LEGAL AFFAIRS AND COMMUNITY SAFETY COMMITTEE

Members present:

Mr PS Russo MP (Chair)
Mr JP Lister MP
Mr SSJ Andrew MP
Mr JJ McDonald MP
Mrs MF McMahon MP
Ms CP McMillan MP

Member in Attendance:
Mr MC Berkman MP

Staff present:

Ms R Easten (Committee Secretary)
Ms E Jameson (Inquiry Secretary)
Ms M Westcott (Assistant Committee Secretary)

PUBLIC HEARING—INQUIRY INTO THE CIVIL LIABILITY (INSTITUTIONAL CHILD ABUSE) AMENDMENT BILL 2018 AND THE CIVIL LIABILITY AND OTHER LEGISLATION AMENDMENT BILL 2018

TRANSCRIPT OF PROCEEDINGS

MONDAY, 11 FEBRUARY 2019

Brisbane

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The committee met at 9.06 am.

CHAIR: I declare open the public hearing for the committee's inquiry into the Civil Liability (Institutional Child Abuse) Amendment Bill 2018 and the Civil Liability and Other Legislation Amendment Bill 2018. My name is Peter Russo, the member for Toohey and chair of the committee. With me here today are: James Lister MP, the deputy chair and member for Southern Downs; Stephen Andrew MP, the member for Mirani; Jim McDonald MP, the member for Lockyer; Melissa McMahon MP, the member for Macalister; and Corrine McMillan MP, the member for Mansfield. We also welcome Michael Berkman MP, the member for Maiwar, to today's hearing.

On 31 October 2018 Mr Berkman introduced the Civil Liability (Institutional Child Abuse) Amendment Bill 2018 to the parliament. The parliament referred the bill to the Legal Affairs and Community Safety Committee for examination with a reporting date of 30 April. On 15 November 2018 the Attorney-General and Minister for Justice, the Hon. Yvette D'Ath MP, introduced the Civil Liability and Other Legislation Amendment Bill 2018 to the parliament. Parliament referred the bill to the Legal Affairs and Community Safety Committee for examination with a reporting date of 28 February 2019. The purpose of today's hearing is to hear evidence from stakeholders as part of both of these inquiries.

Only the committee and invited witnesses may participate in the proceedings. Witnesses are not required to give evidence under oath, but I remind witnesses that intentionally misleading the committee is a serious offence. These proceedings are similar to parliament and are subject to the Legislative Assembly's standing rules and orders. In this regard I remind members of the public that under the standing orders the public may be admitted to, or excluded from, the hearing at the discretion of the committee. The proceedings are being recorded by Hansard and broadcast live on the parliament's website. The media may be present and will be subject to the chair's direction at all times. The media rules endorsed by the committee are available from committee staff if required. All those present today should note that it is possible you may be filmed or photographed during the proceedings. Images may also appear on the parliament's website or social media page. I ask everyone present to turn their mobile phones off or to silent mode. The program for today has been published on the committee's web page and there are hard copies available from committee staff.

LUTHY, Mr James, Committee Member, Care Leavers Australasia Network

CHAIR: I invite you to make a brief opening statement if you so wish, after which committee members may have some questions for you.

Mr Luthy: My name is James Luthy; I was the president of CLAN for about five years. CLAN is an organisation that advocates and represents those who were in care at various stages of their lives. I have been in various forms of care since the age of four, when I was orphaned, and I am a survivor of Salvation Army brutality. I want to very quickly address three or four points in CLAN's submission; however, as a care leaver I want to say that, as I look down the list of people who are attending today, I am the only care leaver appearing today. As you do what politicians do and as lawyers do what lawyers do, I would like to remind people here of the humanness of those whom I represent, particularly in Queensland. This is not a political or legal game for us; it is very personal and it is human. I feel that there is a need to state that right from the outset.

In its proposal CLAN put forward the idea that there should be equality of access to justice for victims of all forms of abuse. Consequently, the reforms should apply to victims of serious physical and connected other abuse, not only sexual abuse. I would like to endorse that point of view. As a person who was in a particularly brutal institution, as recognised by the Senate committee into institutional abuse and the royal commission, I would like to state that sexual abuse is purely one form of abuse. I can only speak from my experience, but of course if we extrapolate back it applies to all institutions.

