Parliamentary Committees



Civil Liability (Institutional Child Abuse) Amendment Bill 2018

Report No. 37, 56th Parliament
Legal Affairs and Community Safety Committee
April 2019

Legal Affairs and Community Safety Committee

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Acknowledgements

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[1] On 1 November 2018, the Leader of the House appointed the Member for Capalaba, Don Brown MP, as a substitute member of the committee for the Member for Macalister, Melissa McMahon MP, to attend the committee's public briefing held on Monday 12 November 2018.

Contents

Abbreviations

Bill	Civil Liability (Institutional Child Abuse) Amendment Bill 2018
CL Act	*Civil Liability Act 2003*
CLOLA Bill	Civil Liability and Other Legislation Amendment Bill 2018
committee	Legal Affairs and Community Safety Committee
FLP	fundamental legislative principle
LA Act	*Limitation of Actions Act 1974*
LSA	*Legislative Standards Act 1992*
National Redress Scheme	The National Redress Scheme for Institutional Child Sexual Abuse
PACT	Protect All Children Today Inc
PIP Act	*Personal Injuries Proceedings Act 2002*
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 (Institutional Child Abuse) 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.

On behalf of the committee, I thank those individuals and organisations who made written submissions on the Bill and gave evidence at the public hearing. I also thank Mr Michael Berkman MP for briefing the committee on the Bill and responding to the issues raised in submissions. I would also like to thank our Parliamentary Service staff for their assistance.

I commend this report to the House.

Peter Russo MP

Chair

Recommendations

The committee recommends the Civil Liability (Institutional Child Abuse) Amendment Bill 2018 not 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.[2]

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 (Institutional Child Abuse) Amendment Bill 2018 (Bill) was introduced into the Legislative Assembly and referred to the committee on 31 October 2018. The committee is to report to the Legislative Assembly by 30 April 2019.

1.2 Inquiry process

On 5 November 2018, the committee invited stakeholders and subscribers to make written submissions on the Bill. Fourteen submissions were received.

The committee received a public briefing about the Bill from Mr Michael Berkman MP, Member for Maiwar, on 12 November 2018.

Mr Berkman MP provided written advice to the committee in response to matters raised in submissions.

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

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

1.3 Policy objectives of the Bill

The explanatory notes provide that the objective of the Bill is to implement recommendations 89 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).[3] This includes amendments to:

- the *Civil Liability Act 2003* (CL Act) by inserting the following in a new Chapter 2 Part 6 Liability of institutions for child abuse:
  - section 49C Definitions
  - section 49D Duty of care for institutions
  - section 49E Particular institutions must nominate defendant
  - section 49F Particular trustees may be liable for breach of institution's duty of care

[2] *Parliament of Queensland Act 2001*, section 88 and Standing Order 194.

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

- the *Limitations of Actions Act 1974* (LA Act) by inserting a definition of 'child abuse' in section 11A so that the statutory exemption from limitation of action applies to child abuse more broadly
- the *Personal Injuries Proceedings Act 2002* (PIP Act) by inserting a definition of 'child abuse' in section 9(10) so that the statutory exemption from time limits around the commencement of personal injuries claims applies to child abuse more broadly.[4]

1.4 Private Member Consultation on the Bill

As set out in the explanatory notes, the Bill implements recommendations which were developed by the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission). The Royal Commission conducted extensive consultation, including with government, industry, institutional, legal, insurance, non-government organisations, child protection advocacy bodies and community members, specifically focusing on the policy objectives.[5]

The Bill relies on further consultation undertaken since the publication of the Royal Commission's final report recommendations, including through a government issues paper[6]; and a Bill introduced on 10 October 2017 by then Member for Cairns, Mr Rob Pyne MP—the Civil Liability (Institutional Child Abuse) Amendment Bill 2017. The Civil Liability (Institutional Child Abuse) Amendment Bill 2017 lapsed upon the dissolution of the Queensland Parliament on 29 October 2017.

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 (Institutional Child Abuse) Amendment Bill 2018 not be passed.

4 Explanatory notes, pp 1-2.

5 Explanatory notes, p 4.

6 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.

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 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'.[7]

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. One of these reports, 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.[8]

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'.[9] 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.[10]

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.[11] 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.[12] These amendments responded to recommendations 85 to 86 and 88 of the Royal Commission.

2.1.1 National Redress Scheme

The National Redress Scheme was established in response to the Royal Commission and the recommendations contained in its final report.[13] The scheme provides access to counselling, monetary payments ('redress payments'), and direct personal responses from institutions (such as an apology).[14]

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

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

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

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

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

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

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

14 Australian Government, National Redress Scheme, 'What can you apply for?', https://www.nationalredress.gov.au/applying/what-can-you-apply

A survivor can apply to the National Redress Scheme if they experienced institutional child sexual abuse before 1 July 2018, were born before 30 June 2010, and are an Australian citizen or permanent resident. The institution responsible for the abuse must have joined the National Redress Scheme for a person to be able to access redress through the scheme.[15]

Each application to the National Redress Scheme is considered by an independent decision maker, who makes a determination about whether redress can be accessed by the applicant through the scheme. Under the scheme, a survivor may receive up to $150,000 in monetary payments.

