



## ***Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill 2016 (Qld) and the Limitation of Actions and Other Legislation (Child Abuse Civil Proceedings) Amendment Bill 2016***

**Submission by Queensland Advocacy Incorporated**

**Legal Affairs and Community Safety Committee**

**September 2016**

“Words have no power to impress the mind without the exquisite horror of their reality.”

Edgar Allan Poe

“To deny people their human rights is to challenge their very humanity.”

Nelson Mandela

## About Queensland Advocacy Incorporated

Queensland Advocacy Incorporated (QAI) is an independent, community-based systems and individual advocacy organisation and a community legal service for people with disability. Our mission is to promote, protect and defend, through systems and individual advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland.

QAI does this by engaging in systems advocacy work, through campaigns directed to attitudinal, law and policy change, and by supporting the development of a range of advocacy initiatives in this state.

QAI also runs three individual advocacy services – the Human Rights Legal Service, the Mental Health Legal Service and the Justice Support Program. Our experiences in providing legal and advocacy services and support for individuals within these programs has provided us with a wealth of knowledge and understanding about the experiences, needs and concerns of individuals who are the focus of this inquiry.

QAI believes that all humans are equally important, unique and of intrinsic value and that all people should be seen and valued, first and foremost, as a whole person. Further, QAI believes that we should embrace difference and diversity, rather than aspiring to an ideal of uniformity of appearance and behaviour. Central to this, and consistent with our core values and beliefs, QAI will not perpetuate use of language that stereotypes or makes projections based on a particular feature or attribute of a person or detracts from the worth and status of a person with disability. We consider that the use of appropriate language and discourse is fundamental to protecting the rights and dignity, and elevating the status, of people with disability.

QAI welcomes the introduction of the *Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill 2016* (Qld) and the *Limitation of Actions and Other Legislation (Child Abuse Civil Proceedings) Amendment Bill 2016* (Qld) by the Hon Anastacia Palaszczuk MP and Mr Rob Pyne MP. QAI also applauds the joint referral of these Bills to the Committee for inquiry. We thank the Committee for the opportunity to make a submission on these Bills.

## Background

Any consideration of issues surrounding the abuse, whether sexual or otherwise, of children or vulnerable people is very sobering. Where this abuse is inflicted by those trusted with their care and protection, it is cause for grave concern and reflection, the development of safeguards to protect future generations and a critical look at ways to help to rehabilitate and compensate those who have experienced the abuse.

Australia has historically taken a reactive, rather than proactive or preventative, approach to cases of violence, neglect and abuse against vulnerable people and children, in contrast to some other jurisdictions.

With this understanding, the move by the Queensland Government to finally remove the time limitation on the commencement of civil actions is a welcome relief. People who have experienced abuse by those in positions of power and authority must not have their slowly

regained tenuous trust shattered by the failure of our law to respond in a humane way and offer a just outcome. A threat of legal liability that has a prospect of being exercised and enforced is also a far more effective deterrent in helping to protect against further abuses in the future.

Case examples provided throughout this submission are evidence of the societal devaluation of people with disability that lead to abuse, neglect, and disregard for personal autonomy, and the imposition of practices that would otherwise constitute criminal offences if applied to people without disability.

People with disability in Australia are a highly vulnerable and marginalised group. They experience higher rates of unemployment, homelessness, imprisonment and substandard educational and inadequate healthcare as compared with people without disability.

People with disability also experience significantly elevated rates of violence, abuse and neglect. This is particularly disturbing, given that this group already experiences disproportionate hardship and is denied equitable opportunities across a broad spectrum of areas. It is also deeply distressing that those perpetrating this abuse and violence are often those in positions of authority and trust, who are charged with responsibility for the care of the person with disability and should be supporting the people in their care to reach their full potential. That vulnerable people are being harmed by those entrusted with their care is untenable and a grave misuse of power.

Queensland, like every other state in Australia, has a history of abuse in institutional settings, such as hospitals and large and small congregate residential arrangements. It is difficult to collate accurate data as many cases are un-reported or confidential, although the recent Royal Commission into Institutional Response to Child Sexual Abuse has shed some light on the extent of this abuse in Queensland.

### **The connection between disability and abuse**

QAI is a systemic advocacy organisation, and is also a community legal centre that strives to protect the most vulnerable people with disability in Qld. QAI is particularly concerned to ensure the availability of access to justice for people with disability who have been victims of childhood abuse. This is likely to be a significant proportion of those who have experienced sexual or serious physical abuse, given the strong correlation between disability and abuse.

- Sobsey and Varnhagen suggest that most people with disabilities will experience some form of sexual assault or abuse throughout their lives.<sup>1</sup> Sobsey estimates up to 80% of people with a disability are sexually abused.<sup>2</sup>
- Muccigrosso suggests that the incidence of sexual assault against people with an intellectual disability is at least four times higher than in the general population.<sup>3</sup>

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<sup>1</sup> 'Sexual abuse and exploitation of people with disabilities: Toward prevention and treatment'. In M. Csapo and L. Gougen (eds) *Special Education Across Canada* (pp.199-218). Vancouver: Vancouver Centre for Human Development and Research.

<sup>2</sup> Sobsey, D. 1994. *Violence and abuse in the lives of people with disabilities: the end of silent acceptance?* Baltimore, MD: Brooks Publishing.

