Queensland Law Society

Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001 ABN 33 423 389 441
P 07 3842 5943 | F 07 3221 9329 | president@qls.com.au | qls.com.au
Office of the President

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

By email: [redacted]

Dear Committee Secretary

Civil Liability and Other Legislation Amendment Bill 2018

Thank you for the opportunity to provide comments on the Civil Liability and Other Legislation Amendment Bill 2018 (the **Bill**). The Queensland Law Society (**QLS**) appreciates being consulted on this important piece of legislation.

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 with the assistance of our Accident Compensation/Tort Law Committee and Not for Profit Law Committees whose members have substantial expertise in this area. With respect to the Bill we raise the following matters.

Proposed Part 2A Division 1 of *Civil Liability Act 2003*

Proposed section 33C(1)(d) defines "*associated with*" to include "a person prescribed by regulation."

This has the potential for a wide range of persons to be added to this definition. Care must be taken that any regulations are consistent with section 4(5) of the *Legislative Standards Act 1992*.

QLS would be pleased to be consulted on any proposals to prescribe additional persons by regulation.

Proposed Division 2 – Duty of institutions

We note proposed section 33E(2) reverses the onus of proof prospectively (by virtue of proposed section 86) which generally applies to civil liability matters by stating that the

institution is taken to have breached its duty of care (under proposed section 33D) unless it proves it took all reasonable steps to prevent the abuse.

Our legal system generally requires that the person bringing the claim or charge prove fault. The commitment not to reverse the onus of proof is a fundamental legal principle which should not be breached without appropriate justification.

Our members, particularly those who practice in this area, are aware of the difficulties in bringing these claims and achieving a successful resolution. It is often the case that significant time has passed between the event and the claim[1] and that the claimant may have no other evidence apart their own recollection of what took place. Accordingly, QLS supports the National Redress Scheme and other law reform to provide appropriate assistance to victims of child sexual abuse.

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

If this reform is proceeded with, the Explanatory Notes to the Bill clearly state the intention that these sections are to apply prospectively only. We support this intention and note that it is consistent with the Royal Commission's recommendation in this regard.[2]

Finally in respect of this Division, QLS queries whether, added to the matters in proposed section 33E(3), should also be the degree of control the institution had (or could reasonably be expected to have) over the relevant person in the place of the abuse. This is perhaps made more important given the breadth of "person associated with an institution" in proposed section 33C to include volunteers.

Proposed Division 3 – Liability of particular institutions and office holders

The New South Wales Court of Appeal decision in *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* (2007) 70 NSWLR 565 is authority for the proposition that liability in *tort* (as opposed to *contract*) is to be against the management committee at the time of the wrong.

The Royal Commission's Redress and Civil Litigation Report 2015 noted the difficulties that the "Ellis defence" has posed to survivors of sexual abuse in identifying a proper defendant to sue. The Report acknowledged that there was broad agreement from church based groups that unincorporated institutions should nominate a legal entity which is capable of being sued.

While the purpose of the Bill in part is to overcome difficulties associated with the unincorporated status of certain institutions, there are aspects of the Bill that do not seem to have taken into account the nature and limitations of an unincorporated body. This creates some recurring issues in interpretation.

The Bill refers to an institution that is an "unincorporated body" (see eg s 33F(c)). This may be compared with the phrase "unincorporated association" which has been described by the

[1] We note the Royal Commission was presented with evidence that the average length of time for a survivor to disclose the abuse is 22 years.
[2] Recommendation 93 of the Redress and Civil Litigation Report

courts as "a general catch-all phrase to describe a residual miscellany of groups not otherwise recognised or categorised by the law. It has no precise legal definition".[3] Generally speaking unincorporated bodies do not have any fixed or defining characteristics. The Catholic Church, where the Archbishop may be the relevant office holder, is perhaps the exception to the general structure of unincorporated associations. In the experience of our members, common forms of unincorporated associations such as clubs or community groups normally have a *management committee* who will be the relevant office holders and therefore, the drafting of the Bill should reflect that the individuals comprising the management committee at the time the relevant tort was committed are typically liable in these claims.

With this in mind, the following elements of the Bill may require some further consideration:

1. The terms "current office holder" and "former office holder" in sections ss 33F and 33G are defined to include a person who has or had "responsibility for the institution".

   For the reasons outlined above, many unincorporated bodies are unlikely to have a single person responsible for the institution. This normal plural understanding (with the singular being the exception) and the well-understood role of the management committee, especially in contractual liability for unincorporated associations[4] should ideally be reflected in the drafting of the Bill, and especially the definitions of *current office holder* and *former office holder*.