If a survivor accepts redress through the National Redress Scheme for abuse perpetrated by an institution or official of an institution, they can no longer pursue civil proceedings against the institution or official in relation to that abuse.[16]

The Queensland Government commenced its participation in the National Redress Scheme on 19 November 2018.[17]

2.1.2 Civil litigation for institutional child sexual abuse

An act of sexual abuse against a child in an institutional setting, in addition to raising a number of potential criminal charges, 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 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).[18]

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.[19] 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.[20]

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.[21] 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.[22]

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15 National Redress Scheme, Fact Sheet, Overview, https://www.nationalredress.gov.au/sites/default/files/documents/2018-08/overview-fact-sheet.pdf, 29 August 2018.

16 *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth), s 43.

17 Queensland Government, *Queensland Government annual progress report: Royal Commission into Institutional Responses to Child Sexual Abuse,* December 2018, p 2.

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

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

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.

The Royal Commission reported its concern regarding the effectiveness of civil litigation systems across Australia, and considered when an institution should be held responsible at law, for institutional child sexual abuse.[23]

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.[24]

2.2 Other proposed legislation

The Civil Liability and Other Legislation Amendment Bill 2018 (CLOLA Bill) was introduced on 15 November 2018 by the Hon. Yvette D'Ath MP, Attorney-General and Minister for Justice. The CLOLA Bill proposed amendments to respond to recommendations 91 to 94 of the Redress and Civil Litigation Report. Some submissions to the Bill include reference to the CLOLA Bill. The committee tabled its report on the CLOLA Bill on 28 February 2019.[25]

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23 Australian Government, Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper 5: Civil Litigation*, December 2013, p 1; Australian Government, Redress and Civil Litigation Report, p 474.

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

25 Legal Affairs and Community Safety Committee, Report No. 29, 56th Parliament: *Civil Liability and Other Legislation Amendment Bill 2018* can be accessed here: https://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2019/5619T276.pdf

3 Examination of the Bill

The Bill's objective is to implement recommendations 89 to 94 of the Redress and Civil Litigation Report.[26] 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.[27]

Recommendations 89 to 94 of the Redress and Civil Litigation Report are as follows:

Recommendation 89: *State and territory governments should introduce legislation to impose a non-delegable duty on certain institutions for institutional child sexual abuse despite it being the deliberate criminal act of a person associated with the institution.*

Recommendation 90: *The non-delegable duty should apply to institutions that operate the following facilities or provide the following services and be owed to children who are in the care, supervision or control of the institution in relation to the relevant facility or service:*

a) residential facilities for children, including residential out-of-home care facilities and juvenile detention centres but not including foster care or kinship care

b) day and boarding schools and early childhood education and care services, including long day care, family day care, outside school hours services and preschool programs

c) disability services for children

d) health services for children

e) any other facility operated for profit which provides services for children that involve the facility having the care, supervision or control of children for a period of time but not including foster care or kinship care

f) any facilities or services operated or provided by religious organisations, including activities or services provided by religious leaders, officers or personnel of religious organisations but not including foster care or kinship care.

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.*

[26] Explanatory notes, p 1.

[27] Australian Government, Redress and Civil Litigation Report, p 4.

> ***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.*[28]

Mr Berkman MP stated that the Bill:

> *… aims to remove the final barriers to civil litigation for survivors of institutional child abuse and to incentivise institutions to invest in child protection and abuse prevention and to enter into dignified negotiations with survivors seeking fair reparations.*[29]

The majority of provisions in the Bill propose to take effect retrospectively. This includes the introduction of a duty of institutions to prevent child abuse.[30]

The majority of stakeholders expressed support for the Bill, however many made recommendations for amendments to the Bill. 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 abuse and the duty of institutions

3.1.1 Definition of 'child abuse'

The Bill proposes to insert a definition of 'child abuse' to extend the availability of civil litigation against perpetrators of institutional child sexual abuse, to include perpetrators of serious physical and connected abuse.

The Bill defines 'child abuse', to mean:

> *any of the following perpetrated in relation to an individual while the individual is a child—*
>
> - *sexual abuse;*
> - *serious physical abuse;*
> - *any other abuse perpetrated in connection with sexual abuse or serious physical abuse of the child, whether or not the other abuse was perpetrated by the person who perpetrated the sexual abuse or serious physical abuse.*[31]

This definition is proposed to be inserted into the CL Act,[32] the LA Act,[33] and PIP Act.[34]

The definition would allow for a survivor of child 'serious physical' and 'connected other' abuse to sue an institution or official of an institution, in a civil case for damages.

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

29 Michael Berkman MP, public briefing transcript, Brisbane, 12 November 2019, p 1.

30 Bill, cl 3, s 49D.

31 Bill, cl 3, s 49D.

32 Bill cl 3, s 49D.

33 Bill, cl 6, s 11A.

34 Bill, cl 9, s 9.

Mr Berkman MP advised:

> *Child abuse is intentionally defined in part 2 of this bill to extend beyond sexual abuse and to include serious physical and connected abuse where connected either to the sexual or physical abuse. Part 3 applies the same definition to the Limitation of Actions Act 1974, and part 4 applies this definition to the Personal Injuries Proceedings Act 2002. This definition of abuse is consistent with the definition in other jurisdictions.*[35]

The explanatory notes suggest such an approach would be 'consistent with the delivery of the National Apology on 22 October 2018 which acknowledged all forms of abuse'.[36]

Stakeholder views and Member response

Numerous submitters noted the significant impacts of physical and psychological abuse perpetrated in connection with or in addition to sexual abuse.[37] The difficulty of survivors in separating the harm caused by the different types of child abuse, was also raised.[38]

