25 October 2016

Child sexual abuse - civil litigation issues review
Strategic Policy
Department of Justice and Attorney-General
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Dear Research Director

Issues Paper: Child sexual abuse – civil litigation issues review

Thank you for the opportunity to provide comments on the Issues Paper: Child sexual abuse – civil litigation issues review (the Issues Paper).

The Queensland Law Society (the Society), in carrying out its central ethos of advocating for good law and good lawyers, endeavours to be an honest, independent broker delivering balanced, evidence-based comment on matters which impact not only our members, but also the broader Queensland community.

In this response the Society will address the questions raised in the Issues Paper including removing limitation periods in respect of claims for abuse other than just sexual abuse and against persons other than just institutions, whether there should be a non-delegable duty of care and a reverse onus of proof imposed on institutions and finally, the difficulties for a plaintiff in identifying the proper defendant with a capacity to pay damages.

For ease of reference, we have adopted the question numbers used in the Issues Paper. Our comments do not address all substantial aspects of the Issues Paper and should not be considered to be either endorsement or rejection of its subject matter. Further, the Society believes that many of the issues raised warrant further consideration before an unequivocal position is taken and/or legislated. As such, we would welcome the opportunity to discuss any of the issues raised by the Issues Paper to assist in ensuring the best approaches to reform are adopted.

Question 1 - Recommendation 85 is limited to child sexual abuse. Should other forms of abuse, for example, physical abuse and related psychological abuse be considered? If so, should there be a threshold of seriousness of abuse and how might that be defined?

The Royal Commission into Institutional Responses to Child Sexual Abuse (the Commission) made recommendations which were limited by their terms of reference to child sexual abuse. Similarly, the evidence it received about the average length of time for a survivor to disclose abuse was also confined to sexual abuse. We are not aware of the average disclosure periods
for physical abuse and related psychological abuse. We believe this information should be presented before a decision is made on this point and so that there is balance between the rights of a victim and the rights of a potential defendant.

As noted in the Issues Paper, New South Wales and Victoria have recently removed the limitation periods applying to actions relating to child abuse. New South Wales has defined "child abuse" to be sexual abuse, serious physical abuse and other abuse that is connected to the sexual or serious physical abuse. There is no legislative "seriousness test". Similarly, in Victoria, the limitation period does not apply to actions relating to child physical abuse, sexual abuse, and related psychological abuse.

In the Second Reading speech for the Limitation Amendment (Child Abuse) Bill 2016, the NSW Attorney-General, Ms Gabrielle Upton said:-

"This broader approach recognises that many children who have been maltreated experience multiple forms of abuse. For example, a perpetrator of sexual abuse may also use physical violence, grooming and psychological manipulation to prepare a child for sexual activity or to ensure that a child does not report the abuse. The evidence demonstrates that non-sexual forms of abuse, such as serious physical abuse, can be equally as traumatic as child sexual abuse.

.... To avoid being overly prescriptive, the bill does not exhaustively define what conduct constitutes "sexual abuse" or "serious physical abuse". Rather, the bill requires courts to determine whether or not abuse has occurred having regard to the circumstances of each individual case and the ordinary meaning of the terms. The term "child abuse" should be interpreted in a beneficial manner.

The following examples are indicative of the type of conduct that may constitute child abuse. "Sexual abuse" of a child has been defined by the royal commission as "any act which exposes a child to, or involves a child in, sexual processes beyond his or her understanding or contrary to accepted community standards". This includes sexual activities that do not involve physical contact with the victim, such as acts of exhibitionism and exposure to pornography. "Serious physical abuse" should capture non-accidental physical contact with a child that could cause injury. It may consist of a series of relatively minor episodes over a period that causes (sic) the conduct to become serious, as well as serious, one-off conduct.