   The *Legal Identity of Defendants (Organisational Child Abuse) Act* 2018 (Vic) ("the Victorian Act") utilises the concept of a "management member" which is defined to mean:

   "(a) a member of any management committee of the NGO; or

   (b) if the NGO does not have a management committee, a person who is concerned with, or takes part in, the management of the NGO, irrespective of the person's title or position."

   In that Act, an "NGO" means a "non-government organisation that is an unincorporated association or body". An almost identical definition is utilised in *the Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018* (NSW) ("the NSW Act").

   We submit that the use of a term such as this would be a more appropriate way of accounting for the diversity in structure and membership of unincorporated bodies.

2. The Bill makes numerous references to the liabilities, duties and rights of an institution that create ambiguity in circumstances where the institution is unincorporated and has no legal personality. Simply providing in section s. 33H(2) that "A proceeding for an abuse claim may be started against the institution" does not address this fundamental problem. The QLS suggests that the following words are added at the end of that section, "in the name of the institution as if it had legal personality".

   For example, s. 33I(b) provides that any liability of an institution under the court's decision will be incurred by the institution's nominee, and s. 33I(c) provides that anything done by the institution is taken to have been done by the nominee.

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[3] Faehrmann v Van Vucht [2018] NSWSC 397 at 107

[4] See for example, *Anglican Development Fund Diocese of Bathurst (in its own capacity and in its capacity as trustee of the Anglican Development Fund Diocese of Bathurst (Revivers and Managers Appointed) v Palmer and Others* (2015) 336 ALR 372.

Section 33I(d) also speaks of "a duty or obligation of the institution in relation to the proceeding" and section 33I(e) requires the institution to "continue to participate in the proceeding".

Section 33D of the Bill also sets out the duty of institutions to prevent child sexual abuse. The position in *Ellis* is that liability in tort is to be against the management committee at the time of the wrong. Without further clarification from the legislature there is a question as to whether this also extends to liability under a statutory obligation such as 33D.

The QLS suggests that a catch all provision be inserted that provides to the extent that the institution has liability, duties or obligations under the Bill that these may be enforced against the current office holder(s).

We note that the Victorian Act specifies that, for the purposes of the Act, any power which is exercisable by an NGO may be exercised by any management member of the NGO.

3. In relation to proposed sections 33F(3) and 33G(3), the QLS suggests that the legislation should make it clear that the institution and current office holder(s), respectively, enjoy the defences and insurances that were also enjoyed by the former institution or office holder(s). The recently passed and assented to *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018* (NSW) ("**NSW Act**"), specially addresses this in sections 60(f) and (g) of that Act.
4. The QLS suggests that the Bill needs to be amended to oblige an unincorporated institution to continue to participate in the proceedings by its current office holder(s), not just in the case of a nominee, as currently proposed by section 33I(e), but also for example when the proceedings are against an associated trust.

   The QLS also suggests that proposed sections 33I(g) and (h) also apply when the proceedings are against current office holder(s) and an associated trust.

Proposed Division 4 – Satisfaction of Liability

Associated trust assets

The Bill appears to set out two avenues for an institution to satisfy a liability out of the assets of an associated trust.

First, the Bill sets out the process for an unincorporated institution to nominate an "associated trust" as the appropriate defendant to an abuse claim: s. 33H. The trustee must consent to the nomination, unless the court considers it would be appropriate for the trustee to be the nominee and makes an order accordingly. Pursuant to s. 33I(b) the associated trust as nominee would incur any liability of the institution under the court's decision and s. 33K allows a trustee nominee to satisfy the liability of the institution out of the assets of the trust and the assets of the institution. It does not require the assets of the institution to be exhausted first before the assets of the trust may be drawn upon.

Second, the Bill provides that an institution (whether incorporated or not) may satisfy any liability under a judgment or settlement out of the assets of the institution and the assets of an associated trust that the institution uses to carry out its functions or activities: s. 33J. This section applies to incorporated and unincorporated associations. It is not limited to an associated trust that has been nominated as the appropriate defendant pursuant to clause 33H. Neither the consent of the trustee is required, nor an order of the court that it is appropriate for the trust funds to be used to satisfy the liability. Finally it does not require the assets of the institution to be exhausted first before the assets of the trust may be drawn upon.

It seems clear that the Bill proposes to go further than the recommendation of the Royal Commission. Recommendation 94 of the Royal Commission's Redress and Civil Litigation Report 2015 provided that:

> "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."

The Report speaks of property trusts in the context of those trusts that have been established by statute for the purpose of holding property on behalf of a religious institution. One example used in the Report is the Corporate Trustees of the Diocese of Grafton which was incorporated under the NSW *Anglican Church of Australia Trust Property Act 1917* for the purposes of holding property for the Anglican Church in the Diocese of Grafton.