The majority of stakeholders recommended the extension of child sexual abuse to other forms of child abuse, such as serious physical abuse or psychological abuse.[39]

This included Bravehearts, which stated:

> *From over twenty years working with clients we know that child sexual assault rarely happens in isolation from other forms of abuse; physical abuse, psychological abuse and neglect are often a factor in the harms suffered. For example, grooming of children and young people by sex offenders often involves psychological manipulation and abuse. In addition, by the very nature of being victimised by a perpetrator, children and young people are often made vulnerable to other forms of abuse by other adults and/or peers.*[40]

Ms Michelle James, Spokesperson for Childhood Sexual Abuse Claims, Australian Lawyers Alliance, further explained the need for wider forms of abuse to be recognised:

> *… from a practical perspective and understanding how sexual abuse is perpetrated, often the psychological and physical abuse form part of that grooming activity that then leads to sexual abuse and it becomes nigh on impossible as that survivor is an adult to try and disentangle which particular part of the crimes committed against them have caused the injuries that they now suffer from. Was it the beatings that preceded a rape? Was it the rape itself? Was it the psychological trauma that happens to many survivors, particularly those who were in closed institutions? For those reasons we favour the broader definitions. I am not aware of them causing any perversity in terms of outcomes in how they have been applied in the other states that have the broader definitions.*[41]

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35 Berkman MP, explanatory speech, Record of Proceedings, 31 October 2018, p 3201.

36 Explanatory notes, p 5.

37 See, for example, submissions 003, 004, 005, 011, 012, 013.

38 Michelle James, Spokesperson for Childhood Sexual Abuse Claims, Australian Lawyers Alliance, public hearing.
transcript, Brisbane, 11 February 2019, p 4.

39 See, for example, submissions 002, 003, 004, 008, 009, 011, 012, 013.

40 Bravehearts, submission 012, pp1-2.

41 Michelle James, Spokesperson for Childhood Sexual Abuse Claims, Australian Lawyers Alliance, public hearing transcript, Brisbane, 11 February 2019, p 4.

Similarly, knowmore, an Australia-wide community legal centre established to assist people to engage with the Royal Commission, provided support for expanding the definition to include serious physical abuse and connected abuse.[42] Mr Warren Strange, Executive Officer of knowmore, suggested it would 'promote consistency' with other states of Australia, and would 'help to recognise the totality of survivors' experiences and afford them access to justice for all of those forms of abuse that they suffered'.[43]

The Queensland Law Society (QLS) further advised the committee that if the application of the reforms proposed by the Bill extended to other forms of child abuse:

> *The only concern that the QLS has at this stage—and obviously we would need the opportunity to make further submissions if required—is that at the time that some of these abuses were perpetrated you had very different definitions and expectations with respect to corporal punishment. There would need to be a very tight definition as to what is, for example, physical or related abuse or psychological abuse that is claimable in respect of these actions. We have discussed the difference between claims available in Queensland and claims in other states on this very basis and on the basis of the commission's recommendation that there be uniform law Australia-wide. What we have at the moment is a situation where, if there is the availability of bringing claims for abuse suffered in two different states, a lawyer such as myself will look for the most advantageous forum to bring that claim. If that is a forum that includes physical or psychological abuse as opposed to just sexual abuse, that is primarily the claim that you would pursue.*[44]

An individual who provided evidence to the committee in a private hearing, also explained the need for recognition of other types of abuse:

> *It is not just the active abuse but it is the in-between times. The anticipation of what is going to happen and not knowing when it is going to happen next extends the psychological impact. This is seen across-the-board in many contexts such as policing and military patrols. About one per cent of military patrols result in an exchange of fire. That does not mean that the other 99 per cent do not have a stressful, traumatic impact on that soldier's brain, and that is well described and well documented. The anticipation of the threat is every bit as real as the realisation of the threat. I say that with respect to members of this committee with service history.*[45]

Similarly, a submitter who wished to remain anonymous, stated:

> *The Berkman Bill introduced by the member for Maiwar gives the right for anyone who has suffered and survived abuse the ability to seek justice. It is a fundamental right of everyone to be able to pursue justice for themselves. The current legislation restricts the ability of a person who has suffered physical abuse from pursuing the relevant institution and fight for justice.*[46]

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42 Knowmore, submission 008, p 3.

43 Warren Strange, Executive Officer, knowmore, public hearing transcript, Brisbane, 11 February 2019, p 6.

44 Trent Johnson, Member, Accident Compensation/Tort Law Committee, QLS, public hearing transcript, Brisbane, 11 February 2019, p 9.

45 Private hearing transcript, Brisbane, 11 February 2019, p 5.

46 Name suppressed, submission 004, p 1.

Mr John O'Leary, a survivor of institutional child abuse, detailed his personal experience and empahsised:

> *The unconscionable behaviour of these institutions, in relation to patently provable cases of ALL types of child assault, must be reined in, for the good of all children in the future… The statute time-limiting ANY type of child assault must be abolished, for the good of all future generations of children.*[47]

Mr Berkman MP, noted the support for expansion of the definition of 'child abuse' and stated:

> *The importance of the expanded definition in seeking just outcomes for survivors is clear from the supportive submissions from survivor advocacy groups. It would be plainly unjust to limit avenues of civil redress to only sexual abuse, in circumstances where an individual has experienced and endured far more extensive related harm.*[48]

