abuse. It would require an institution to take all reasonable steps to prevent the sexual abuse of a child by a person

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19 Australian Government, Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper 5: Civil Litigation*, December 2013, p 1.

20 Australian Government, Redress and Civil Litigation Report, p 460.

21 Australian Government, Redress and Civil Litigation Report, p 460.

22 Australian Government, Redress and Civil Litigation Report, p 460.

23 Australian Government, Redress and Civil Litigation Report, p 460.

24 Australian Government, Redress and Civil Litigation Report, p 464.

25 Australian Government, Redress and Civil Litigation Report, p 464.

26 Australian Government, Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper 5: Civil Litigation*, December 2013, p 1.

27 Australian Government, Redress and Civil Litigation Report, p 474.

28 Australian Government, Redress and Civil Litigation Report, p 495 (recommendation 91).

associated with the institution, while the child is under the care, supervision, control or authority of the institution.

Usually in common law, if a duty of care is owed to a person, the person bringing the claim must prove that the duty was breached. The Bill proposes to reverse this responsibility and instead would require that an institution prove that it did not breach its duty (to prevent child sexual abuse). This type of reversal can be referred to as a 'reverse onus' of proof. The Bill would allow an institution to prove that it did not breach its duty, if it can establish that it took all reasonable steps to prevent the abuse.

The Bill proposes that the duty of institutions would only apply after commencement of provisions, and would not apply to any acts of child sexual abuse which had already occurred. The existing avenues for bringing a civil action in common law would remain.

The amendments in the Bill aim to address the imbalance between a survivor and an institution,[29] by ensuring a survivor does not carry the burden of establishing that an institution was legally responsible for preventing child sexual abuse.[30]

The Royal Commission identified the imbalance between a survivor and institution regarding institutional child sexual abuse claims. It explained:

> *For those who experience child sexual abuse in an institutional context, there is also the possibility of a significant and continuing power imbalance between the survivor, even as an adult, and the institution. Many of the institutions are large and authoritative organisations in the community. While litigation often involves an imbalance in size and resources between the parties, the long-term impacts of child sexual abuse leave many survivors much less able to confront institutions through the legal system and they remain at great risk of re-traumatisation.*[31]

The Royal Commission, in its Redress and Civil Litigation Report, stated that reversing the onus of proof would be reasonable for all institutions, including community-based not-for-profit or volunteer institutions that offer opportunities for children to engage in cultural, social and sporting activities.[32]

> *We are satisfied that institutions should be in a good position to prove the steps they took to prevent abuse. The institution generally should have better access to records and witnesses capable of giving evidence about the institution's behaviour than plaintiffs are likely to have. Reversing the onus of proof has the potential to encourage higher standards of governance and risk mitigation in institutions, both through their own efforts and through their compliance with the requirements of their insurers.*[33]

The Bill includes a list of relevant factors which could be taken into consideration when determining whether an institution has breached its duty to prevent child sexual abuse.[34] Factors listed include the nature of the institution; the resources that were reasonably available to the institution; the relationship between the institution and the child; and the position in which the institution placed the person in relation to the child.[35] This list is inclusive, and further relevant factors may be identified, based on the circumstances of each case.[36]

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29 Leanne Robertson, DJAG, public briefing transcript, Brisbane, 3 December 2018, p 4.

30 Explanatory notes, p 3.

31 Australian Government, Redress and Civil Litigation Report, p 91.

32 Australian Government, Redress and Civil Litigation Report, p 56.

33 Australian Government, Redress and Civil Litigation Report, p 494.

34 Clause 4, s 33E.

35 Clause 4, s 33E.

36 Imelda Bradley, DJAG, public briefing transcript, Brisbane, 3 December 2018, p 3.

The department noted the amendments which introduce a duty of institutions to prevent child sexual abuse, may result in an increase of court cases involving the state, as they may make it easier for a person to make an application for a civil litigation claim against an institution.[37]

> *It is simply because the royal commission itself identified the imbalance between an applicant, a claimant, and the institution. As a matter of normal general principles, it is on the claimant to satisfy the particular criteria that there has been a breach. This reverses that. One would expect that, again, given the royal commission's incredible work program that had to lead to that recommendation, it was of the view that it would make it easier for applicants to bring those applications.*[38]

3.1.1.1 Stakeholder views and department response

Application of provisions to future acts only

Generally, changes to legislation only apply to events which occur after the commencement of new provisions (also referred to as 'prospective application').

Consistent with this approach, the Bill's introduction of a duty of institutions to prevent child sexual abuse, is proposed to apply only to future acts. This means if a person is subjected to institutional child sexual abuse before the Bill's proposed changes come into effect, the person will not be able to rely on the new statutory duty of care (however, they may continue to rely on the existing process of bringing a claim for battery or negligence, as discussed above).

A number of stakeholders suggested the duty of institutions should instead apply to acts which have already occurred (also referred to as 'retrospective application'). This would mean that a survivor of institutional child sexual abuse where the abuse happened before commencement of new legislation, would be able to rely on the statutory duty of care of institutions proposed by the Bill, and would not be required to prove that the institution owed the person a duty of care to prevent child sexual abuse. It would also mean that an institution would be responsible for proving it took all reasonable steps to prevent the sexual abuse of a child which occurred before the provisions took effect.

The ALA expressed concern that the reverse onus provisions, 'may be satisfied by as little as a denial of knowledge or having an unenforced policy'.[39] It was the ALA's view that the duty should apply retrospectively, and that prospective application would mean 'from the day that this bill was assented to and became law any survivor would have more narrow remedies'.[40]

Michelle James, Spokesperson for Childhood Sexual Abuse Claims, ALA, further explained:

> *You are right when you say that as a general proposition laws should not be retrospective because everybody has a right to get their affairs in order with the laws as they exist at a particular time, but what our submission is suggesting is that the laws that brought about those trustee arrangements, particularly for the Catholic Church in Queensland, were not looking to set the law up in a particular way so as to have trustees found not liable for these claims. In other words, it is almost a side effect, if I can use that sort of colloquial terminology. Because of that and because those laws setting up those quite complex trustee arrangements that exist in Queensland and other states were designed merely to create trustee type arrangements, we say for that reason and because this is almost an unintended consequence it is quite proper in those circumstances that that part of the legislation be retrospective. Were it not to be, there would be a gross injustice for many of the survivors in Queensland.*

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37 Explanatory notes, p 2; Leanne Robertson, DJAG, public briefing transcript, Brisbane, 3 December 2018, p 4.

38 Leanne Robertson, DJAG, public briefing transcript, Brisbane, 3 December 2018, p 4.

39 Australian Lawyers Alliance (ALA), submission 002, p 11.

40 Michelle James, Spokesperson for Childhood Sexual Abuse Claims, ALA, public hearing transcript, Brisbane, 11 February 2019, p 4.