Every person who came into care was abused because there was the extreme threat that at some time or other you were going to be hit, bashed or something would happen to you. The other thing is you knew that, if you were going to be hit, bashed or psychologically abused, there was no comeback whatsoever. Consequently, boys were sent to hospital with broken bones and broken noses for breaking a plate; there were boys who could not sit down at school; and there were boys who could

not write. They all suffered abuse. I have been to too many funerals and I have given too many eulogies for people who lost their lives prematurely. It should not have happened. Abuse was something that was there all the time, and the medical, legal, police and educational institutions did absolutely nothing. Those who were in charge of the homes did nothing as well. Of course you are going to be talking about vicarious liability. Did they know it was happening? Yes, they did: it is as simple as that.

The next point CLAN makes is that the duty of institutions should be retrospective, as in WA, to ensure equality of access to justice for victims of past and future abuse. We believe that institutions should be held accountable for retrospective abuse. The fact is that they knew. The fact is that governments and government departments knew as well and that is something that no government can hide from. They all knew what was happening and they all chose to ignore it. People who were in homes for some unknown reason were thought of as being rather stupid and foolish. If you have done any reading you will find that people were psychologically abused and told they were no good because they lived in a home.

I was recently on the honours list this year, given an OAM, of which I am very proud, because of my advocacy for Salvation Army children—adults now. Those people suffered and their whole lives have been impacted upon—their careers have been impacted upon—by the abuse that they suffered. Has my career been impacted upon? I would say yes. I taught in Queensland schools for around 35-something-or-other years and thankfully have now retired, but was my career impacted? Yes, it was—very much so. I have a plethora of degrees and that is fine, but I never really achieved what I was able to do because of the treatment that I received as a child. I look at the lives that have been wasted because of this.

I am also very aware of Leneen Forde's comments in regard to the Salvation Army where she said that they value their good name and their money and nothing else, not the people who were affected by this. It needs to be retrospective. The history of Australia needs to acknowledge this, and if it can be done in those ways. Some people need money just for funerals, for God's sake. This is just crazy that it would not even be considered to be retrospective.

CHAIR: James, I am conscious of the time and I am sure the members have some questions for you

Mr Luthy: Very quickly, we would like the ability to make associated trusts liable to be applied equally to incorporated and unincorporated institutions. That is the belief of CLAN. I am sorry if I went over there.

CHAIR: No, there is no problem.

Mr Luthy: I do understand.

CHAIR: Could I start by congratulating you on your OAM.

Mr Luthy: Thank you.

CHAIR: I think it is important that you are acknowledged for your advocacy. James, do you have a question?

Mr LISTER: Thank you very much for coming in today. I add my congratulations on your award of the OAM. I am sure that is well deserved. Can I ask perhaps a more gentle question for my own knowledge. What is the difference between someone such as yourself who suffered at the hands of an institution and has gone through terrible things but who is able to rise up and be an advocate and present a case like this and someone else who just wants to put it all behind them and struggles to deal with what they have been through as a child?

Mr Luthy: I have thought of that question myself. Can I say that I have not been able to put all things behind me. I did start my doctoral dissertation on this and was unable to complete that. I have also been to counselling, paid for by the Salvation Army. I was just determined that I was not going to be ground down. I was absolutely determined that this was not going to happen. When I was told that I was a fool and would never amount to much, that was fine; I went and got an apprenticeship. I worked hard. I have a total of seven meaningless degrees that look good, but it was a sheer grind—an absolute grind, a sheer determination that I would not be put in that situation. Some people retreated. I came out probably acting more aggressively, I guess. I was not going to live up to that kind of Pygmalion concept where you are told you are no good so you live to that. I was determined not to.

Mr BERKMAN: Thank you for being here. I could ask you questions all day but I have very limited time. Just for clarity, is your experience and that of other members of CLAN or people represented by CLAN common to people who have suffered in all manner of institutions, be they state or private or religious or secular institutions? That is a fair comment, yes?

Mr Luthy: Yes, certainly.

Mr BERKMAN: With that in mind, can I ask you to elaborate on what difference it makes for survivors—this question of whether the duty of institutions will apply retrospectively or not?

Mr Luthy: 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.

Mrs McMAHON: One point you raised in your submission is about the unincorporated institutions. In your submission you state that obviously one of your concerns is that many unincorporated institutions may slip through the cracks. In your experience, what kinds of institutions would you be referring to? How does the proposed legislation seek to address that?