Mr Berkman MP further advised:

> *This bill will not open a floodgate of litigation. Compensation through litigation in Queensland is very measured and moderate. Survivors must prove on the balance of probabilities that the abuse occurred, and the injury must be quantified by medical experts.*[49]

Serious physical abuse and other abuse

Former Head of the Department of Journalism at the University of Queensland, Mr Bruce Grundy, emphasised the importance of defining what would constitute 'serious' physical abuse and other child abuse under the Bill.[50]

The QLS noted there would be potential difficulties in defining what would constitute 'serious' physical abuse and the circumstances which would be considered to be other abuse perpetrated 'in connection with' child sexual or serious physical abuse.[51]

Mr Berkman MP, in response to the QLS, stated:

> *While QLS indicates the view in its submission that there should be more clarity around "serious physical abuse", or the circumstances in which "other abuse" is "perpetrated in connection with" this or sexual abuse, it acknowledges that the Royal Commission was constrained by limitations in its terms of reference.*[52]

Submitter 013, a survivor of institutional child sexual abuse and advocate for law reform, expressed support for a lack of specificity, stating:

> *Whether the physical abuse is 'serious' is a matter of fact to be determined by a court and would include considerations of factors such as the 'action' (the physical act) and the 'consequence' (the impact on the victim). For example, sustained, prolonged beatings as regular, repeated occurrences may be regarded by the court as serious, whereas a single strike or act of caning may not be regarded by the court as 'serious' – unless the single instance resulted in 'serious' injury (for example broken bone, or head injury).*[53]
>
> *…*

47 Submission 010, pp 2-3.

48 Michael Berkman MP, correspondence dated 18 January 2019, pp 1-2.

49 Explanatory speech, Record of Proceedings, 31 October 2018, p 3202.

50 Bruce Grundy, submission 005, p 3.

51 QLS, submission 014, p 2.

52 Michael Berkman MP, correspondence received 18 January 2019, p 1.

53 Name suppressed, submission 013, p 21.

> *It is appropriate to limit the provision to 'serious' physical abuse to ensure the legislation applies for the purpose intended, which is to give rights of access to justice to victims of abuse that was serious enough to cause lasting injury, or injury that has had lasting impact requiring financial reparation (ie under the existing civil litigation framework).*[54]

Similarly, individual Kevin Lindeberg, suggested: '"child abuse" is "child abuse" in whatever form it takes, just as "a crime" is "a crime" no matter who commits the act if the triggering elements can be satisfied'.[55]

3.1.2 Duty of institutions

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

The Bill seeks to address this issue, by reversing the onus of proof, and proposes to introduce a statutory duty of institutions, whereby an institution would be responsible for proving that it took all reasonable steps to prevent child abuse.[56] The duty is non-delegable, and is a personal duty borne by the institution. This means an institution would be held responsible for acts of its employees and other persons associated with the institution.

The duty of institutions as proposed by the Bill, would apply to abuse perpetrated before the commencement of the Bill (also known as retrospective application).[57]

It would be a defence for an institution to prove that it 'took reasonable precautions, and exercised due diligence, to prevent the relevant child from suffering the child abuse'.[58] The Bill includes a list of what may be considered as 'reasonable precautions' and exercising due diligence, and includes:

- the resources that were reasonably available to the institution
- the relationship between the institution and the relevant child
- whether the institution had delegated the care of, supervision of or authority over the relevant child to another institution or an individual
- the role, in the institution or a related entity, of the official that perpetrated the child abuse.[59]

Stakeholder views

It was emphasised by a stakeholder who wished to remain anonymous, that the proposed amendments to introduce a duty of institutions would not lead to vexatious litigation or the bankrupting of institutions. The submitter stated:

> *All institutions remain protected by the legislation relating to calculating damages. Damages such as for 'General Damages' (often referred to as 'pain and suffering') are strictly capped in Queensland. Also, in Queensland damages must be proven; for example specific economic losses and specific health care costs must all be proven.*
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> *…*

54 Name suppressed, submission 013, p 28.

55 Kevin Lindeberg, submission 011, p 8.

56 Bill, cl 3, s 49D.

57 Bill, cl 3, s 49D(2).

58 Bill, cl 3, s 49D(3).

59 Bill, cl 3, s 49D(4).

Civil litigation requires the victim / survivor to prove their claim. They must be able to prove that the abuse happened, that the abuse has caused an injury and that the injury has resulted in some sort of economic loss (such as lost earnings or health care costs).

…

The Private Member's Bill does not alter the existing safeguards of institutions to defend against non-meritorious claims as well as the safeguards inherent in the law to prevent against the bringing of a non-meritorious claim by a plaintiff in the first place. [60]

3.1.2.1 Vicarious liability

The concept of holding an institution accountable through vicarious liability (a type of strict liability) in common law was outlined by the Royal Commission:

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.[61]

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'.[62]

The Bill proposes to introduce a non-delegable vicarious liability for institutions, which would hold institutions responsible for child abuse perpetrated by officials of the institution. An 'official' of an institution is defined by the Bill, and extends to related entities (entities that provide or provided activities, facilities, programs or services of any kind for the institution).[63]

Mr Warren Strange, Executive Officer of knowmore, noted:

The royal commission had recommended strict liability being imposed on a certain category of institutions—basically, high-risk services that are providing facilities for children for commercial gain. With regard to childcare centres, schools and those sorts of operations, the royal commission had recommended that they be strictly liable so that in effect if child abuse happens they are responsible.[64]

Mr Strange noted however, that other jurisdictions of Australia have not moved to introduce vicarious liability for institutional child abuse.[65]

An individual who provided evidence at a private hearing of the committee, suggested that the Bill's expansion to provide for vicarious liability of institutions would 'codify the common law, to catch up with the common law which has actually moved far beyond the state of statutory law in Queensland'.[66]

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60 Name suppressed, submission 013, p 17.