The Care Leavers Australasia Network (CLAN) similarly submitted that the duty of institutions should be retrospective, noting that was the approach taken in Western Australia.[41] Mr James Luthy, committee member of CLAN, stated:

> *I think if it applies retrospectively what it means is that it is able to give closure to a lot of people, that they were believed. There are still people who do not believe the findings of the royal commission or the Senate inquiry. There were government departments that came and inspected homes but never did anything. They were supposed to inspect but they really did not. They knew what was happening but they did not do anything terribly much. Again, that came out at the royal commission.*
>
> *The fact is that it is going to be an acknowledgement that, yes, the representatives of the people, the electors, are acknowledging the fact that these things happened. It also gives the possibility to take legal action. That is quite important because, as I said before, there are some people who do not have the capacity to even pay funeral expenses. I think people should be given the right to do some of these things. They did not ask to be treated in this way. It needs to be acknowledged, for the complete history of the nation, the state, whatever, that the truth does come out and that there is an acknowledgement. The fact is that it is a bit like the banks. The churches have hidden behind their statutes and their legal manoeuvring for way too long and they need to be held more accountable.*[42]

The department advised that the prospective effect of the proposed duty of institutions was recommended by the Royal Commission in its Redress and Civil Litigation Report, and that similar legislation in New South Wales and Victoria also apply prospectively.[43]

The Queensland Catholic Education Commission (QCEC) supported the prospective application, noting:

> *…institutions that are covered by the Bill, including [Catholic School Authorities], will need to be made aware of the changes and consider the actions they should take to ensure systems and practices in place continue to meet necessary standards including in relation to the revised scope of their obligations. This will include the keeping of detailed records of steps taken to prevent abuse, such as records of training provided to staff, volunteers and contractors, regular policy reviews, investigations of inappropriate conduct, volunteers and employment screening and reference checking.* [44]

The Queensland Law Society (QLS), while supporting reform to provide appropriate assistance to survivors of child abuse, did not support the amendments to introduce the duty of institutions which includes the reverse the onus of proof, stating:

> *… QLS is not able to support reversing the onus of proof. We submit that doing so would undermine a fundamental tenant of our legal system and we consider that other measures, for example, the reforms to establish a statutory duty of care and to assist in the nomination of a proper defendant will better achieve the policy intent without causing harm to established legal process which seeks to provide a fair and balanced system.*[45]

Mr Trent Johnson, Member of the Accident Compensation/Tort Law Committee of the QLS, further explained:

> *if we introduce the reverse onus of proof provisions the obligation is still upon the survivor to prove that the abuse occurred. They are not off scot-free. They cannot simply say, 'This*

41 Submission 001, p 3.

42 Public hearing transcript, Brisbane, 11 February 2019, p 3.

43 DJAG, correspondence dated 14 January 2019, attachment, p 2.

44 Queensland Catholic Education Commission (QCEC), submission 003, p 2.

45 Queensland Law Society (QLS), submission 006, p 2.

> *happened,' and that is it. The onus then shifts to the defendant to say, 'Hang on a tick. We took all reasonable measures.*[46]

The QLS noted that if the proposed duty of institutions was implemented, then it supported the intention that the provisions would apply prospectively only.[47]

All reasonable steps

Some submitters requested further clarity regarding what may constitute 'all reasonable steps' when determining whether an institution has breached its duty to prevent child sexual abuse.[48]

Bravehearts stated:

> *Defining 'reasonable steps' would provide clarification around expectations of organisational responsibility… Although consideration does need to be given to the wide variety of organisations (size, structure and resourcing), Bravehearts does believe that there are basic minimum standards that would be applicable to all organisations, for example: that the interests, safety and protection of children and young people is paramount; that appropriate child protection policies and procedures are in place; that regular risk management audits are conducted; that a reporting/complaints procedure is transparent and in place; and that staff are regularly trained in child protection issues.*[49]

Knowmore, an Australia-wide community legal centre established to assist people to engage with the Royal Commission, supported the inclusive list of relevant factors provided in the Bill,[50] stating that a narrower definition in legislation would be 'unlikely to be helpful, given that the proposed reform will apply to all institutions (and therefore a wide variety of circumstances)'.[51]

The QLS recommended the degree of control the institution has (or could reasonably be expected to have) over the person in the place of the abuse, should be included in the list of relevant factors for determining whether an institution breached its duty of care.[52]

Independent Schools Queensland (ISQ) suggested that to implement the proposed new duty of institutions, it would 'require supporting documentation of expected actions to assist schools in taking "all reasonable steps" to prevent abuse or harm from occurring.'[53]

The department advised 'there is no one size fits all for "all reasonable steps"', and that institutions would 'need to consider the scope of their duty and adopt and implement practices, policies and procedures to comply with their obligations'.[54]

> *What constitutes 'reasonable steps' will vary from situation to situation. It is likely that there will be some impact on institutions as they seek to address and mitigate the risk and to keep records of what has been done.*[55]

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46 Trent Johnson, Member, Accident Compensation/Tort Law Committee, QLS, public hearing transcript, Brisbane, 11 February 2019, p 10.

47 QLS, submission 006, p 2.

48 See, for example, submissions 003, 005, 011.

49 Submission 011, p 2.

50 Clause 4, s 33E(3).

51 Submission 009, pp 18-19.

52 Clause 4, s 33E.

53 Submission 005, p 1.

54 DJAG, correspondence dated 14 January 2019, attachment, p 4.

55 DJAG, correspondence dated 14 January 2019, attachment, p 4.

Effect on community organisations

The committee heard concern from stakeholders regarding the proposed duty of institutions and how it would affect the management and sustainability of community organisations. Queensland Cricket expressed concern that the duty of institutions 'may result in an additional burden being placed on community cricket clubs, many of which are run by volunteers utilising basic administrative systems and resources'.[56]

The Royal Commission, in its Redress and Civil Litigation Report, provided the following in regard to volunteers:

> *We do not consider that including volunteers will unreasonably discourage people from volunteering. The liability is imposed on the institution and not the volunteer. We consider it appropriate that institutions that operate the facilities or services we have identified be liable for abuse committed while a child is under the care, supervision or control of the institution, regardless of whether it is committed by a volunteer or by a person with a different association with the institution. Institutions should take all necessary steps to prevent abuse that might arise from the involvement of volunteers in the institution's care, supervision or control of children, just as they should take those steps in relation to employees and others.*[57]

3.1.2 Definition of 'institution'

The Bill defines 'institution', to include an entity that provides an activity, program or service of a kind that gives an opportunity for a person to have contact with a child.[58] It also includes a public sector unit (such as a government department or public service office).[59]

The department advised this definition is consistent with the recommendations of the Royal Commission, is inclusive, and 'is not intended to limit persons who would be included in the ordinary meaning of the phrase.'[60]

The definition is intended to capture institutions which were before the Royal Commission, including religious associations, sporting clubs and scouting organisations.[61]

3.1.2.1 Stakeholder views

The structure of the definition of 'institution' as a non-exhaustive list, was supported by knowmore.[62]

ISQ noted the broad application of the definition of 'institution' and requested further clarification on the impact of provisions for activities which are offered at a school, utilising school facilities but are not run directly by the school (such as holiday cooking classes and after school care).[63]

The department advised that liability in such a case would depend on the facts of the case, and to attach liability the threshold provided in the Bill would need to be met, 'that the child or claimant was

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56 Queensland Cricket, submission 004, p 2.