Mr Luthy: I will be very honest here: I was given this stuff only the other day so I have not had the full time to go through all of this. CLAN is concerned that organisations such as the Catholic Church in particular—and again, for your information, the Anglicans and the Salvation Army were initially invited by the Catholics to join in the Ellis defence. They declined that, but 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. These were the children that the government—not you guys but the government at the time—put into care. These are the adults who have suffered. I cannot give you a direct response, but I am simply saying that any organisation that allowed this to happen needs to have the ability to make reparations.

CHAIR: I am conscious of time and that we do have a witness waiting. I thank you for your attendance here today.

JAMES, Ms Michelle, Spokesperson for Childhood Sexual Abuse Claims, Australian Lawyers Alliance (via teleconference)

CHAIR: I now welcome Michelle James, who is joining us via teleconference. I apologise that we are running a little behind schedule. We will hopefully get back on track. Would you like to make a short opening statement? Then the committee will have some questions for you.

Ms James: Very briefly, Chair, thank you. My opening remarks are very brief, really just to outline the long history that the Australian Lawyers Alliance has had in advocating in this space for the survivors of childhood sexual abuse. In the main, of course, we wholly appreciate the changes that are being proposed. You will see from our submissions that we do differ in some respects in terms of what we believe to be best practice to provide necessary law reform for survivors, but in the main we do welcome the move on the part of the Queensland government and other governments to legislate in accordance with the royal commission recommendations. I will take my submissions as read and I am very happy to deal with questions from the committee.

CHAIR: Thank you very much.

Mr LISTER: I might hand the first question to the member for Maiwar.

Mr BERKMAN: Thank you for being with us. I wanted to start by touching on the question of the definition of sexual abuse as compared with the broader definition of child abuse that is proposed in the private member's bill. The Queensland Law Society has raised concerns about that definition and suggests that there will be difficulty in defining what constitutes serious physical abuse and when other abuse is perpetrated in connection with sexual or serious physical abuse. Can you describe how these concerns are dealt with in other states where this kind of broader definition has been adopted and, following on from that, what are the implications for survivors of child abuse if the narrower definition of child sexual abuse is retained?

Ms James: Yes, sure. Paragraph 3 of our submission deals with this. Queensland is really on its own in terms of quite a narrow definition. Other states—New South Wales and Victoria in particular—have adopted a broader definition of child abuse. We support those broader definitions really because, 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.

Mr BERKMAN: Thank you. The ALA's submission also states that the bill offers less than the common law already provides. This is predominantly, as I understand it, in relation to reversal of the onus of proof, vicarious liability. Is it the case that this bill would effectively leave survivors with fewer avenues of redress than they currently have?

Ms James: Potentially. The first issue is that it would depend on whether any legislation—if this bill were to be passed, for example—was prospective or retrospective. Certainly if it was prospective, then from the day that this bill was assented to and became law any survivor would have more narrow remedies. That is the case in our submission. We are of the view that the way the case law has gone in Australia, with regard to the Prince Alfred decision from 2016, it makes clear that the vicarious liability test is the current law and has always been the law. In other words, for a survivor today who wants to bring a claim, that is what we would say the state of the law is, but it is made clear from the earlier decision of Lepore that then brought into sharper focus in the later decision of Prince Alfred College that vicarious liability can exist in these cases, even where the conduct complained of is criminal, as is clearly the case in the case of sexual abuse against children.

Moreover, we say that this follows the common law in other common law jurisdictions and our submission highlights this. In particular, the appendices to our submission go into some detail around the state of the law in Canada and the UK in particular, which is very in line with a broader definition of vicarious liability where it does not need to be an employer/employee relationship; it just needs to be that close connection test and, further, that vicarious liability is not defeated by a criminal act on the part of the perpetrator.

Ms McMILLAN: In relation to retrospective claims, why does the ALA therefore recommend it apply retrospectively? How will the ALA justify the breach of fundamental legislative principles?

Ms James: The bill covers a range of different areas, as you are aware. Vicarious liability is just part of it. In particular with the retrospectivity point, we suggest that that is specifically in connection to the liability of institutions and the defeats of the Ellis defence, and we go into some detail about that in our submission. 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.

CHAIR: Thank you, Michelle. That brings to a conclusion this part of the hearing. We thank you for your attendance and for your written submission.