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

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

63 Bill, cl 3, ss 49C, 49D.

64 Warren Strange, Executive Officer, knowmore, public hearing transcript, Brisbane, 11 February 2019, p 6.

65 Warren Strange, Executive Officer, knowmore, public hearing transcript, Brisbane, 11 February 2019, p 6.

66 Private hearing transcript, Brisbane, 11 February 2019, p 4.

3.1.2.2 Retrospectivity

Some stakeholders specifically supported the retrospective application of the duty of institutions proposed by the Bill.[67]

Mr Kelvin Johnston, Spokesperson for the Queensland Child Sexual Abuse Legislative Reform Council, stated: 'all laws regarding child sexual, physical, emotional and psychological abuse should be made retrospective, so all victims and survivors can be treated equally at law'.[68]

Mr Berkman MP commented:

> *The alternative approach - that is, not adopting these amendments in respect of abuse that has already occurred - would deprive vast numbers of survivors of adequate redress and justice. This retrospective, survivor-focussed approach is singled out by Micah Projects (Submission 9) as one of the precise reasons they support the Bill.*[69]

The QLS did not support the retrospective application of the proposed duty of institutions, and stated:

> *Imposing a new statutory duty on an institution (especially noting the concerns raised above about who might be captured by this duty) for past events creates an unfair and unreasonable hurdle for institutions defending a claim. The imposition of this retrospective obligation is a breach of a fundamental legislative principles as set in the Legislative Standards Act 1992 (see section 4(3)(g)).*[70]

3.1.2.3 Reasonable precautions

The list of what would constitute 'reasonable precautions' required to discharge a duty of an institution to prevent child abuse, was commented upon by stakeholders.

Bravehearts suggested the term 'reasonable precautions' be further defined, to provide organisations with 'guidance about the scope of what would be reasonable, and add clarity around the minimum expectations of organisations'.[71]

A submitter who wished to remain anonymous, stated that the list of considerations provided in the Bill for what would constitute 'reasonable precautions' is inclusive, and would allow a court to consider other factors relevant to each case.[72]

3.1.2.4 Implementation

Bravehearts noted that resources may be required to implement the proposed changes to introduce a duty of institutions to prevent child abuse, and stated:

> *… similar to Safe Work Australia, we advocate that a body and 'code of practice' may need to be established to oversee organisations to ensure that they are taking all necessary steps.*
>
> *…*
>
> *Whether a survivor chooses to apply for recompense through the National Redress Scheme, or the [sic] civil processes, we believe that we must ensure that there is adequate legal and emotional support provided.*

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67 See for example, submissions 003, 006, 009.

68 Queensland Child Sexual Abuse Legislative Reform Council, submission 006, p 2.

69 Mr Berkman MP, correspondence dated 18 January 2019, p 3.

70 QLS, submission 014, p 3.

71 Bravehearts, submission 012, p 2.

72 Name suppressed, submission 013, p 33.

We believe that many organisations will need to undertake an audit of policies and procedures and implement any necessary changes. Likely, this would include cultural reform and specific trainings for many organisations. It may be necessary for some organisations to be funded to build capacity and knowledge. We believe that the recommendations as handed down by the Royal Commission and implemented by State and Territory governments will have positive changes for the safety and protection of children and young people within organisational and institutional settings. [73]

3.1.3 Definitions of 'institution', 'official' and 'related entity'

The Bill defines 'institution' as an entity other than an individual, which has or had a child in its care, or under its supervision or authority; or provides or provided activities, facilities, programs or services of any kind that give or gave a person an opportunity to have contact with a child.[74] It is irrelevant whether the entity currently exists, is incorporated, and how it is described.[75] This allows the provision to capture entities which have changed names or structure, or have changed their incorporation status. For example, it would allow for a person to bring a claim against an institution which has been merged with another institution, or which was unincorporated at the time of the abuse but is now incorporated.

The explanatory notes provide that: 'It is the function of having access to children that is relevant to the policy objective sought to be achieved by this Bill, not any specific structure that results in that function'.[76]

The explanatory notes further state that the definition 'is drafted to ensure that the changing nature of the delivery of child services by institutions is captured by the Bill'.[77]

The duty of institutions proposed by the Bill applies to acts perpetrated by an official of an institution. An 'official' is defined by the Bill and includes representatives, members, officers, employees, associates, contractors and volunteers, however described, of the institution or a related entity.[78] A 'related entity' of an institution is also defined, and includes 'an entity that provides or provided activities, facilities, programs or services of any kind for the institution'.[79]

Mr Berkman MP advised:

Definitions in this bill such as 'institution', 'official' and 'related entity' are intentionally worded to ensure that the types of child abuse that occurred in the past—and that may be expected to occur in institutions in the future—are captured by this bill. These definitions intentionally have regard to the likely changing face of institutional structures, including the likely delegation or outsourcing of important child services where abuse could be expected to occur. To achieve this, institution is defined by function rather than structure; that is, it is defined by reference to the delivery of child services to ensure that any organisational structure may be appropriately covered.