The proposed definition of "associated trust" in section 33B of the Bill is much broader than the notion of an associated property trust as discussed in the Report and is not limited to statutory property trusts.

The QLS acknowledges, with thanks, the attempt of the Bill to balance the competing public policy issues in respect of specific purpose charitable trust assets (as previously advocated for by the QLS), by the use of the following language in italics, "assets of an associated trust *that the institution uses to carry out its functions or activities*." It is noted that this qualifying language is used in proposed sections 33J(2) and 33L(2).

However what this language does not deal with is property in an "associated trust" that might be held for a different charitable purpose or a more specific charitable purpose. For example:

- A generous will-maker gifts a valuable piece of real estate in a regional town to a charity to be held on a more specific charitable trust purpose by it for the outworking of its charitable purposes (or even a different charitable purpose) **in that regional town**. The Bill would allow the charity head-quartered in Brisbane to sell and apply the proceeds of sale of the regional property to meet liability to a child sexual abuse claimant where the abuse had no connection with that region, being the specific charitable purpose intended by the donor; or

- A single charitable institution may, for example, hold property on trust in separate charitable trusts for different charitable purposes, but still "control" each of those trusts. For example:

    - Church buildings held on charitable trust for the charitable purpose of the *advancement of religion*;

    - School buildings held on charitable trust for the different charitable purpose of the *advancement of education* (the construction of which may have been partially funded by government grant or donor gifts for that purpose);

    - Aged care facilities held on charitable trust for the different charitable purpose of providing *public benevolent relief* (advancement of social or public welfare) purposes.

In each of the above examples, all of the trust property in question would be "assets of an associated trust *that the institution uses to carry out its functions or activities*" (as the Bill currently uses that language) and available to meet the claimant's damages. That is, the proposed limiting language does not save the specific purpose charitable assets in the examples above. Reference to the "functions and activities" of the institution do not effectively limit the scope of assets that are available to meet a claim where it could be argued that the "functions and activities" of a faith based institution are broad enough to include a range of matters including the delivery of benevolent charitable services in the community.

Historically, our common law has recognised four distinct heads (types) of charitable purpose:

- Advancement of education;
- Advancement of religion;
- Relief of poverty;
- Other purposes beneficial to the community (within the spirit and intent of the above).

These four heads of charity under the common law have now been expanded at a Commonwealth level via the *Charities Act 2013* (Cth). Each registered charity with the *Australian Charities and Not-for-profits Commission* must register as a particular sub-type(s) of charity, governed by its charitable purpose or purposes.

The tax concessions available differ between the different charitable purposes. Government grant and service contracts often require application and delivery by a particular charitable purpose organisation.

In the submission of the QLS there are **two competing public policy issues** to be considered:

- First, the identification of a proper defendant for unincorporated associations with assets to provide appropriate compensation to survivors of child sexual abuse; and
- Second, the honouring of the intentions of donors by the upholding, saving and preservation of charitable trusts within the charitable purposes in perpetuity that the assets were first impressed with. This is for example the purpose of the *Cy Pres* jurisdiction to apply charitable trust assets for a charitable purpose as near as possible to the original purpose.

The Royal Commission, as far as the QLS is aware, did not consider these competing public policy issues. The assumption the Royal Commission was making, we suggest, in its recommendations on this subject, is that the assets in view in the associated trust would be held for a charitable purpose consistent with that of the institution in whose hands primary liability rested.

This assumption is, we suggest, able to be distilled from the following extracts from the *Redress and Civil Litigation Report of the Royal Commission* (**emphasis added**), which the QLS submits makes it clear is that the intention of the Royal Commission was that the law reform make ***the*** assets of the institution, that is for its charitable purpose (despite them being in an associated trust), available:

> *Much of the discussion of difficulties in finding the proper defendant to sue has focused on the absence of an incorporated body, particularly for some faith-based institutions. The same difficulty will arise whenever **THE assets of any institution** are held in a manner that makes **THOSE assets** unavailable in a civil action that a survivor brings. This may be because, like various religious bodies, **THE assets of an institution** are held in **a trust**.*
>
> *We are satisfied that survivors should be able to sue a readily identifiable church or other entity that has the financial capacity to meet claims of institutional child sexual abuse. We are satisfied that the difficulties for survivors in identifying a correct defendant when they are commencing litigation against unincorporated religious bodies, or other bodies where **THE** assets are held in **a trust**, should be addressed.*[5]

Proposed solution

Therefore, it seems to QLS, that if the intention of the law reform recommended by the Royal Commission in Recommendation 94[6] of the Redress and Civil Litigation Report is to be honoured, then the meaning of "associated trust" should be expressly limited and the Bill should include consistent checks and balances to protect assets held on trust for a specific charitable purpose (as distinct from "activity") that is distinct from the general purposes of the relevant institution.