The bill is not intended to capture conduct that on its own would not amount to "serious physical abuse", such as a one-off physical altercation between two minors, the reasonable restraint of a violent child, reasonable corporal punishment where a defence of lawful chastisement was available at law at the time of the incident, lawful medical treatments conducted under previous policies, and medical negligence claims. "Connected abuse" could include psychological abuse where a child is manipulated to feel complicit in the abuse, where a child is threatened to prevent them from reporting the abuse, or where a child is coerced into covering up the abuse. It would also include "grooming", which is defined by the royal commission as "actions deliberately undertaken with the aim of befriending and establishing an emotional connection with a child to lower the child's inhibitions in preparation for sexual activity with the child". "Connected abuse" could also include minor physical abuse that does not meet the threshold of serious physical abuse, such as minor physical assaults."

In respect of a threshold of seriousness, while the Society accepts that this would be desirable to ensure balance between the rights of all parties, we envisage difficulty in legislation defining what constitutes "serious abuse". As the NSW Attorney-General has said above, an abusive
act may not, in itself, be classed as “serious” however, should that act be sustained, repeated or done in conjunction with other acts, the effects on a child could be serious. Placing examples of what constitutes “serious abuse” in the legislation would be useful however; it could not be an exhaustive list. Such a test might be best left to the Courts when deciding liability, causation and damages for these claims.

**Question 2 - Recommendation 85 is limited to child sexual abuse that has occurred in an institutional context. Should child abuse in other or all settings, including the family setting, foster care and out of home care, also be included?**

The Society welcomes further consideration of this issue. There effects of this proposal on victims and persons and group not considered institutions will be significant. We believe that the starting point for consideration should be the underlying principles of equality.

The proposed section 11A of the *Limitations of actions (Institutional Child Sexual Abuse) and other Legislation Amendment Bill 2016* (the Bill) states that:

“(2) For subsection (1), sexual abuse happens in an institutional context if the sexual abuse—

(a) happens—

i. on the premises of an institution; or

ii. where activities of an institution take place; or

iii. in connection with the activities of an institution; or

(b) is engaged in by an official of an institution in circumstances, including circumstances involving settings not directly controlled by the institution, in which the institution has, or the institution’s activities have, (whether by act or omission) created, facilitated, increased, or contributed to—

i. the risk of sexual abuse of children; or

ii. the circumstances or conditions giving rise to the risk of sexual abuse of children; or

(c) happens in any other circumstances in which an institution is, or should be treated as being, responsible for persons having contact with children.” (emphasis added)

We note also the breadth of the definitions of “institution” and “office official of an institution” in s11A(6) of the Bill.

The Society is of the view, that this drafting (especially the passages marked in underline above) may well be considered broad enough to encompass some of the situations and settings contemplated by Question 2.

Further, the Society notes the significance of removing the limitation on claims against individuals. An individual might risk bankruptcy to defend a claim and there will likely be a severe impact on individual if a claim is made against them, even a vexatious claim.

Notwithstanding the above arguments, the Society notes there are several points to be made in favour of extending the removal of the limitation period outside of the institutional context.
Firstly and fundamentally, a victim should not be disadvantaged simply because the abuse was perpetrated by someone outside of a recognised institution. The Society does not advocate for the creation of categories of victims. If child sexual abuse is limited to only abuse which occurred in institutional settings, then that is exactly what would occur.

The Issues Paper notes that the average reporting time is some 22 years from the time of the abuse and we note that the evidence provided to the Commission that reporting timeframes are longer if the abuse is perpetrated by a friend or relative. Further, while there is a proposal to impose a non-delegable duty of care and a reverse onus, those provisions have not been legislated and even if those provisions do become law, there still may be instances where an institution will not be found liable for an individual’s actions. The Commission chose not to recommend broadening vicarious liability in this regard. However, we note the common law continues to develop in this area.

The Society is of the view that, at the very least, given there is some uncertainty from current judicial authority and the desire to achieve access to justice for abuse survivors, it would seem to be in the interests of both the abuse survivors and institutions that the boundaries are clearly marked out by statute (rather than being litigated through appellant courts to obtain clarity) about what persons or actions will fall within the meaning of “institution” and “institutional context”.

Question 5 - Does the Personal Injuries Proceedings Act 2002, create additional or unnecessary obstacles for parties? Should alternative procedures be adopted?