Ms James: No problem. Thank you, Chair. Thank you, committee.

STRANGE, Mr Warren, Executive Officer, knowmore

CHAIR: I now welcome Mr Warren Strange. Good morning. I invite you to make a brief opening statement, after which committee members may have some questions for you.

Mr Strange: Thank you, Mr Chair. I thank the committee for the opportunity to make our submission and to appear today. Our service is very pleased to see these reforms progressing via the two bills that are currently before parliament. We have dealt in our submission with the importance of moving quickly on these reforms. Survivors are now in a position where they have the option of making a claim to the national redress scheme or exercising their common law or civil rights, and that position is complicated for people whilst the laws around their common law rights and their civil rights are still to be settled.

I just wanted to make a couple of points. In some of the submissions the committee is urged to make some departures from the direction that the drafting currently reflects. One example is around the limiting of the concept of an associated trust to excise certain trusts that might be set up for other specific charitable purposes. I just wanted to note that in determining any of these policy issues it really devolves to a question for parliament as to who bears the loss of what happened to survivors. Does it sit with the survivor, who as a child through no fault of their own was placed in these circumstances and abused, or should it lie with the institution? The royal commission exposed what can only be described as a catastrophic national picture of institutional failings which in our view strongly mandates that policy decision being made in favour of survivors.

Secondly, these reforms are not just about access to justice for survivors; they are also an important way of driving and shaping institutional behaviour. Imposing increased duties on institutions and making sure that their assets are available to settle child abuse cases will, we think—and the royal commission also thought—have a significant impact on driving institutional behaviour and hopefully preventing child abuse happening in the first place.

The only other point I wanted to make by way of opening was that we are very supportive of expanding the definition of child abuse, as the other two witnesses have mentioned, to include, as in other states, serious physical abuse and connected abuse. That would promote consistency and it will help to recognise the totality of survivors' experiences and afford them access to justice for all of those forms of abuse that they suffered. Thank you.

CHAIR: Michael or James, do you want to start?

Mr LISTER: I think the member for Maiwar should go first, Mr Chair.

Mr BERKMAN: Thank you very much. I appreciate the indulgence. Thanks for being here, Mr Strange. On that expanded definition of child abuse, you heard the question and the response from the ALA representative. Are you aware of any perverse outcomes interstate or any issues with that expanded definition and the way it is framed in the private member's bill?

Mr Strange: Not that we have heard of, no. I think it is very unlikely that survivors are going to be bringing civil claims for minor physical abuse. We are talking here about experiences that in the criminal law would constitute grievous bodily harm or bodily harm—what children suffered related to their sexual abuse. It is very common amongst our client group, unfortunately, and the expanded definition will recognise all of those forms of harm that they suffered and allow them to bring a proper case that is dealt with on its merits and not have to fragment cases and pursue different remedies for different forms of abuse.

Mr BERKMAN: Thank you. In your introduction you mentioned that that sort of central policy decision needs to be made by the parliament about who bears the ultimate responsibility—that is, whether it falls to survivors or to institutions. Given that the recommendations of the royal commission purport very much to be survivor-centric and survivor focused, you have said in your submission that there should be no significant derogation from the recommendations of the commission. Can you outline whether there are any respects in which the government bill falls short of fully implementing the recommendations of the royal commission to the letter or in their intent?

Mr Strange: Probably the main divergence is around the scope of the duty imposed on institutions. 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. No-one has implemented in the other jurisdictions that recommendation and it is not followed in the Queensland legislation either—that is, the government bill, which recommends instead the reverse onus position such that institutions are responsible unless they can discharge that onus. That has been a major policy departure across all Australian jurisdictions to date.

Mr BERKMAN: Can you elaborate very quickly on the implications of that departure? Do you feel it was justified?

Mr Strange: Our position is essentially to support the royal commission's recommendations. They were very carefully crafted and they felt that, following all of the evidence and policy considerations that they went through, that category of higher risk institutions should have that strict liability so that if harm occurs the institution is responsible.

Mr BERKMAN: The institutions to which liability might fall under these reforms obviously include any number of government institutions in addition to private institutions, religious or secular, as I mentioned earlier. Will any of these shortcomings and the implementation of the recommendations of the royal commission in effect lessen the potential liability for the Queensland government?