57 Australian Government, Redress and Civil Litigation Report, p 493.

58 Clause 4, s 33A.

59 *Acts Interpretation Act 1954*, sch 1.

60 Leanne Robertson, DJAG, public briefing transcript, Brisbane, 3 December 2018, p 2; Imelda Bradley, DJAG, public briefing transcript, Brisbane, 3 December 2018, p 3.

61 Leanne Robertson, DJAG, public briefing transcript, Brisbane, 3 December 2018, p 3; Australian Government, Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, 2017.

62 Submission 009, p 16.

63 Submission 005, p 2.

under the care, supervision, control or authority of the institution when the abuse occurred and that the perpetrator was a person associated with the institution'.[64]

3.1.3 Associated persons

The Bill provides for when a person is 'associated with' an institution. The definition includes a list of groups including officers, employees, members, volunteers, contractors of institutions, and religious leaders of organisations.[65] These types of relationships were identified by the Royal Commission as being associated with institutions.[66]

Under the Bill, a person not be considered to be associated with an institution purely because the person is associated with an entity that is funded or regulated by the institution.[67] This could include for example, organisations which receive funding by the Queensland Government, which do not provide services relating to the care of a child. The definition also specifies that it does not apply only because a person is in a foster care arrangement.[68]

The Bill also allows for regulation to prescribe that a person is associated with an institution. [69]

3.1.3.1 Stakeholder views and department response

The QLS noted the broad application of provisions regarding when a person is considered to be associated with an institution.[70] Referring to the ALA's submission to the inquiry, Trent Johnson, Member of the Accident Compensation/Tort Law Committee of the QLS explained:

> *There was the example in there of a school that hires a pool complex for swimming lessons or for a school swimming carnival and the school sends along one of its employees or a representative of the school and that person perpetrates sexual abuse upon one of the students. Strictly speaking, if we have a wide definition of 'associated with', the entity responsible for running the pool, although having done nothing other than renting or leasing the pool or hiring the pool to the school, could be an associated entity responsible for the abuse. I think that is an unintended consequence of the drafting of the legislation. Obviously, we will want to ensure that those responsible for abuse and those in an associated position with them are responsible for that abuse so that victims have an entity to pursue. We need to ensure that those unintended and unrelated entities are not included in that; otherwise, we will have unforeseen litigation going on against innocent parties.*[71]

The QCEC noted that the definition would include 'all individuals engaging in activities in a school, whether paid or unpaid and whether employed by a [Catholic School Authority] or not'. This would mean that the proposed new provisions could apply to volunteers and contractors in schools.[72] The QCEC raised concern that provisions could impact on the engagement of volunteers and parents, and stated: 'It would be an unfortunate outcome of the proposed legislation if this important aspect of school life was diminished due to liability and insurance concerns'.[73]

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64 DJAG, correspondence dated 14 January 2019, attachment, p 5.

65 Clause 4, s 33C(1).

66 Explanatory notes, p 4; Australian Government, Redress and Civil Litigation Report, pp 56-57.

67 Clause 4, s 33C(2)-(3).

68 Clause 4, s 33C(1)(d).

69 Clause 4, s 33C(1)(d).

70 QLS, submission 006, p 1; *Legislative Standards Act 1992,* s 4(5).

71 Trent Johnson, Member, Accident Compensation/Tort Law Committee, QLS, public hearing transcript, Brisbane, 11 February 2019, p 10.

72 Submission 003, p 2.

73 QCEC, submission 003, p 2.

The Australian Lawyers Alliance (ALA) recommended the Bill adopt provisions 6E (introducing a duty of organisations to prevent child abuse) and 6G (regarding vicarious liability of organisations) of the *Civil Liability Act 2002* (NSW).[74] Section 6E reads:

> *In this Division, an individual associated with an organisation without limitation includes an individual who is an office holder, officer, employee, owner, volunteer, or contractor of the organisation and also includes the following: (a) if the organisation is a religious organisation – a religious leader (such as a priest or a minister) or member of the personnel of the organisation…*[75]

Similarly, submitter number 007, a survivor of institutional child sexual abuse and advocate for law reform, suggested the definition of 'associated persons' is too narrow, and recommended the definition be amended to include 'without limitation', similar to the definition in the New South Wales legislation. The department advised the committee it would further consider these suggestions 'to the extent of additional categories in NSW section 6E'.[76]

Knowmore recommended the definition of 'associated persons' should provide specifically for when abuse is perpetrated by children under the care, control or supervision of institutions upon other children.[77] The department advised that the definition is 'meant to be read inclusively and without limiting people who may be associated with an institution in the ordinary meaning of the term'.[78]

3.2 Proper defendant

The Royal Commission reported difficulties survivors of institutional child abuse have faced in identifying a proper defendant against whom to commence civil litigation. These included the financial capacity of a perpetrator, if a perpetrator is deceased, an absence of an incorporated body for institutions, and the time between the abuse occurring and the survivor wishing to commence civil litigation. [79]

Under common law, unincorporated associations are not treated as having legal personality and so cannot sue or be sued.[80] Although they can vary in structure and characteristics, examples of unincorporated associations can include religious groups and sporting or other special interest clubs.[81]

The Royal Commission acknowledged issues raised by survivors when commencing litigation against unincorporated bodies, or other bodies where the assets are held in a trust, and considered that governments should address these issues.[82] The Royal Commission recommended state and territory governments introduce legislation to allow for a property trust of an institution to be a proper defendant to litigation, and allow for liability of an institution arising from proceedings to be met from the assets of the institution or institution's trust.[83]

The Bill proposes amendments to the CL Act to assist in identifying a 'proper defendant' to sue in circumstances where an entity is unincorporated, or where there is a sufficient link between 'the

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74 ALA, submission 002, p 16.

75 *Civil Liability Act 2003* (NSW), s 6E(1); name suppressed, submission 007, p 32.

76 DJAG, correspondence dated 14 January 2019, attachment, p 3.

77 Submission 009, p 18.

78 DJAG, correspondence dated 14 January 2019, attachment, p 10.

79 Australian Government, Redress and Civil Litigation Report, p 496.

80 See *Williams v Hursey* [1959] HCA 51 (16 September 1959) [20]-[23]; (1959) 103 CLR 30, 53–5 (Dixon CJ).

81 Australian Government, Redress and Civil Litigation Report, p 496.

82 Australian Government, Redress and Civil Litigation Report, p 509; DJAG, correspondence dated 28 November 2018, p 2.

83 Australian Government, Redress and Civil Litigation Report, p 509.

alleged damage and a property trust associated with the defendant that has sufficient assets to meet any liability arising from proceedings'.[84]

The department advised:

> *The proper defendant amendments are intended to overcome difficulties claimants may face with identifying a proper defendant to sue and establishing a sufficient link between the alleged damage and a property trust associated with the defendant that has sufficient assets to meet any liability arising from the proceedings.*[85]

The department stated that these provisions were also drafted to address the 'Ellis case'.[86] The Ellis case (sometimes referred to as the 'Ellis defence') refers to the New South Wales court decision *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis,*[87] in which it was decided that the plaintiff, John Ellis, could not sue the Catholic Archdiocese of Sydney as it was an unincorporated association so could not at common law, sue or be sued. It was also determined that the church's trustees which held the property of the church, could not be sued on behalf of the institution.