…

The definition of official is consistent with royal commission recommendation 92.[80]

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73 Bravehearts, submission 011, pp 2-3.

74 Clause 3, s 49C.

75 Clause 3, s 49C.

76 Explanatory notes, p 5.

77 Explanatory notes, p 6.

78 Clause 3, s 49C.

79 Bill, cl 3, s 49C.

80 Berkman MP, explanatory speech, 31 October 2018, p 3201.

Stakeholder views

Mr Bruce Grundy raised a concern that the Bill does not explicitly include the State of Queensland in its definition of 'institution', which he stated was responsible for institutional child abuse conducted in state-run facilities such as orphanages.[81]

The QLS raised concern that the definition of institution did not explicitly exclude a family. It also suggested the phrase 'services of any kind' and the word 'facilities' in the definition, could impose unintended consequences and could mean the duty of institutions would apply to individuals and entities owner of facilities who are not intended to be caught by the reforms, such as an entity which delivers food to an institution.[82]

Knowmore provided support for the definitions of institution and official of an institution, stating:

> *We support broad organisational coverage and a broad and non-exhaustive approach to institutional associates, to ensure appropriate application of the new laws and also to limit opportunities for institutions to avoid liability through the delegation of their responsibilities regarding the delivery of services to children.*[83]

The QLS raised a concern that the definitions regarding what constitutes an institution or official of an institution are too wide and explained:

> *This paragraph has the effect that an entity, such as the owner of a commercial pool, could owe a duty of care to prevent the employee of a school (e.g. a teacher) from abusing a child where the school who employs the abuser has rented the pool facility for swimming lessons or a swimming carnival. This could eventuate because: -*
>
> - *"Related entity" is defined to mean "an entity that provides facilities ... for the institution"; and*
> - *The "official" of the institution who owes the duty of care is defined to include such a related entity.*[84]

The QLS suggested that the definition of 'related entity' should include a causal link to the capacity of the related entity, rather than only that the entity provided a facility.[85]

Other concerns included that foster carers and kinship carers may be unintentionally captured by the definition and should be explicitly excluded.[86]

Committee comment

The committee noted the concerns raised by stakeholders regarding the broad drafting and application of proposed definitions of 'institution', 'official' of an institution, and 'related entity' of an institution. The committee would caution against the implementation of such definitions as currently drafted, considering the potential unintended consequences as raised by submitters.

The committee also notes that the definition of 'institution' in clause 3 appears to be missing a word. It appears the definition should read:

> *An entity other than an individual is an institution if the entity ….*

81 Bruce Grundy, submission 005, p 2.

82 QLS, submission 013, p 2.

83 Knowmore, submission 008, p 3.

84 QLS, submission 014, p 2.

85 QLS, submission 014, p 3.

86 Name suppressed, submission 013, p 5.

3.2 Nominated 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.[87]

Under common law, unincorporated associations are not treated as having legal personality and so cannot sue or be sued.[88] Although they can vary in structure and characteristics, examples of unincorporated associations can include religious groups and sporting or other special interest clubs.

The Bill proposes to impose a duty on institutions to nominate an appropriate defendant if the institution is not able at law to be sued (including because the entity is unincorporated) or if the institution is not in a financial position to meet its liability.[89]

The nominated entity would then be responsible at law, for any liability arising out of a claim for damages for a breach of the institutions' duty of care (regardless of whether the breach happened before or after the nomination of the entity).[90]

The explanatory notes state that this amendment is consistent with recommendation 94 of the Royal Commission.[91]

3.2.1 Stakeholder views and department response

The proper defendant provisions of the Bill were supported by stakeholders including Protect All Children Today Inc (PACT), Bravehearts, and a submitter who wished to remain anonymous.[92]

The QLS recommended amendments to the proper defendant provisions proposed by the Bill, including that:

- the provisions should reflect that some institutions may not have an entity to nominate, so it should be an ability of the institution to nominate a defendant, rather than a mandatory requirement
- in both subsections 49E(2) and 49E(3), the institution has the flexibility to nominate one entity as the defendant for the current claim only, so as to enable the institution to nominate another entity for future claims. It is possible that a nominated entity may only have limited financial capacity
- the process for the nominated entity accepting responsibility should be made clear
- the nominated entity should be able to refuse to accept responsibility for a current proceeding
- the court should have discretion regarding the nomination of a proper defendant.[93]

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

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

89 Bill, cl 3, s 49E.

90 Bill, cl 3, s 49E(3).

91 Explanatory notes, p 7.

92 PACT, submission 002, p 2; Bravehearts, submission 011, p 2; name suppressed, submission 013, p 24.

93 QLS, submission 015, p 3.

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.[94]

The Bill introduces a framework which allows for trustees which are associated with an institution, to be held responsible for liability arising from a breach of the institution's duty of care.[95] A trustee's liability would be limited to the value of the trust property.[96]

These amendments would mean that if an institution is found to have breached its duty of care under the CL Act, and the institution has property held on trust or benefits from property held on trust, the assets of the trust can be used to satisfy the liability (to the extent of the value of the trust).