The Society notes that the Personal Injuries Proceedings Act 2002 (the PIPA) provides the process by which personal injury claims in Queensland (save for those falling with the Motor Accident Insurance and Workers’ Compensation schemes) are progressed prior to a proceeding being commenced. This Act seeks to provide a procedure for the speedy resolution of claims, the promotion of settlement of claims at an early stage wherever possible and ensuring that a person may not start a proceeding in a court based on a claim without being fully prepared for resolution of the claim by settlement or trial. It also seeks to limit costs. This process has been in place since 2002 and the Society queries whether it would be effective or efficient to create another system for child abuse claims which would most likely have some of the same elements as the PIPA. We further note that the parties involved in these claims including insurers, the legal profession and the judiciary are familiar with the requirements of the PIPA.

The Society supports retaining the PIPA as the appropriate vehicle to deal with child sexual abuse claims.

Question 6

What processes and procedures could be adopted for dealing expeditiously (to avoid unnecessary costs) with matters where a stay of proceedings may eventuate?

As stated, the current framework contained in the PIPA should adequately deal with claims before they reach a trial. Further, given the removal of the limitation period for sex abuse claims against institutions, there is no need for a plaintiff to commence a proceeding prior to a pre-court process being agitated. Delay once a proceeding is on foot is dealt with already by rule 389 in the Uniform Civil Proceedings 1999.
Non-delegable Duty and Reversal of Onus

7. Is the imposition of a non-delegable duty the best way to ensure that institutions take reasonable steps to prevent harm caused by child sexual abuse?

Whilst we note the significance and burden that a non-delegable duty of care places on a person (institution), if this duty is to be prospective, such that institutions will be able to establish an appropriate system going forward, we are of the view that this is a better mechanism for dealing with this issue than imposing a reverse onus of proof on institutions.

Therefore, the Society cautiously supports the imposition on a non-delegable duty of care on institutions to take reasonable steps to prevent harm caused by child sexual abuse. This proposed duty is distinguishable from the broader non-delegable to duty to protect someone from an intentional criminal act as was discussed in New South Wales v Lepore (2003) 212 CLR 511. In this case the High Court held that a school’s non-delegable duty did not extend to intentional criminal conduct by a teacher in sexually abusing a child. (We note the Court in the recent case of Prince Alfred College Incorporated v ADC [2016] HCA 3 did not specifically reconsider the arguments regarding non-delegable duty of care.)

We note that the Commission decided not to recommend extending the scope of vicarious liability. The common law continues to develop in this area.

Question 8

Should legislation define ‘non-delegable duty’ and the extent of the duty or, should defining the nature and extent of a non-delegable duty be left to the courts? Please explain which approach you favour and why.

As stated above, given some of the uncertainty from current judicial authority, and the desire to achieve access to justice for abuse survivors, it would seem to us to be in the interests of both the abuse survivors and institutions that the boundaries are clearly marked out by statute (rather than being litigated through appellant courts to obtain clarity).

Question 10

Recommendation 92 of the Commission identifies the types of ‘relationships’ (e.g. employees, members, officer holders, volunteers) that should be captured under the proposed statutory non-delegable duty. Are there any relationships that should be in or out of scope? Please explain why you think the relationship should be included or excluded?

The Society considers that the list of relationships in recommendation 92 is exhaustive. While, as stated above, the Society cautiously supports the imposition of a non-delegable duty based on all the factors, we question whether an institution should have that duty imposed on them with respect to persons such as agents or volunteers. An institution’s liability with respect to abuse committed by those persons would depend on the level of notice, supervision and control it is able to exercise.

Question 11
If implemented should the legislation include a test for what constitutes reasonable care to prevent child sexual abuse in an institutional context? What would the test include?

We query whether a reasonableness test can be effectively legislated and done so in a way that will sufficiently cover the circumstances in which child sexual abuse occurs and can be prevented. However, in the interests of certainty for both the abuse survivor and the institution we would support the introduction of guidelines that institution ought to follow. Compliance with these guidelines would be instructive when determining whether there was a breach of an institution’s duty of care.

Further, the extent of “institutional context” has the potential of significantly broadening an institution’s liability in contexts where the institution cannot necessarily manage the risk or direct the conduct of volunteers or visitors. We make some further comment on this below.