The Bill would allow an unincorporated institution to nominate a person (with the person's consent), to be the appropriate defendant for the purposes of an abuse claim against the institution.[88] If no nomination is made or a court is satisfied the nominee does not have sufficient assets to satisfy a liability which may be found, after 120 days a court would be able to make an order that the trustee of an associated trust of the institution is the institution's nominee.[89] The court would be able to make orders to nominate more than one appropriate entity as a nominee.[90]

3.2.1.1 Stakeholder views and department response

The provisions of the Bill which provide for a proper defendant were supported by Bravehearts, which considered the amendments to be justified 'due to the barriers victims face where a proper defendant is not nominated.'[91]

The ALA expressed support for the reforms, particularly in regards to the retrospective application of the nominated defendant provisions.[92] While it considered the amendments to be appropriate to overcome aspects of the 'Ellis defence', however, the ALA remained concerned that a 'failure to extend this to vicarious liability… leaves a significant gap'.[93]

Queensland Cricket raised concerns that the proper defendant amendments may deter people from volunteering for executive positions as this would involve taking on the risk of defending future claims relating to past incidents, and stated:[94]

> *While QC sees the need for victims to be able to identify a proper defendant, it is likely to be difficult for current office holders to be able to provide documented evidence of the actions of previous office holders within their clubs due to the nature of their administrative systems*

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84 DJAG, correspondence dated 28 November 2018, p 2.

85 Leanne Robertson, DJAG, public briefing transcript, Brisbane, 3 December 2018, p 2.

86 Imelda Bradley, DJAG, public briefing transcript, Brisbane, 3 December 2018, p 5.

87 *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* (2007) 70 NSWLR 565.

88 Clause 4, s 33H.

89 Clause 4, ss 33H(5)-(6).

90 Imelda Bradley, DJAG, public briefing transcript, Brisbane, 3 December 2018, p 5.

91 Submission 011, p 2.

92 Submission 002, p 6.

93 Submission 002, p 6.

94 Submission 004, pp 2-3.

…

While we support the concept of local clubs being responsible for child safety and needing to have in place appropriate strategies, we ask the Committee to consider protection mechanisms for community sporting clubs to ensure ongoing sustainability, and that the focus of punishment remains squarely on those individuals who commit crimes against children. [95]

In response, the department clarified that a current office holder would not be personally liable for the liability of the former office holder, and would be able to satisfy any liability out of the assets of the institution or the institution's associated trust, if applicable.[96]

3.3 Satisfaction of liability

The Royal Commission reported difficulties arising for survivors when the assets of an institution are held in a manner that makes them unavailable in a civil action, such as assets held in a trust. In its Redress and Civil Litigation Report, the Royal Commission recommended these issues be addressed by state and territory governments. [97]

The Bill introduces a framework which allows an institution to satisfy a liability under a judgement in, or settlement of, an abuse claim, by enabling an institution to use its assets or the assets of an associated trust.[98] An 'associated trust' is defined by the Bill, and can be used to satisfy the liability of an institution or office holder of an institution, if it is an associated trust that the institution uses to carry out its functions or activities.[99]

The department advised that these provisions provide a choice for the institution involved, stating:

If they have the assets, they may choose to take it out of the institutions. They may have many trusts. That would give them the choice of which of the trusts they think is most appropriate in the circumstances to take that judgement from. It leaves that in the hands of the institutions.[100]

3.3.1 Stakeholder views and department response

Stakeholders noted that the provisions regarding associated trusts, allow but do not require, incorporated institutions to satisfy liability through its assets or an associated trust.[101]

CLAN recommended that the provisions regarding liability of associated trusts, should apply to incorporated as well as unincorporated institutions.[102] The department stated the provisions allowing an unincorporated institution to nominate an appropriate defendant are necessary for unincorporated institutions only, as unincorporated institutions do not have legal personality and so cannot be sued.[103] It was noted that corresponding legislation in New South Wales, Victoria and the Australian Capital Territory, also only apply to unincorporated institutions. [104]

95 Submission 004, pp 2-3.

96 DJAG, correspondence dated 14 January 2019, attachment, p 4.

97 Australian Government, Redress and Civil Litigation Report, p 509.

98 Clause 4, s 33B.

99 Clause 4, ss 33B, 33J(2), 33L(2).

100 Imelda Bradley, DJAG, public briefing transcript, Brisbane, 3 December 2018, p 5.

101 QLS, submission 006, p 5; name suppressed, submission 007, p 30.

102 Submission 001, pp 3-4; public hearing transcript, Brisbane, 11 February 2019, p 2.

103 DJAG, correspondence dated 14 January 2019, attachment, pp 2-3.

104 DJAG, correspondence dated 14 January 2019, attachment, pp 2-3.

The department further advised that under the Bill, an institution would be able to satisfy liability out of the assets of the institution or the assets of an associated trust, regardless of whether the institution is incorporated or unincorporated.[105]

The QLS submitted that the Bill's proposals regarding associated trusts extend beyond the recommendations of the Royal Commission in its Redress and Civil Litigation Report.[106] The QLS suggested the definition of 'associated trust' in the Bill is broader than the intent of the Royal Commission, as it is not limited to statutory property trusts.[107] The QLS considered that the Bill's provisions would allow for a trust which is held for a different charitable purpose or a more specific charitable purpose than a general trust, to be used to satisfy liability. It was stated that this may lead to unintended consequences such as a reduction in generosity of donors of substantial gifts to specific charitable purposes and 'creative trust drafting for asset protection'.[108] Mr Andrew Lind, Chair of the Not for Profit Law Committee of the Queensland Law Society explained:

> *By way of example, a generous donor in a regional town leaves a very significant gift of real property to a charitable institution that might exist for the advancement of religion or the advancement of education, for example, to be held on trust by that institution for public benevolent relief, a different charitable purpose. Under the current drafting of the bill, if abuse occurred in the religious or educational activities of the institution in a major capital city, the assets in that regional town held on trust for a very distinct charitable purpose, which those assets were impressed with at the time the donor gave the gift—that is, for the relief of poverty and benevolent relief in that regional town—would be roped in and be available to meet the damages award.*[109]

To address this issue, the QLS recommended the definition of 'associated trust' be narrowed to capture only trusts of which the charitable purposes include or are the same as the general charitable purposes of the institution.[110] It was suggested that this would prove a 'balance between appropriate compensation for survivors of child sexual abuse and the honouring and preservation of the intention of donors and continuing to encourage generosity towards public charitable purpose'.[111]

The department advised that a narrower definition of 'associated trust' was not supported by stakeholders:

> *Generally, stakeholders did not support restricting the definition of associated trust in this way due to a concern about narrowing the survivor's access to the institution's assets. There was a sense that institutions could be expected to be mindful of their diverse responsibilities in deciding which trust assets, if any, to access.*
>
> *Other jurisdictions either do not limit the use of associated trusts or limit access to the assets of an associated trust that the institution uses to carry out its functions or activities' (see the definition of 'associated trust' in the Legal Identity of Defendants (Organisational Child Abuse) Act 2018 (Vic)).*[112]

The recommendations made by the Royal Commission in its Redress and Civil Litigation Report, were informed by extensive consultation and consideration, with the aim of the recommendations to

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105 Clause 4, s 33J; DJAG, correspondence dated 14 January 2019, attachment, p 3.