3.3.1 Stakeholder views and department response

Care Leavers Australasia Network supported the ability to make trustees liable, including that it should be applied to both incorporated and unincorporated institutions.[97]

Submission 013 noted the protections provided by the Bill to trustees, stating:

> *The bill protects trustees by ensuring that the release of assets from a trust to meet the liability of the institution is lawful and does not breach their duty as trustee – in fact it is their duty as trustee.*[98]

Knowmore suggested the inclusion of 'appropriate 'anti-avoidance' provisions, in order to restrict the capacity of institutions to develop trust arrangements that seek to immunise their assets from access to meet child abuse liabilities'.[99]

3.4 Amendments to the *Limitation of Actions Act 1974*

The Bill amends the LA Act, including by inserting a definition of 'child abuse' to reflect the definition inserted into the CL Act.[100]

This amendment expands the removal of limitation periods from applying only to child sexual abuse, to applying to serious physical abuse and other abuse (connected with the sexual or serious physical abuse).

This means a person will not be time barred from pursuing civil litigation against an institution which perpetrated child abuse against the person.

3.4.1 Stakeholder views and department response

The proposed amendments to the LA Act were generally supported by stakeholders who supported the extension of the definition of 'child abuse' more broadly.[101]

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

95 Bill, cl 3, s 49F; explanatory notes, p 8.

96 Explanatory notes, p 9.

97 Submission 003, p 3.

98 Name suppressed, submission 013, p 25.

99 Knowmore, submission 008, p 4.

100 Clause 6, amendment to s 11A.

101 See, for example, submissions 002, 005, 008, 011 - 013.

For example, PACT stated it was 'extremely supportive of the amendments to the definition of child abuse in section 11A so that the statutory exemption from limitation of action applies to child abuse more broadly'.[102]

The QLS suggested amendments proposed to the LA Act:

> *… will present challenges and costs in respect of record keeping, institutional memory, insurances, and proper defendants when institutions may no longer be in existence. Whilst institutions have been required to address these challenges in respect of sexual abuse claims, they may not have dealt with these issues as they relate to claims for other forms of abuse. Hence, if this reform is to progress, considerable thought needs to be given to these issues. In this regard we consider that section 11A of the Limitation of Actions Act 1974 adequately preserves the inherent jurisdiction of the court to, as noted in the example in the section, dismiss or stay a proceeding if the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible.*[103]

3.5 Amendments to the *Personal Injuries Proceedings Act 2002*

The Bill amends the PIP Act, including by inserting a definition of 'child abuse' to reflect the definition inserted into the CL Act and LA Act.[104]

This amendment will allow for a person to apply for and be awarded damages for personal injuries through a civil litigation action; for sexual abuse, serious physical abuse, and other abuse (in connection with sexual or serious physical abuse), which was perpetrated by an institution against the person when they were a child.[105]

3.5.1 Stakeholder views and department response

The proposed amendments to the LA Act were generally supported by stakeholders who supported the extension of the definition of 'child abuse' more broadly.[106]

For example, Bravehearts stated:

> *Again, consistent with our comments above, we fully support the amendment of the definition of 'child abuse', in the Personal Injuries Proceedings Act 2002, to include sexual abuse, serious physical abuse and any other abuse perpetrated in connection with sexual abuse or serious physical abuse, whether or not the other abuse was perpetrated by the person who perpetrated the sexual abuse or serious physical abuse.*[107]

3.6 Consistency with other jurisdictions

The explanatory notes state that the Bill is consistent with legislation in other jurisdictions in that it would:

- form part of a national framework of legislation in all states and territories implementing the recommendations of the Royal Commission
- ensure that the commencement of the non-delegable duty of care of institutions would apply whether the abuse was perpetrated before, on or after the commencement of the Bill

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102 Submission 002, p 2.

103 QLS, submission 014, p 4.

104 Bill, cl 9, amendment of s 9.

105 Explanatory notes, pp 2, 8.

106 See, for example, submissions 002, 005, 008, 012, 013.

107 Bravehearts, submission 011, p 3.

- ensure a trustee is responsible at law for any liability arising out of a breach of the institutions' duty of care, whether the breach happened before or after the commencement (49F(2))
- apply to child abuse, not only child sexual abuse.[108]

Knowmore stated in their submission:

> *Civil litigation reform to remove the barriers addressed in Mr Berkman's Bill has already been implemented in Victoria, New South Wales and Western Australia. Queensland needs to move urgently on these issues.*[109]

It was noted by submitter 013 that the proposed amendments to the definition of 'child abuse' would be consistent with 'almost every other Australian jurisdiction'.[110]

[108] Explanatory notes, pp 8-9.

[109] Knowmore, submission 008, p 1.

[110] Name suppressed, submission 013, p 28.

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' (FLPs) 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 FLPs to the Bill. The committee brings the following to the attention of the Legislative Assembly.

4.1.1 Duty of institutions

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

Summary of provisions

Proposed section 49D in the CL Act (inserted by clause 3 of the Bill) would require that an institution must ensure that a relevant child does not suffer child abuse perpetrated by an official of the institution. Section 49D(3) provides a defence for an institution in an action for a breach of duty of care, if the institution can prove it took reasonable precautions and exercised due diligence to prevent the child from suffering child abuse.

Potential issue of fundamental legislative principle

Section 4(3)(d) of the LSA provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not reverse the onus of proof in criminal proceedings without adequate justification.

Proposed section 49D will involve a reversal of the onus of proof, at least in a practical sense as the onus of proof lies with the institution. This can be regarded as effectively reversing the normal onus of proof in civil matters, whereby a claimant has to prove their case.