Question 12
Should a complementary code of practice or standards be developed to provide guidance to institutions in respect of discharging the duty? What should the code or standards cover?

As stated, the Society supports the introduction of either a code of practice or guidelines which outline the systems an institution should have in place to both prevent and address circumstances of child sexual abuse. It might be appropriate for these guidelines to include a risk assessment of each type of environment or activity present within an institution.

Question 13
Should the implementation of recommendation 89 be broadened to include other forms of abuse, for example, to impose a non-delegable duty on institutions to prevent serious physical and related psychological abuse in an institutional context?

We refer to our comments in question 1 and 7 above and would cautiously support such a proposal.

Question 14
What are the financial and other associated impacts for institutions in implementing recommendations 89, 90, and 92 as regards to non-delegable duty? What are the implications for the cost and availability of insurance?

In terms of financial impact, the Society would defer to other experts about specifics. We would consider there would be a substantial initial outlay to set up appropriate systems and then the cost of enforcing and reviewing same. In addition, there may be adverse financial impacts on service providers and/or other organisations and persons the institution has a relationship with. The effect of the recommendations may increase the costs to these third parties and, if this is too burdensome, the institution could lose these services and relationships.

As to insurance, polices that already exist will need to be renewed so that claims for child sexual abuse were specifically included. Potentially, an institution is vulnerable until the next renewal date. Consideration of exclusion provisions will also need to be examined closely. There will likely be an increase in premiums and potentially, claims which will cost the insurer
and respondent money to defend even if these claims are not successful. We query whether an insurer would refuse to indemnify an institution who did not comply with the guidelines (or whatever mechanism is ultimately introduced). This though may be an effective tool to ensure an institution does comply with relevant guidelines.

**Question 15**

**Recommendation 91 of the Commission provides that all institutions should be liable for child sexual abuse, unless the institution can prove that it took reasonable steps to prevent the abuse. Do you agree that the reverse onus should apply to all institutions? Please explain why you agree or disagree with the Commission’s recommendation and which institutions should be included or excluded?**

As stated above, the Society would cautiously support the imposition of a non-delegable duty in favour of a reversal of the onus of proof. In this regard we make the following points.

The hurdles faced by abuse survivors in the absence of a reversal of the onus need to be weighed against the right of the defendant institution to mount a proper defence. Liability may occur where a reverse onus cannot be discharged by a defendant due to lack of evidence particularly if the onus relates to the abuse. This lack of evidence may not be due to the actions of the institution, but simply due to the passage of time, lack of records about the abuse, and lack of witnesses.

If the reserve onus relates to "reasonable steps to prevent the abuse", for the reasons already stated, we do not agree with the statement in the Issues Paper that, "institutions should be well positioned to provide evidence, by way of access to records and witnesses, regarding the steps that the institution took to prevent the abuse".

It is both possible, and perhaps even probable, that the governors and executive of an institution, at the time an abuse civil claim is brought some decades after the abuse, will have no direct knowledge of the circumstances surrounding the alleged abuse or control over the alleged perpetrator (for example as a continuing staff member) in order to be able to gather the knowledge necessary to appropriately adduce evidence that it took reasonable steps to prevent the abuse. The alleged perpetrator may of course also be deceased.

Such abuse, even with the best management and risk management, is likely to be deeply hidden, meaning that the evidence that the institution could give may be limited to full details of its policies and practices. The institution may be able to adduce little or no direct evidence of the reasonable steps to prevent the abuse.

It should also be noted that many of the institutions in question exist for public charitable purposes (and some partly funded by the "public purse"). These institutions will need to allocate significant resource in terms of staff time and "legal spend" (whether via an insurer or not) in responding appropriately to claims. It of course needs to be remembered that this allocation of resources is often the expenditure of public resources which are not otherwise applied to their charitable purposes.

**Question 16**

**Recommendation 92 of the Commission identifies the types of ‘relationships’ (e.g. employees, members, officer holders, volunteers) which should be captured by the proposed reverse onus requirement. Are there any relationships that should be**
included or excluded from the types of relationships captured? Please explain why you think a relationship should be included or excluded?

We refer to our response about the imposition of a "reverse onus".