106 QLS, submission 006, p 5; Australian Government, Redress and Civil Litigation Report, p 57 (recommendation 94).

107 QLS, submission 006, p 5.

108 QLS, submission 006, p 8.

109 Public hearing transcript, Brisbane, 11 February 2019, p 9.

110 QLS, submission 006, p 8.

111 Andrew Lind, Chair, Not for Profit Law Committee, QLS, p 11.

112 DJAG, correspondence dated 14 January 2019, attachment, p 7.

increase the capacity of the justice system to provide fair access and outcomes to survivors of child sexual abuse wishing to pursue a claim for civil damages for personal injury arising from the abuse. Further, the department advised that:

> *The proper defendant amendments are intended to overcome difficulties claimants may face with identifying a proper defendant to sue and establishing a sufficient link between the alleged damage and a property trust associated with the defendant that has sufficient assets to meet any liability arising from the proceedings.*[113]

Submitters to the inquiry raised concerns that the Bill did not contain provisions to address anti-avoidance of the associated trust amendments.[114] Submitter 007 explained:

> *This bill fails to address the situation where an institution has altered its organisational structure or altered its trust arrangement to intentionally cause the trusts to fall outside the definition of associated trust in order to avoid meeting its proper financial liability for child abuse.*[115]

It was recommended that the Bill include an anti-avoidance provision similar to legislation in New South Wales, which allows a court to appoint as the proper defendant of an institution, a trustee of:

> *a trust that was formerly an associated trust of the organisation if the court considers that the trust ceased to be an associated trust in an attempt to avoid trust property being applied to satisfy any liability that may be incurred in child abuse proceedings and it would be unjust not to appoint the trustees of the trust.*[116]

Similarly, QLS submitted that addition of anti-avoidance provisions could prevent institutions from placing assets out of reach by changing the charitable purposes of associated trusts.[117]

The department noted that other jurisdictions of Australia do not have general anti-avoidance provisions, and that the legislation in New South Wales has 'limited anti-avoidance application'.[118] It advised that some stakeholders expressed concern regarding anti-avoidance provisions, suggesting they would not be effective.[119]

It was also recommended by a submitter that the Bill include a provision similar to s 6N(4) of the *Civil Liability Act 2002* (NSW), which requires an unincorporated institution to disclose to the court, all of its associated trusts, including the financial capacity of the trusts.[120] This could assist a survivor by being able to identify the assets associated with an institution.[121]

The QLS suggested the Bill incorporate a statutory indemnity to provide for '*the reasonable legal costs of the trustee, liability for breach of trust and immunity from suit for acting in breach of trust if a trustee so acts in accordance with the conduct permitted by the Bill (that would otherwise be in breach of trust)'.*[122] The department did not specifically respond to this suggestion.

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113 Leanne Robertson, DJAG, public briefing transcript, Brisbane, 3 December 2018, p 2.

114 See, for example, submissions 006, 007, 009.

115 Name suppressed, submission 007, p 29.

116 *Civil Liability Act 2002* (NSW), s 6N(2)(b).

117 QLS, submission 006, p 8.

118 DJAG, correspondence dated 14 January 2019, attachment, p 8.

119 DJAG, correspondence dated 14 January 2019, attachment, p 7.

120 Name suppressed, submission 007, p 33.

121 Name suppressed, submission 007, p 33.

122 QLS, submission 006, p 9.

3.3.2 Unincorporated and incorporated institutions

The Bill distinguishes between unincorporated and incorporated institutions in regards to liability, and nomination of a proper defendant.[123]

3.3.2.1 Stakeholder views

The QLS raised concerns regarding the application of the Bill's provisions to unincorporated bodies. It explained that the nature of unincorporated bodies means that there is no fixed or defining characteristics of what constitutes 'unincorporated'. This can then lead to uncertainty if a definition is not appropriately specific. To address this issue, QLS recommended the Bill refer to individuals of an institutions' management committee as the persons who should be liable.[124] Alternatively, it was suggested the Bill's terminology instead reflect relevant provisions in the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic) (LID Act (Vic)) and *Civil Liability Act 2002 (NSW);* which refer to a 'management member' of unincorporated associations or bodies.[125] To further address this issue, the QLS suggested amendments to the definitions of 'current office holder' and 'former office holder', to include 'a person who has or had "responsibility for the institution".'[126]

Mr Trent Johnson, Member of the Accident Compensation/Tort Law Committee of the QLS, explained:

> *With respect to unincorporated bodies, there are some recurring issues regarding interpretation, whether or not a proper defendant can be identified and also whether an institution has legal capacity and personality and may be sued. We know there are various provisions in the bill talking about current and former office holders. We suggest that they could be changed to instead—similar to the New South Wales provisions—reference a management member, to more broadly take into account the unincorporated associations and bodies that our membership generally deal with and the structures of those organisations where we do not usually have a single individual as an office holder who is responsible for the activities of the unincorporated entity or body. As I said, unincorporated associations usually have a management committee as opposed to office holders.*[127]

Mr Johnson clarified that it was QLS's opinion that a management member would not be personally liable, but would be liable in their capacity as a management member.[128]

The QLS also recommended the Bill be amended to include 'in the name of the institution as if it had legal personality'; and that a 'catch all' provision be included which ensures that liabilities, duties and obligations against institutions can be enforced against current office holders.[129]

Mr James Luthy, committee member of CLAN, stated that 'the fact is that no institution, incorporated or unincorporated, should be able to escape through any form of legal manoeuvring or wrangling because they were all responsible.'[130]

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123 Bill, cl 4, ss 33F-33I.

124 QLS, submission 006, pp 2-3.

125 *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic), ss 3, 5; *Civil Liability Act 2002* (NSW), s 6J.

126 QLS, submission 006, p 3.

127 Public hearing transcript, Brisbane, 11 February 2019, p 8.

128 Trent Johnson, Member, Accident Compensation/Tort Law Committee, QLS, public hearing transcript, Brisbane, 11 February 2019, p 8.

