

4 December 2018

Our ref: WD:Gen

Committee Secretary
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane Qld 4000

By email: [REDACTED]

Dear Committee Secretary

Civil Liability (Institutional Child Abuse) Amendment Bill 2018

Thank you for your letter dated 2 November 2018 and the opportunity to provide comments on the Civil Liability (Institutional Child Abuse) Amendment Bill 2018 (**Bill**). The Queensland Law Society (**QLS**) appreciates being consulted on this important issue.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by the QLS Accident Compensation/Tort Law Committee and the Not for Profit Law Committee, whose members have substantial expertise in this area.

We note that since the introduction of the Bill, the Government has introduced the Civil Liability and Other Legislation Amendment Bill 2018 (**Government's Bill**), which largely deals with the same issues. We will respond to key policy issues in our submission on the Government's Bill and have limited our comments in this submission to specific issues on this Bill.

QLS has considered these issues in detail over the last few years, given the significant reforms in this area following the Royal Commission into Institutional Responses to Child Sexual Abuse (**Royal Commission**). In particular, QLS has made submissions to the State government inquiry which considered the bills to remove the limitation period for institutional child sex abuse claims and contributed to submissions to the Commonwealth inquiries that have examined the National Redress Scheme.

Our comments in respect of this Bill are set out below.

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Proposed section 49C - Definition of “*child abuse*”

The proposed definition of *child abuse* is wider than the proposed approach in the Government's Bill.

The Royal Commission also made recommendations which were limited, by their terms of reference, to child sexual abuse, not serious physical abuse.

There will be potential difficulties in defining what constitutes:

- “serious physical abuse” for the purposes of paragraph (b) of the proposed definition as there is no further definition of “serious”; and
- the circumstances in which the “other abuse” is “perpetrated in connection with” the abuse referred to in paragraphs (a) and (b) of the definition for the purposes of paragraph (c) of the definition.

These issues need to be clarified if the policy decision is made to widen the definition of “*child abuse*” as proposed.

Proposed section 49C - Definition of “*institution*”

We raise the following concerns in relation to the proposed definition:

- There is no exclusion for a “family” in paragraph 1(a) which defines “an entity”. The concept of family is excluded in the Government's Bill, which appears sensible to avoid any unintended consequences of the duty of care framework.
- The inclusion of the word “*facilities*” in paragraph 1(b) could have the effect that an owner of facilities would be subject to the duty of care in proposed section 49D(1) of the Bill, particularly in light of the definitions of “*official*” and “*related entity*” (see discussion below).
- We make the same comment in relation to the phrase “*services of any kind*” which could extend to an entity which delivers food to an institution. This could potentially be too broad in the absence of the requirement for a causal link.

Proposed section 49C - Definition of “*related entity*”

We raise the following concerns in relation to the proposed definition:

- Paragraph (a) of the definition is too wide.
- 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.

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- The definition of “related entity” needs to incorporate some causal link to the capacity of the related entity to prevent the abuse, rather than the simple fact that the related entity provided a facility. In these circumstances, it may not be reasonable for the owner of the facility to be subject to the duty where the owner could not be expected to have any control or influence over the activities held at the facility by a third party school.
- For the same reasons, paragraph (b) of the definition is too broad as it captures a wide range of entities within a corporate group which would have no realistic capacity to prevent the abuse.

Proposed section 49D - Duty of care of institutions

Subsection (2) of this provision states that the duty of care will be owed by an institution whether the child abuse was perpetrated before or after the commencement of these amendments. We do not agree that the duty should be imposed retrospectively.

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)).

Proposed section 49E – Particular institutions must nominate defendant

If this model is to be adopted, the provisions should be amended so that:

- In subsection (2), “must” is replaced with “may” as some institutions may not have an appropriate entity to nominate.
- In both subsections (2) and (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.
- There is a clear process by which the nominated entity accepts responsibility for the liability.
- In relation to paragraph (3)(c), the nominated must be able to refuse to accept responsibility for a current proceeding.
- Similarly to the Government’s Bill, the court has a discretion in these circumstances (the processes outlined in proposed subsections 33H(5) to (7) of the Government’s Bill appear sensible when dealing with the proposal to nominate an appropriate nominee).

Amendments to the *Limitation of Actions Act 1974*

In respect of these amendments, we repeat our concerns about the definition of “child abuse” raised above.

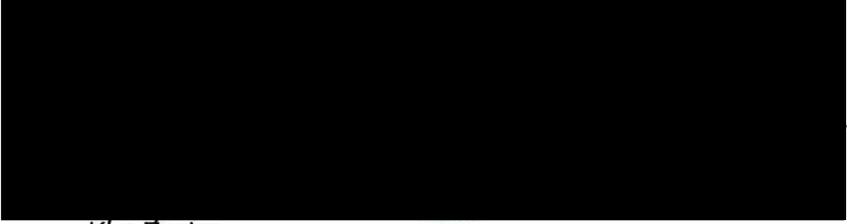
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As to expanding section 11A generally, we are cognisant that this will present challenges and costs in respect of record keeping, institutional memory, insurances, and proper defendants when institutions may no longer be in existence. Whilst institutions 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."

These comments should also be considered when reviewing the proposed amendments to the *Personal Injuries Proceeding Act 2002*.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Principal Policy Solicitor, Wendy Devine by phone on [REDACTED] or by email to [REDACTED]



Ken Taylor
President