The extent of the duty to manage volunteers and visitors needs some clear articulation. The contribution of many charities and not-for-profits is substantially built on volunteer hours.

If imposed, the extent of the duty needs to be tested against the effect it may have on the willingness of volunteers to continue to engage from both an institution-viability and institution-culture perspective.

We suggest, again if imposed, that statutory definitions and tests are moderated in respect of volunteers and visitors, especially in a context of a reversal of the onus of proof.

**Question 18**

**What are the financial and other associated impacts for institutions in implementing recommendations 91 and 92 as regards to the reversal of the onus of proof? What are the potential implications for the cost and availability of insurance?**

Again, we refer to our position in respect of a "reverse onus" and also to our comments under questions 14 and 15. We make some additional comments.

Civil litigation is conducted in a context which involves less coercive investigative powers than in criminal proceedings. That is, police officers are not gathering evidence with the spectre of criminal charges for those who do not co-operate with their investigation. While a civil court has powers to make orders for disclosure, the path to both obtain them, and enforce them should they not be complied with, is far longer and more expensive for civil litigants. This, it seems to us, would mean that even greater public charitable resource would be expended in responding to these claims particularly with a reversal of the onus in respect of the abuse.

It seems to us that the costs to institutions (many of whom are substantially government-funded) of policy, practice, insurance, record keeping and responding to actions may lead to some reduction in "front line services" that we note does not seem to have been estimated on a quantitative basis.

We query whether a Statutory Defendant (with elements akin to WorkCover Queensland), along with a statutory insurance scheme, should be considered. This body could have coercive powers to aid in its investigation and would be the respondent to the claims outside a particular time frame. This scheme could be funded by institutions, avoiding the need to rely upon usual insurance.

The establishment of a statutory defendant, or statutory insurance scheme, for institutions would allow institutions to meet a liability arising from an order of compensation and also provide assurance to institutions in relation to their ongoing risk exposure in this area. In combination with operational guidelines for institutions in relation to these risks, institutions can ensure that best practices are employed and allow any victims to access justice. A premium or fee payable by subscribers to a single scheme (rather than spread across multiple insurers) may be a more affordable mechanism by which institutions can facilitate access to justice for abuse survivors while being able to continue to provide valuable services to the community.
Identifying a Proper Defendant

The Society recognises the problems outlined in the Issues Paper surrounding the difficulty for victims in identifying a proper defendant.

Question 19

Should the claimant/plaintiff be required to enquire as to the correct defendant, or the nature of entities related to the defendant in order to identify any related property trusts, before commencing proceedings? Should the defendant have a responsibility to nominate an additional related entity with capacity to meet any award of damages or costs?

Currently, it is not possible for a claimant/plaintiff to recover damages from a related entity, such as a property trust, if this entity cannot be sufficiently linked to the alleged damage. The Society does not support changing the law in this regard. That is, we do not think it is right that an entity becomes financially responsible for a claim that it is not otherwise responsible for in fact and in law.

We propose consideration of mechanisms for a claimant/plaintiff to ensure that all possible parties, who may be found to be liable, are included in a proceeding. A proposal that could be considered is recognition of unincorporated associations by statute. If legislation such as that applying in Canada, many states of the United States of America and Mexico known as the Revised Uniform Unincorporated Nonprofit Association Act ("RUUNAA") were enacted that would make the relevant unincorporated association itself liable. RUUNAA is a relatively short piece of legislation, comprising only 16 pages, that reverses the common law position in relation to unincorporated associations so that they are recognised and can hold property and be sued.

We note that under the PIPA, a person who is served with a Notice of Claim must respond and advise whether they are a proper respondent to the claim. If they advise they are not a proper respondent, then they must state why and provide any information they have to help the claimant to identify a proper respondent to the claim.

There is no obligation under the PIPA for a respondent to necessarily identify another party who has a better capacity to pay damages. Disclosure obligations are confined to giving "documents which are reports and other documentary material about the incident alleged to have given rise to the personal injury to which the claim relates" and if asked by the claimant, "information that is in the respondent's possession about the circumstances of, or the reasons for, the incident". Under the Uniform Civil Procedure Rules 1999 (the UCPR) a defendant needs to disclose a document in their possession or under their control that is directly relevant to an allegation in issue in the pleadings and, if there are no pleadings, directly relevant to a matter in issue in the proceeding.