129 QLS, submission 006, pp 3-4.

130 Public hearing transcript, Brisbane, 11 February 2019, p 3.

3.4 Continuity of institutions and offices

As part of its inquiry, the Royal Commission reported case examples where particular office holders were not considered liable for abuse due to there being no 'successor liability' such as between a previous archbishop at the time the abuse occurred and the current archbishop at the time of the litigation.[131]

The Bill addresses this issue by providing for the continuity of institutions and offices of institutions.[132] An institution will be taken to be the same institution if it is substantially the same as it was when the relevant cause of action accrued, or if it is not the same or substantially the same, where the current institution is the relevant successor of the old institution.[133] This would apply despite a change in name of the institution, a change in organisational structure, whether the institution has since become incorporated, or the location of the institutions' functions or activities.[134]

A regulation making power is provided by the Bill, to allow for an institution to be prescribed by regulation, as the relevant successor of the old institution.[135] This could only be done where the relevant Minister is satisfied that the institution has a relevant connection to the old institution, or with the agreement of the head of the institution.[136]

3.4.1 Stakeholder views and department response

The provisions regarding continuity of institutions were generally supported by stakeholders who addressed the proposal.[137] Knowmore noted the importance of continuity of institutions in identifying a proper defendant, and the similar approach taken in Western Australia.[138]

QLS submitted that the continuity of institutions as provided the Bill, should only apply prospectively after a transition period, and that the liability of a current institution should be limited to the value of the assets that were transferred from the earlier institution.[139] The department responded that it had consulted stakeholders on the issue and that although stakeholders had considered potential unfairness for an institution becoming liable for an unknown liability for historical sexual abuse, due to the acquisition of assets of an institution that has now been wound up; consideration was also given to the unfairness if 'institutions with significant historical liability for child sexual abuse could 'phoenix' and leave victims without an avenue to seek compensation'.[140]

The regulation-making power in s 33O of the Bill was noted by one submitter, who raised concerns regarding the delegation of power to the Governor in Council.[141] The department advised:

> *New section 33O(5) would allow the Minister to make a recommendation to the Governor in Council to make a regulation prescribing a current institution (with that institution's consent) to*

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131 Australian Government, Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 11: Congregation of Christian Brothers in Western Australia response to child sexual abuse at Castledare Junior Orphanage, St Vincent's Orphanage Clontarf, St Mary's Agricultural School Tardun and Bindoon Farm School*, December, 2014, p 51; Australian Government, Redress and Civil Litigation Report, p 498.

132 Clause 4, ss 33O-33P.

133 Explanatory notes, p 8; Bill, cl 4, s 33O(3)-(4).

134 Clause 4, s 33O.

135 Clause 4, ss 33O(4)(e),33O(5).

136 Clause 4, s 33O(5).

137 See for example, submissions 002, 007, 009.

138 Submission 009, p 23.

139 Submission 006, p 8.

140 DJAG, correspondence dated 14 January 2019, attachment, p 8.

141 Submission 007, name suppressed, pp 34-35.

be the relevant successor of an old institution for the purposes of the continuity of institution provisions in new section 33O.[142]

QLS recommended the Bill clarify that an institution and current office holder(s), enjoy the defences and insurances that were also enjoyed by the former institution or office holder(s). It was noted that such provisions are provided for in the corresponding New South Wales legislation.[143]

The Bill requires an institution to participate in proceedings for abuse claims where there is a nominee for the institution (cl 4, s 33I(e)). It also specifies that a nominee of the institution 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; and 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 (cl 4, s 33I(h)). It was suggested that the Bill also require unincorporated institutions to continue to participate in proceedings of its current office holders in addition to nominees; and that proposed ss 33I(g) and (h) should apply when the proceedings are against current office holders and an associated trust.[144]

3.5 Other jurisdictions

Other state and territory governments of Australia have progressed legislation in response to recommendations of the Redress and Civil Litigation Report, to varying degrees.

For example, in October 2018, the New South Wales Government passed the Civil Liability Amendment (Institutional Child Abuse) Bill 2018, which included amendments to introduce a duty of care for institutions, vicarious liability of certain institutions and employees, proper defendant provisions, and provisions regarding satisfaction of liability by institutions and nominees.[145]

In Victoria, the LID Act (Vic) introduced proper defendant provisions, where an unincorporated non-government organisation (NGO) that controls one or more associated trusts, must nominate an entity that is capable of being sued to act as a proper defendant. If the NGO does not do so, the legislation provides that the trustees of the associated trust or trusts are considered to be the proper defendants in the proceedings (on behalf of the NGO) and will incur any liability arising from the proceeding. The Victorian Government had already imposed a duty of care on institutions under the *Wrongs Amendment (Organisational Child Abuse) Act 2017* which commenced on 1 July 2017. [146]

In Western Australia, the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* included amendments to provide a legal basis for commencing an action against institutions in the name of their current office holders for historical child sexual abuse, and allow institutions, trustees and office holders to use assets of the institution to satisfy liability.[147]

The department advised that in the development of the Bill, particular regard was given to the following relevant legislation in other jurisdictions:

- section 6 of the LID Act (Vic) and s 6N(3) of the *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018* (NSW) – regarding the meaning of an 'associated trust' of an institution in cl 4, s 33B of the Bill

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142 DJAG, correspondence dated 14 January 2019, attachment, p 9.

143 *Civil Liability Act 2002* (NSW), ss 6O(f)-(g).

144 QLS, submission 006, p 4.

145 NSW Government, *NSW Annual Report on Progress: Royal Commission into Institutional Responses to Child Sexual Abuse*, December 2018, p 7.

146 Victoria State Government, *Victorian Government Response to the Royal Commission into Institutional Responses to Child Sexual Abuse*, July 2018, p 6.

147 Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Bill 2018 (WA), explanatory notes, p 1.

- section 91 of the *Wrongs Act 1958* (Vic) – regarding the reverse onus amendments in cl 4, ss 33D and 33E of the Bill
- sections 15B and 15D of the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* (WA) – regarding cl 4, ss 33F and 33G of the Bill, about the liability of particular institutions and office holders
- section 7 of the LID Act (Vic) – regarding the proper defendant amendments in cl 4, s 33H of the Bill
- section 60 of the *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018* (NSW)
- section 15C and 15E of *the Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* (WA) and s 6P of the *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018* (NSW) – regarding cl 4, ss 33J to 33M of the Bill, about satisfaction of liability
- sections 15F to 15H of the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* (WA) and s 6C of the *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018* (NSW) – regarding cl 4, ss 33O and 33P of the Bill [148]

The department further advised that while not identical, the proper defendant provisions were consistent with Victorian and New South Wales legislation. Similarly, it was advised that the proposed framework for a duty of institutions was consistent with legislation in Victoria and New South Wales, with the same 'intent and purpose'.[149]

3.6 Amendments to the *Civil Proceedings Act 2011*

The proposed amendments to the CP Act are unrelated to the Royal Commission and its Redress and Civil Litigation Report.