Mr Strange: It is difficult to answer that. If the government bill as framed is passed, then it is a reverse onus position so all of those institutions moving ahead will have to show that they have appropriate child-safe systems in place. That is a higher barrier for survivors than a test of strict liability would be, where they simply have to prove that they were abused in that institutional context for liability to attach.

Ms McMILLAN: Thanks for coming in, Mr Strange. Could you outline for us what practical change you think the government bill, if passed in parliament, will provide in terms of individuals and their ability to pursue civil litigation against an abuser? What are the practical impacts of the government bill for those individuals?

Mr Strange: It is very hard at the moment to hold an institution vicariously liable for sexual and other connected abuse that someone has suffered as a child. It is easier to sue the perpetrator in tort, but often the perpetrator has no assets so people want to look to the institution. It is difficult on the current state of the law, the way the law has evolved in Australia, particularly outside the relationship where the abuser is an employee of the institution, and many thousands of survivors who were in homes and other environments were abused by people who were not employees. Religious priests are not technically employees of a church or an order. Volunteers, visitors, associates or employees—all sorts of people engaged in shocking abuse of children, and it is very difficult to bring home any liability to the institution at the moment. We have seen reliance by institutions on the so-called Ellis defence to avoid civil suit and to protect assets from being available, and that has prevented access to justice for those people. The removal of limitation periods was a very important reform, but these reforms are necessary to create access to justice and enhance those rights for survivors moving ahead.

Mr LISTER: Mr Strange, thanks for coming in today. The Queensland Law Society raised concerns regarding a causal link to distinguish other abuse perpetrated in connection with sexual or serious physical abuse. Would your group have any suggestions regarding the threshold for what would be considered to be abuse perpetrated in connection with sexual abuse or serious physical abuse?

Mr Strange: I think guidance can be taken from the drafting in the other states. New South Wales has the qualifying factor of serious physical abuse. I did not bring it, but in the New South Wales legislation I do not think that is defined. That will evolve over time in determined decisions as to where that is drawn.

In terms of the link, that is a matter for proof and all of these cases will turn on their individual facts. However, there is a wealth of information available in the royal commission's report, which talks about why sexual abuse was so prevalent in so many of these institutions. They speak at length about institutional cultures of oppression and of physical brutality that in effect groomed children to make them more susceptible to the occurrence of abuse and to effectively silence them so that the reporting or investigation of abuse was not going to occur easily in those sorts of environments. I think there is a very significant body of material that will guide decisions around that connectedness.

CHAIR: That brings this part of the hearing to a conclusion. Mr Strange, I thank you for your attendance and also for the written submission that you have provided to the committee.

DEVINE, Ms Wendy, Principal Policy Solicitor, Queensland Law Society

JOHNSON, Mr Trent, Member, Accident Compensation/Tort Law Committee, Queensland Law Society

LIND, Mr Andrew, Chair, Not for Profit Law Committee, Queensland Law Society

POTTS, Mr Bill, President, Queensland Law Society

SAMPSON, Ms Kerryn, Policy Solicitor, Queensland Law Society

CHAIR: I now welcome representatives from the Queensland Law Society. I invite you to make an opening statement. After that, the committee will have some questions.

Mr Potts: We thank you all for inviting the Queensland Law Society to appear at this public hearing on the Civil Liability (Institutional Child Abuse) Amendment Bill, the so-called Greens bill, and the Civil Liability and Other Legislation Amendment Bill, the so-called government bill. My name is Bill Potts and I am currently the president of the Queensland Law Society. The Law Society is an independent, apolitical representative body and the peak professional body for the state's legal practitioners. We are also representative of its member practitioners. In particular, I note the efforts of the Accident Compensation/Tort Law Committee and the Not for Profit Law Committee in compiling the written submissions on these bills.

I listened very carefully to what Mr Warren Strange has had to say. The Law Society has always supported this legislation. We are pleased to see that this government and this parliament will be considering, in a victim oriented way, the very real horrors perpetrated—sometimes in the name of God and sometimes in the name of just sheer fecund personal failings—upon the youth of Australia.

However, despite the good intentions of these reforms, the QLS is unable to support the reversal of the onus of proof. It is our submission that this would undermine a fundamental tenet of our legal system and that other measures set out in our submission on this issue will better achieve the policy intention whilst preserving a fair and balanced system. The significant reforms in this area following the royal commission and the steps that the government is taking to ensure that the survivors of institutional child sex abuse may commence proceedings for damages are indeed appropriate.