Therefore, we would cautiously support an obligation on a respondent/defendant to disclose entities, related to the institution, whom the claimant/plaintiff may be able to establish a claim against, either in negligence or some other action (for example breach of contract).

Question 20

Should the court have the power to appoint an expert to investigate and identify the appropriate entity to be joined in proceedings, upon application by the
claimant/plaintiff? (Note the current powers contained in the Uniform Civil Procedure Rules 1999 (Qld) (UCPR), in particular, rule 429G Appointment of experts and rules 429J to 429M dealing with powers to facilitate the preparation of the report.)

We refer to our comments above regarding the circumstances by which entity should become a party to a proceeding. The Society does not support an outside party, even a court appointed expert, having the ability to access private information about the assets of an entity, especially one who would not otherwise be a defendant to the claim.

If such a proposal was adopted, it would appear the court is better placed to evaluate the appropriateness of joining a connected entity or property trust as it is able to evaluate the purposes of that trust, its terms, control, and assets. This would prevent entities and/or trusts being inappropriately joined and charitable funds used in the defence of an action inappropriately brought against them.

Question 21

Should the court have the power to direct the related entity to make a payment in satisfaction of any award of damages or costs, notwithstanding the terms of any deed of trust, or statutory instrument establishing the trust?

As stated above, the Society objects to another entity being involved in a proceeding, financially or otherwise, when that entity bears no liability for the claim and therefore would not otherwise be involved.

Importantly, our law recognises multiple charitable purposes and is committed through the doctrine of cy-pres to see charitable assets applied to the charitable purposes intended by the benefactor.

There is a strong policy argument that the funds gifted by the community, or gifted by the State, to a charitable trust for a particular charitable purpose ought not be available to pay the debts of an entity or fund established for different charitable purposes.

Historically our common law has recognised four heads (types) of charity – advancement of education, advancement of religion, relief of poverty, and other purposes beneficial to the community. Those heads have now been expressly expanded at a Commonwealth level via the Charities Act 2013.

Assets in a charity, for example existing for the charitable purpose of the advancement of education cannot be applied to a charity for the advancement of religion. Additionally the charitable purpose may by terms of trust for example be further resistant to the application of those assets in a particular geographical area as this was the intention of the benefactor.

Therefore these questions are apparent:

(a) Is it appropriate for abuse survivors to be paid from a property trust where that trust is not the entity responsible for the harm? How could such a payment be made without amounting to a breach of the terms of the trust? Such difficulty was accepted as partial barrier to liability in the recent decision of Anglican Development Fund Diocese of Bathurst v Palmer [2015] NSWSC 1856 (10 Dec 2015).

(b) If the first hurdle can be overcome, is it a legal possibility for money held for one charitable purpose to be applied for another?
(c) Where a controlled charitable trust exists for the charitable purposes consistent with the charitable purposes of the entity, subject to the liability, there is now precedent that those funds can be used in meeting the debts of the entity, subject to the liability (including making payment of a compensation order). In the Anglican Development Fund case, the governors of the unincorporated entity, subject to the liability, had control of the trustee of the relevant trust property. That is, the trust property would be dealt with as they directed and to the extent that it was held on charitable purposes consistent with the entity, subject to the liability, it was available to satisfy the liability.

Amending legislation will need to consider how a proper defendant (when that is a related entity or trust with different charitable purposes) interacts with charitable purpose.

While at first instance the idea of reviewing related entities and rendering liable those which hold assets appears an easy solution, this solution does not have respect to the restriction on charitable funds to apply their assets outside of their purposes. The legislature could not render liable a trust established for distinct charitable purposes from that of the liable entity without a comprehensive consideration of the effect on Charity Law.

If you have any queries regarding the contents of this letter, please do not hesitate to contact Kate Brodnik, Policy Solicitor, on 3842 5851 or via email K.Brodnik@qls.com.au.

Yours faithfully

Bill Potts  
President