Committee comment

The committee notes that legislation breaches a specific FLP if the onus of proof is reversed in *criminal matters* without adequate justification (LSA section 4(3)(d)). In the current situation, there is a reversal of the onus of proof, but it would operate only in the context of civil litigation and not criminal matters.

Taking a broad approach, it could be argued that there is a breach of FLP by the Bill 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 (LSA section 4(2)(a)).

An institution is able to discharge the reversed onus by proving that it took reasonable precautions and exercised due diligence to prevent the child from suffering child abuse.

However, the FLPs require that legislation have sufficient regard to the rights and liberties of *individuals*. The provisions in the Bill relates to the duty of institutions.

An institution in this context, by virtue of the definition in proposed section 49C, excludes an individual.

The committee therefore highlights that

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

Given these elements, the committee considers, on balance, any breach of FLP is justified by the policy intents of the Bill.

4.1.2 Nominated defendant and satisfaction of liability

Clause 3 of the Bill would insert section 49E in the CL Act. The provision will require relevant institutions to nominate an appropriate entity as defendant for a claim in certain circumstances.

The nominated entity is responsible for any liability arising out of the current claim, or any future claim, whether the breach happened before or after a nomination.

Potential issues of fundamental legislative principle

Legislation should be unambiguous and drafted in clear and precise way

Legislation should be unambiguous and drafted in a sufficiently clear and precise way.[111] Plain English is recognised as the best approach to the use of language in legislation, with the objective to produce a law that is both easily understood and legally effective to achieve the desired policy objectives.[112]

Retrospectivity

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.

Fairness and reasonableness

The reasonableness and fairness of treatment of individuals is relevant in considering whether legislation has sufficient regard to the rights and liberties of individuals.

Proper defendant and satisfaction of liability

Proposed sections 49E and 49F aim to implement recommendation 94 of the Redress and Civil Litigation Report, with proposed section 49E directed to implementing that part of recommendation 94 relating to the nomination of a proper defendant.

However, the provision *requires* an institution to nominate an appropriate entity, whereas the recommendation in the Redress and Civil Litigation report, while relating to an institution nominating a proper defendant, does not *require* this to be done.

Legislation should be unambiguous and drafted in a clear and precise way

The requirement to nominate an appropriate entity, set out in proposed section 49E, appears to create unintended consequences, by allowing:

- an appropriate entity to be nominated without consent, and
- an 'appropriate entity' to be able to include an individual.

Subsection 49E(2) requires an institution to nominate an appropriate entity as a defendant in certain circumstances.

The provision is silent on requiring the consent of the entity or notifying the appropriate entity that it has been nominated as defendant for a claim.

Section 49E(4) defines 'appropriate entity' as an entity that is:

(a) capable in law of being sued; and

(b) related to, or has an association with, the institution; and

(c) in a financial position to meet the claim.

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111 *Legislative Standards Act 1992*, section 4(3)(k).

112 Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, pp 87-88.

While it is not clear whether this is the intention of the provision, this definition could, as drafted, extend to an individual, provided they came within the scope of these three categories.

Collectively, the provisions appear to have the effect that an individual could, without their consent, be nominated as a defendant and be responsible for any liability arising out of a claim, or any future claim, arising from any alleged breach of the duty of care, whether the breach happened before or after a nomination.

Retrospectivity

Under section 49E(2), an institution must nominate an entity as defendant for damages for a breach of the institution's duty of care, for a current or future claim. As just noted, the nominated entity is responsible for any liability arising out of current and future claims, whether the breach happened before or after the nomination (by virtue of proposed section 49E(3)(a)).

This involves the imposition of obligations retrospectively.

The explanatory notes state:

> *This section provides for institutions that, while capable in law of being sued, are otherwise not in a financial position to meet current or future claims for any breach of duty of care (e.g. incorporated institutions who intentionally hold their assets in trust).*[113]

Committee comment

The committee notes the potential breach of FLPs raised by proposed sections 49E and 49F.

In particular, the committee notes that an individual could be named as the defendant for an institution, without their consent. The individual could be responsible for any liability arising from a current or future claim.

The committee believes this imposition could have the potential to unduly impact on an individual who was merely associated or related with the institution, and had no personal culpability.

The committee is not satisfied, on balance, that the provisions have sufficient regard to an individual's rights and liberties and the breaches of FLP are justified.

4.2 Explanatory notes

Part 4 of the LSA requires an explanatory note to be circulated when a Bill is introduced, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. Under the heading *Consistency of the bill with Fundamental Legislative Principles,* the explanatory notes state 'The Bill is consistent with FLPs'.

The explanatory notes contain the information required by Part 4 of the LSA and a sufficient level of background information and commentary to facilitate understanding of the Bill's aims and origins.

Committee comment

The committee notes the explanatory notes for these subordinate legislation generally comply with the requirements of the LSA.

However, it is the committee view that it is arguable whether the statement that 'The Bill is consistent with FLPs' is accurate.

[113] Explanatory notes, p 7.

Appendix A – Submitters

Sub #	Submitter
001	Girl Guides Queensland
002	Protect All Children Today Inc
003	Care Leavers Australasia Network
004	Name suppressed
005	Grahame Bruce Grundy
006	Queensland Child Sexual Abuse Legislative Reform Council
007	Allan Allaway
008	knowmore
009	Micah Projects
010	John O'Leary
011	Kevin Lindeberg
012	Bravehearts Foundation
013	Name suppressed
014	Queensland Law Society

Appendix B – 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