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[5] *Redress and Civil Litigation Report*, https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final_report_-_redress_and_civil_litigation.pdf, page 58.

[6] Recommendation 94 (**emphasis added**): *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.*

One way of striking an appropriate balance would be to amend the definition of "associated trust" to limit it to, *a trust the charitable purposes of which include*[7] *the general charitable purposes of the institution.*

In addition the QLS suggests that anti-avoidance mechanisms should be added to the Bill to prevent the placing of assets out of reach by changing of charitable purpose (if permitted by the trust instrument), post commencement, so as to avoid liability.

Proposed solution consistent with policy intent and avoids unintended consequences on donors

This solution appears to be consistent with the policy intent indicated by the Attorney-General and Minister for Justice when the Bill was presented to the Parliament on 15 November 2018, when she said:

> *"... it is appropriate to limit ... access to the assets of an associated trust which it uses to carry out its functions or activities. This is to ensure the institution cannot access the assets of an associated trust with which the institution has only a tenuous connection."*

Absent a striking of balance, akin to the manner suggested above by the QLS (under the heading Proposed solution), the QLS submits that the current Bill may well result in the following adverse impacts:

- a reduction in generosity of donors of substantial gifts to specific charitable purposes. Our members report that substantial donors not uncommonly impose specific charitable purposes with the gifts they make during life-time and upon death;

- donors using creative trust drafting for asset protection, effectively using charitable Discretionary Trusts with an uncontrolled trustee having discretion as to how the income and capital is applied to charitable purposes and no indicia of "associated trust"; and

- the reduction in charitable services for others in need, that the specific charitable purpose assets otherwise would have served (who for example were in view by the donor when the gift was originally given).

Proposed Division 5

Liability following assets

While the QLS understands the policy intent of proposed section 33O(2) and following, we submit that this change should be *prospective only*, after a not insubstantial transitional period.

Our members report that the amount of Merger and Acquisition activity in the charitable sector has not been insignificant in recent years (often due to the need for greater efficiency in service delivery pursuant to Government Services contracts).

Much of this Merger & Acquisition activity has been by *asset transfer* rather than *entity transfer*. The governors of charities have in good faith taken on assets and enterprises of often struggling charities and assumed known and agreed liabilities. To say now, that they have

[7] There would be an argument that instead of "include" the language should be "are the same as" but on balance the QLS considers this may be overly restrictive.

also assumed the historic liabilities when this was not part of the due diligence engaged in or planned for, appears to the QLS to be an effectively tectonic retrospective change. Section 33O does not propose to limit the liability of the current institution to the value of the assets that were transferred from the earlier institution. QLS notes that this did **not** form part of the recommendations of the Royal Commission.

While the desire not to leave a survivor without remedy when an historic institution no longer exists or has been left with insufficient assets is understandable (especially when Government will not usually be funders of last resort in the Statutory Redress Scheme), what is proposed by the Bill is not the solution.

It should be noted that the successor institution provisions in the Bill do not limit the liability of the successor institution to the value of the assets it took over from the old institution but expose all of its current assets.

The QLS suggests that the solution may be that liability of the successor institution be limited in circumstances where the claim arose before commencement of the Bill. The appropriate limit of that liability (including the reasonable legal costs of the institution in responding to the claim) may be the present day value of the assets it took over from the old institution. This is consistent with the liability following the specific assets and being effectively "charged" with all the related liability.

In relation to proposed section 33M, the QLS submits that the Bill should contain a statutory indemnity for the reasonable legal costs of the trustee, liability for breach of trust and immunity from suit for acting in breach of trust if a trustee so acts in accordance with the conduct permitted by the Bill (that would otherwise be in breach of trust). It is noted that the NSW Act and the Victorian *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* contain such provisions.

Amendments to the *Civil Proceedings Act 2011*

We note that clause 8 of the Bill inserts a new subsection (4) into section 64 of this Act to clarify that an award of damages for a person under a legal incapacity may include an amount for management fees relating to the damages awarded to the person. This amendment will allow parties to negotiate payment of management fees or for the court to separately award the payment of management fees in cases involving legal incapacity such that these costs are not deducted from the damages awarded to someone in this vulnerable position.

QLS has previously advocated for this change and is pleased to see that this reform has now been included in the Bill.

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]

[redacted]

Ken Taylor
President