Under the CP Act, if a person's death is caused by a wrongful act or omission which would have otherwise entitled the deceased to recover damages in a proceeding for personal injury, the person who would have been liable for the personal injury, is liable for damages.[150] A court may award damages to the deceased persons' family, proportional to the damage to them resulting from the death.[151]

There is currently no provision in the CP Act which specifically allows for recovery of fund management fees in the award of damages as part of wrongful death proceedings.[152]

The Bill inserts s 64(4) of the CP Act to clarify that a person under a legal incapacity (which includes a child) may recover the cost of trustee management fees in the award of damages for wrongful death of a member of the person's family.[153] This amendment aims to clarify the law following conflicting Supreme Court decisions, and ensure that any award of damages will not be significantly depleted by the cost of managing funds. [154]

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148 DJAG, correspondence dated 28 November 2018, p 4.

149 Imelda Bradley, DJAG, public briefing transcript, Brisbane, 3 December 2018, p 6.

150 *Civil Proceedings Act 2011*, s 64.

151 *Civil Proceedings Act 2011*, s 64(3).

152 *Maggs v RACQ Insurance Limited* [2016] QSC 41, [8].

153 Bill, cl 8; explanatory notes, p 2.

154 DJAG, correspondence dated 28 November 2018, p 4; see also *Maggs v RACQ Insurance Limited* [2016] QSC 41 and *Case & Anor v Eaton & Anor* [2016] QSC 239.

3.6.1 Stakeholder views and department response

The QLS supported the proposed amendments to the CP Act.[155] Other submitters and witnesses did not specifically address the proposed amendments to the CP Act.

3.7 Other issues

A number of submitters raised other issues of relevance, which were not directly addressed by the Bill.

Stakeholders provided commentary on alternative ways of imposing a duty on institutions to prevent child sexual abuse, including by the introduction of strict or vicarious liability.[156] It was suggested that the creation of vicarious liability for institutions would be consistent with recommendations 89 and 90 of the Redress and Civil Litigation Report.[157] The ALA recommended vicarious liability combined with a 'close connection test' would be preferable over the duty proposed by the Bill, suggesting: 'Vicarious liability utilising the close connection test avoids the need for a reverse onus because proving negligence is no longer required.'[158]

The committee also heard from a number of stakeholders, that the Bill should be extended to apply to other forms of child abuse, such as serious physical abuse or psychological abuse. [159] Stakeholders noted the significant impacts of physical and psychological abuse perpetrated in connection with or in addition to sexual abuse, and the difficulty of survivors in separating the harm caused by the different types of child abuse during the civil litigation process.[160]

Proposed amendments including a change to the definition of 'child abuse' is included in the CL(ICA)A Bill. The committee is due to report on the CL(ICA)A Bill by 30 April 2019.

Other related issues raised by stakeholders included:

- introducing mandatory incorporation of institutions with responsibility for children, to allow for the institutions to be sued[161]
- amendment to the *Limitation of Actions Act 1974* to require a court to consider the gravity of matters and the injuries alleged by the plaintiff when deciding whether to summarily dismiss or permanently stay an action for damages relating to personal injury resulting from the sexual abuse of the person as a child[162]
- whether institutions should be required to have insurance, and effects of the proposed amendments on insurance premiums.[163]

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155 Submission 006, p 9.

156 See, for example, submissions 002, 007, 009.

157 See, for example, submissions 002, 007, 009.

158 ALA, submission 002, pp 11, 16.

159 See, for example, submissions 001, 002, 007, 009. Note that extension of civil liability reforms to other forms of abuse, such as physical abuse, was the subject of recommendation 85 of the Redress and Civil Litigation Report.

160 See, for example, Michelle James, Spokesperson for Childhood Sexual Abuse Claims, ALA, public hearing transcript, Brisbane, 11 February 2019, p 4; submission, 007, p 25.

161 ALA, submission 002, appendix, p 4.

162 Chris Kohler, submission 010.

163 See for example, submissions 002, 003, 007, 009.

4 Compliance with the *Legislative Standards Act 1992*

4.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* (LSA) states that 'fundamental legislative principles' are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of Parliament.

The committee has examined the application of the fundamental legislative principles to the Bill. The committee brings the following to the attention of the Legislative Assembly.

4.1.1 Rights and liberties of individuals

Section 4(2)(a) of the LSA requires that legislation has sufficient regard to the rights and liberties of individuals.

4.1.1.1 Duty of care of institutions

Clause 4, s 33D of the Bill provides that an institution has a duty of care to take all reasonable steps to prevent the sexual abuse of a child by a person associated with the institution while under the care, supervision, control or authority of the institution.

Under s 33E, if a child is sexually abused in the above circumstances, the institution is taken to have breached its duty of care, unless it can prove it took all reasonable steps to prevent the abuse.

Potential issue of fundamental legislative principle

Legislation should have sufficient regard to the rights and liberties of individuals, and should not reverse the onus of proof in criminal matters:

> *For a reversal to be justified, the relevant fact must be something inherently impractical to test by alternative evidential means and the defendant would be particularly well positioned [sic] to disprove guilt.*[164]

In relation to the reversal of the onus of proof, cl 4, s 33E(2) provides:

> *The institution is taken to have breached its duty … unless the institution proves it took all reasonable steps to prevent the abuse.*

Thus, the onus of proof lies with the institution. This reverses the normal onus of proof in civil matters, whereby a claimant has to prove their case.

Rights and liberties of individuals and reversal of the onus of proof

Legislation breaches a specific fundamental legislative principle if the onus of proof is reversed in *criminal matters* without adequate justification (s 4(3)(d) of the LSA). In the current situation, there is a reversal of the onus of proof, but it is only in the context of civil litigation and not criminal matters.

Under cl 4, s 33E(2), an institution is able to discharge the reversed onus by proving (on the balance of probabilities) that it took all reasonable steps to prevent the child sexual abuse occurring.

It could be argued that there is a breach of fundamental legislative principle in that legislation must have regard to the rights and liberties of individuals, and a reversal of the normal onus of proof in civil matters amounts to having insufficient regard to such rights (s 4(2)(a) of the LSA).

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[164] Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 36.

The Queensland Society was opposed to the reversal:

> *However, despite these noted difficulties* [facing claimants]*, and the good intention of the proposed reform, QLS is not able to support reversing the onus of proof. We submit that doing so would undermine a fundamental tenant of our legal system and we consider that other measures, for example, the reforms to establish a statutory duty of care and to assist in the nomination of a proper defendant will better achieve the policy intent without causing harm to established legal process which seeks to provide a fair and balanced system.*[165]

The fundamental legislative principles require that legislation have sufficient regard to the rights and liberties of *individuals*. The Bill, and recommendations 89 to 94 of the Redress and Civil Litigation Report, relate to the duty of institutions.

By virtue of the definition in proposed s 33A, the term 'institution':

(a) means an entity that provides an activity, program or service of a kind that gives an opportunity for a person to have contact with a child; and
(b) includes a public sector unit that is an entity mentioned in paragraph (a); and
(c) does not include a family.

It would appear that any reference to an institution is not intended to include an individual. In any event, as a matter of reality, institutions will be unlikely to be individuals.