I will hand over to Trent Johnson, who is an experienced compensation lawyer and, as you heard, a member of the QLS Accident Compensation/Tort Law Committee. Andrew Lind is also experienced in the not-for-profit sector and is the chair of the Queensland Law Society's Not for Profit Law Committee. They will outline the key issues in relation to the bill.

Mr Johnson: The QLS position is that we have various comments on the two draft bills. Talking about the government's bill first, I note there is a definition of 'entity' in section 33A. We believe there should be consideration given to whether that should be changed from ‘entity’ to 'incorporated or unincorporated body', in accordance with the other provisions of the bill.

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.

There is also the proposed section 33D of the government's bill setting out the duty of institutions to prevent child sexual abuse. If we have regard to the former Ellis decision, there are effectively three elements to that. No. 1 is establishing a management committee—and Ellis is principle for the fact that the management committee at the time the abuse occurred is responsible for the abuse. Our submission is that the current management committee of the institution, whether it be unincorporated or incorporated, needs to be listed as liable for the abuse. The members are not personally liable but in their capacity.

Second is identifying the assets of the entity for satisfaction of any claims against it. We submit that a catch-all position is required. To the extent that the institution has a liability, duty or obligations under the bill, some clarification is needed to ensure that those may be enforced against the current

office holders. Obviously, it is our position that the current office holders have the satisfaction and the coverage of any previous policies of insurance applying to the former management committee of that entity. The bill should make that clear. That is with respect to proposed sections 33F and 33G, whether the formerly unincorporated institution is now incorporated or unincorporated still.

That is really all I needed to say with respect to the proposed government bill. I do not have any comments with respect to the Greens bill.

Mr Potts: We regard some of these technicalities as being so important that we think it is important that we address this in our opening statement. Therefore, I ask leave for Mr Lind to address issues relating to the trust assets application of this law.

Mr Lind: With respect to associated trust assets, it is our submission that the proposed provisions go further than the recommendations of the royal commission's 2015 *Redress and civil litigation report*, and specifically recommendation 94. It is our submission that the definition of 'associated trust' in proposed section 33B is much broader than the notion of associated trust property as considered by the royal commission. We submit that the meaning of 'associated trust' needs to be expressly limited, as outlined in our submission, to reflect the royal commission's recommendations. Specifically, the drafting of the bill does not deal with an associated trust asset that might be held for a different charitable purpose to that of the institution or for a more specific charitable purpose.

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.

In relation to division 5 and in particularly proposed section 33O(2), 'Continuity of institutions', we submit that the change should be prospective only, after a not insubstantial transition period. This is in light of the amount of merger and acquisition activity occurring in the sector in recent years. Specifically, the proposed bill does not limit the liability of successor institutions to the assets they took over from the previous institution but it exposes all of their current assets.

Regarding section 33M, the QLS submits that the bill should contain a statutory indemnity of the trustee if they act in accordance with the conduct permitted by the bill, as we see in other states. We are now happy to answer any questions.

CHAIR: Michael, do you want to start, because of the time constraints?

Mr BERKMAN: I will start with the question of the expanded definition of 'child abuse', as we have with other witnesses. You may have heard the responses from the ALA and knowmore representatives that they are not aware of any real concerns in practice about the application of that expanded definition. Given the issues you have raised in the QLS submission, do you have any specific examples of where this has actually been problematic in practice or any perverse outcomes that have been experienced in other jurisdictions?

Mr Johnson: The short answer is no. 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.

Mr Potts: To add to that, as Mr Strange very eloquently pointed out, the whole program of sexual abuse was about grooming. It was the silencing of people. The damage done includes being witnesses to the damage done to others. Whilst we have faith that there is an opportunity here to have regard to a broader picture, we think it is important that the legislation be as broad as it possibly can in that regard and not, as Mr Strange referred to, be fragmented.

Mr BERKMAN: You mentioned in the introduction the QLS's position that you cannot support the reversal of the onus of proof. As I understand it, and based on Mr Strange's evidence, that is one point within this proposed legislation that represents as a derogation from the royal commission's recommendations. Is that a position that you accept, just broadly?

Mr Potts: Yes, it is. It should be a strict liability, which is what the royal commission was recommending.