The explanatory notes provide this justification for any potential breach of fundamental legislative principle:

> *The departure is justified for a number of reasons. The majority of matters before the [Royal] Commission revealed a failure by institutions to prevent the abuse despite the abuse being suspected, reported or even confirmed. The reverse onus amendments address power imbalances and ensure that a victim does not have the burden of establishing liability and recognises that an institution should be liable where it has failed to put in place safe systems or failed to act.*[166]

The explanatory notes further state:

> *The [Royal] Commission was satisfied that institutions should be in a good position to prove the steps they took to prevent abuse, and generally should be in a good position to prove the steps they took to prevent abuse, and generally should have better access to records and witnesses capable of giving evidence about the institution's behaviour than plaintiffs are likely to have. The Commission also considered reversing the onus of proof has the potential to encourage higher standards of governance and risk mitigation in institutions, both through their own efforts and through their compliance with the requirements of their insurers. Importantly, the impact of the potential breach is proposed to be mitigated by providing that the institution is able to discharge liability by proving on the balance of probabilities that it took all reasonable steps to prevent child sexual abuse from occurring.*[167]

Committee comment

The committee notes that the Bill proposes

- the onus will be imposed on institutions and not individuals, and
- the reversal of the onus is not imposed in a criminal context.

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165 QLS, submission 006, p 2.

166 Explanatory notes, p 3.

167 Explanatory notes, p 3.

Given these elements, and the justification provided by the department in the explanatory notes, the committee considers, on balance, any breach of fundamental legislative principle is justified by the policy intents of the Bill.

4.1.1.2 Proper defendant

The Bill inserts provisions to ensure that any relevant liability will lie with the current office holder of an unincorporated institution.[168]

There are also provisions in the Bill whereby a court may order a claim to proceed against the trustees of an associated trust of the institution if, after 120 days, there is no nominee for the institution or the nominee does not have sufficient assets to satisfy liability that may be found under a decision on the abuse claim.

Potential issue of fundamental legislative principle

As acknowledged in the explanatory notes, these provisions involve an element of retrospectivity.[169]

Section 4(3)(g) of the LSA provides that legislation should not adversely affect rights and liberties, or impose obligations retrospectively. Strong argument is required to justify an adverse effect on rights and liberties, or imposition of obligations, retrospectively.

In relation to claims made against current office holders, the explanatory notes state:

> *The proposed departure is justified because it is intended to overcome the difficulties that a victim may face in identifying a proper defendant due to the lack of perpetual succession in unincorporated institutions. Further, the legislation clarifies that the holder of the office is being sued in the name of the office only and not in a personal capacity and that personal assets of the holder of the office cannot be used to satisfy the liability. Equally, liability will not attach to the current office holder if a cause of action against a former official of the association cannot be established.*[170]

The explanatory notes identify that an office holder is being sued in the name of the office only, and not in a personal capacity. Further, such an office holder would not be personally obliged to meet any liability that might be found. The provision is aimed at ensuring a 'proper defendant' can be more readily identified.

In relation to possible claims proceeding against trustees of an associated trust, the explanatory notes state:

> *The proposed departure is justified because it is intended to overcome the difficulties that a victim may face if the institution does not nominate a proper defendant or if the assets of the institution are held, not by the institution itself, but in an associated trust of the institution (e.g. a trust in which the institution has, directly or indirectly, the power to control the application of income of the trust or the distribution of property of the trust).*[171]

Committee comment

Having regard to the policy aims of the Bill, the committee is satisfied that sufficient justification has been provided for the retrospective effects of the provisions.

4.1.2 Institution of Parliament

Section 4(2)(b) of the LSA requires legislation to have sufficient regard to the institution of Parliament.

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168 Clause 4, div 3.

169 Explanatory notes, p 3.

170 Explanatory notes, p 3.

171 Explanatory notes, p 6.

The Bill provides for what is meant by 'a person associated with an institution' and sets out a number of categories.[172] It also provides that the term includes 'a person prescribed by regulation'.

The provision allows for the possibility that a wide range of individuals could be prescribed as associated with an individual.

Potential issue of fundamental legislative principle

Section 4(4) of the LSA states:

Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill -

(a) allows the delegation of legislative power only in appropriate cases and to appropriate persons

This principle is concerned with the level at which delegated legislative power is used.

Generally, the greater the level of political interference with individual rights and liberties, or the institution of Parliament, the greater the likelihood that the power should be prescribed in an Act of Parliament and not delegated below Parliament.

The explanatory notes state:

> *An associated person is defined for the purposes of the reverse onus amendment and includes relationships specifically identified by the Commission for this purpose. While the definition is inclusive and is not intended to be exhaustive of persons who may be regarded as being associated with an institution according to its ordinary meaning, the provision is new and it is appropriate to allow for the prompt prescription of other classes of person should there be uncertainty about whether a particular class of person should be recognised as being associated with an institution.*[173]

Committee comment

The committee is satisfied that any breach of fundamental legislative principle is justified in the circumstances.

4.2 Explanatory notes

Part 4 of the LSA sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by part 4 of the LSA and a reasonable level of background information and commentary to facilitate understanding of the Bill's aims and origins.

[172] Clause 4, s 33C.

[173] Explanatory notes, p 4.

Appendix A – Submitters

Sub #	Submitter
001	Care Leavers Australasia Network
002	Australian Lawyers Alliance
003	Queensland Catholic Education Commission
004	Queensland Cricket
005	Independent Schools Queensland
006	Queensland Law Society
007	Name Suppressed
008	Queensland Child Sexual Abuse Legislative Reform Council
009	knowmore
010	Chris Kohler
011	Bravehearts

Appendix B – Officials at public departmental briefing

Department of Justice and Attorney-General

- Ms Imelda Bradley, Director, Strategic Policy
- Mr Riccardo Rivera, Acting Legal Officer, Strategic Policy
- Mrs Leanne Robertson, Assistant Director-General, Strategic Policy and Legal Services

Appendix C – Witnesses at public hearing

Care Leavers Australasia Network

- Mr James Luthy, Committee Member

Australian Lawyers Alliance

- Ms Michelle James, Spokesperson for Childhood Sexual Abuse Claims

knowmore

- Mr Warren Strange, Executive Officer

Queensland Law Society

- Ms Wendy Devine, Principal Policy Solicitor
- Mr Trent Johnson, Member, Accident Compensation/Tort Law Committee
- Mr Andrew Lind, Chair, Not for Profit Law Committee
- Mr Bill Potts, President
- Ms Kerryn Sampson, Policy Solicitor

Statement of Reservation

Opposition members note concerns expressed by submitters and witnesses concerning the reach of the bill.

The concerns include:

- The absence of retrospectivity, making past cases of abuse ineligible to be dealt with under the proposed legislation;
- The definition of abuse is confined to sexual abuse only, and does not include serious physical, or other serious abuse; and
- The absence of provision for vicarious liability consistent with Recommendations 89 and 90 of the *2015 Redress and Civil Litigation Report* of the Royal Commission into Institutional Responses to Child Sexual Abuse.

James Lister MP

Deputy Chair

Member for Southern Downs

James (Jim) McDonald MP

Member for Lockyer