Mr BERKMAN: What QLS is proposing is a further derogation from that position—the recommendation of the royal commission?

Mr Johnson: The QLS position is that it cannot support the departure from the fundamental tenet of law, which is that the onus rests upon the injured party to prove their claim, and that is the reverse onus of proof. However, if the legislation is structured correctly, it will give a fair balance to both victims whom our members act for and institutions that our members act for with respect to these claims. Although we have not addressed it, the ALA has addressed in its submissions the issue with respect to vicarious liability of institutions. I also note that in the Limitation of Actions Act with the removal of the time limits for sexual abuse claims only in Queensland there is also provision for the courts to dismiss claims on the basis that the defendant has been prejudiced by their inability to adequately defend a claim on the basis of, for example, missing evidence and things like that.

Mr BERKMAN: It is a very technical area. I appreciate the detail in the response. I do not mean to—

Mr Potts: The devil is always in the detail.

Mr BERKMAN: Indeed it is. To try to zoom out, if it is possible, just looking at how the balance is struck between the interests of survivors and the interests of institutions, the position the QLS is proposing is that, rather than framing it as a derogation from the royal commission's recommendations, it would essentially shift the balance to whatever extent slightly further away from the interests of survivors. Is that a fair representation?

Mr Johnson: I do not strictly agree with that, the reason being that 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 happened,' and that is it. The onus then shifts to the defendant to say, 'Hang on a tick. We took all reasonable measures.'

Mr BERKMAN: I accept that, and strict liability is the only way that that would in effect be addressed, as the royal commission recommended?

Mr Johnson: Absolutely, but the survivor is still required to prove that they were abused and that the extent of their abuse has caused them injury, so there is still a requirement on the survivor. Unfortunately, there always will be that hardship imposed upon them where they need to prove their case.

Mrs McMAHON: There was a little point in your submission specifically about proposed part 2A and the definition of 'associated with'. You make the comment that—

This has the potential for a wide range of persons to be added to this definition.

I am assuming that would be unintentional. Could you give the committee an idea of who you think may be captured by what you may consider to be a broad definition? What are the unintended consequences? Who might this definition be picking up, or who is it meant to pick up who might otherwise not be included? Where is the care in there?

Mr Johnson: I think this was in the ALA submissions. 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.

Mrs McMAHON: Mr Lind, going back to the example you provided in relation to assets or associated assets, you gave the example of a wholly unconnected donation that may be caught up in liability. We have heard from a couple of people today about how corporations now almost seem to be

able to move in and trade and hide behind a number of different guises in order to avoid some kind of liability. Is it just the case that potentially these larger organisations—corporations in many respects—simply move the piece around the board so that donations are called something else in order to avoid being captured under entities?

Mr Lind: In our submission we suggested that if there was to be a narrowing of the trust assets that could be called in there would need to be some anti-avoidance mechanisms included in the legislation. That would be one thing. The other thing is that in practice we find that it is the generous donor who imposes the conditions on the gift, who impresses the specific trust obligations on the gift—either an inter vivos gift during their lifetime or a testamentary gift on their death—which restricts the purposes for which the assets can be used. The 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 is the basis of the submission.

Mr Potts: It may have a 'chilling' effect if it is not dealt with properly.

Mrs McMAHON: Yes. I can see instances where a donor would approach an organisation saying, 'I would like to make a significant donation. How do I best do that?' 'Introduce a whole bunch of lawyers to tell you how to structure your donations so it cannot be touched.'

Mr Potts: The point of the 'chilling' part is this. Because they might see their life's work suddenly disappear, it may simply deter people from making proper and appropriate donations to causes which are designed to benefit the entire community.

Mr Lind: I think the anti-avoidance provisions, if appropriately drafted, leveraging off the revenue law anti-avoidance provisions, which are quite broad, would be able to untangle some of those things if they were for no legitimate purpose other than that.

CHAIR: That concludes this hearing. Thank you very much to all of the people who appeared today or joined us by teleconference. Thank you to our Parliamentary Service staff and to our Hansard reporters. A transcript of these proceedings will be available on the committee's parliamentary web page in due course. I declare the public hearing for the committee's inquiry into the Civil Liability (Institutional Child Abuse) Amendment Bill and the Civil Liability and Other Legislation Amendment Bill closed.

The committee adjourned at 10.07 am.