<sup>3</sup> Muccigrosso, L. 1991. 'Sexual Abuse Prevention Strategies and Programs for Persons with Developmental Disabilities'. *Sexuality and Disability*; Vol. 9. Pp. 261-272.

- The incidence of sexual abuse (regardless of age) among people with developmental disabilities was estimated in 1985 by the California State Department of Developmental Services to be 70%.<sup>4</sup>

Congregate settings that have the responsibility for the care of people with disability are not scrutinised or open and transparent in their practices. These closed-off or hidden practices are often undiscovered indefinitely as they are aided by the difficulties experienced by some people with disability to communicate their concerns and experiences and the disbelief and distrust with which those who are able to communicate such concerns are met. This makes has meant that people with disability, including children with disability, are prime targets for abusive treatment by service providers.

Children with disability who experience adverse treatment in care are a particularly vulnerable group. There are a number of reasons for this, including:

1. Many have difficulty communicating their concerns or experiences and require the provision of appropriate support to do so.
2. Many have experienced a history of institutionalisation, or of violence, abuse or neglect, which can exacerbate their concerns with identifying and communicating inappropriate conduct by those in positions of power.
3. Many lack a supportive familial and friendship network that offers a buffer of support and thus experience feelings of isolation and fear.
4. The prescribed avenues for reporting abuse and inappropriate treatment are often difficult or impossible for a person with disability to access, due to the nature of their disability and their disempowerment and lack of appropriate support.
5. People with disability who experience abuse, particularly those living in congregate settings, will often tell someone who is part of the support service of their abuse if they have no family connections. The very nature of dependency upon paid supports will increase a person's vulnerability to abuse, and in many situations their complaints are unheeded. The denial of the validity of their complaint or lack of immediate investigation or response by the service provider or family member undermines a person's confidence in their supports and will increase feelings of fear, abandonment and isolation.
6. The proliferation of abuse upon people with disability can 'normalise' abusive behaviour. When this occurs, some of these victims will also react inappropriately with violence or sexualised behaviours (sometimes not against the abusers but towards other people). They can then be demonised and subject to the application of Restrictive Practices.
7. People with cognitive impairment are not afforded credibility by police and considered unreliable witnesses because of difficulties in cross-examination. Many allegations of abuse do not proceed to trial. The lack of support to assist people to progress

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<sup>4</sup> Abuse Prevention Strategies in Specialist Disability Services Commissioned by National Disability Administrators on behalf of Commonwealth, State and Territory Ministers responsible for disability services in Australia. 2002; Baladerian, N. 1991. 'Sexual abuse of people with developmental disabilities'. *Sexuality and Disability*, 9(4), 323-335.

complaints results in people feeling intimidated and humiliated by the investigative and court processes. In itself, the ordeal of enduring the repeated articulation of their experiences can produce serious emotional trauma, devastating blows to self-confidence and self-esteem and, at times, cause family rifts if the person is not believed or supported by their family members.

When victims with disabilities did report incidents of abuse to authorities, in 52.9% of cases nothing happened. Alleged perpetrators were arrested in only 9.8% of cases where abuse was reported to authorities.<sup>5</sup>

There are significant problems marring the efficacy of the governance, risk management and reporting practices of institutions providing care for young people and people with disability. This flows, to a large degree, from the predominant culture of institutions, which are traditionally hierarchically structured, paternalistic and lack transparency and accountability.

Fear of reprisals by those working within the institutions who witness the infliction of abuse are often a significant deterrent stopping staff members from reporting. The legislative protection provided by the *Public Interest Disclosure Act 2010* (Qld) (which replaced the *Whistleblower Protection Act 1994* (Qld)) has not proven very effective in dampening this fear of reprisal.

The 2012 shadow report “Disability Rights Now” on the Convention on the Rights of Persons with Disability identified many areas in which children with disability are facing considerable barriers around both a disproportionate experience of harm and in systemic responses to that harm. Importantly, this report found that Australia lacks a specific legal, administrative or policy framework for the protection, investigation and prosecution of exploitation, violence and abuse of people with disability.<sup>6</sup>

## The core policy objectives of the Bills

### 1. The removal of statutory and procedural time limitation periods for child sexual abuse and personal injury actions arising from child abuse

Together, the Bills propose to remove both statutory and procedural time limitations on initiating and progressing claims for child sexual abuse and personal injury actions arising from child sexual abuse, with retrospective effect. QAI fully endorses these proposals.

As Mr Rob Pyne noted in his explanatory speech introducing the *Limitation of Actions and Other Legislation (Child Abuse Civil Proceedings) Amendment Bill 2016* (Qld), the Bill is essentially concerned with creating equal justice for survivors of childhood abuse and preventing any discrimination on the basis of context, type of abuse and past unjust settlements.<sup>7</sup>

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<sup>5</sup> A Report on the 2012 National Survey on Abuse of People with Disabilities Nora J. Baladerian, Ph.D. Thomas F. Coleman Jim Stream.

<sup>6</sup> Sally Robinson & Centre for Children and Young People, South Cross University. 2012. Proactive approaches to addressing the abuse and neglect of children and young people with disability.

<sup>7</sup> Explanatory speech by Mr Rob Pyne MP. Hansard, 18 August 2016 at [2985].

Allowing settlements that have been reached on the basis of the defendant raising the time limitation issue in their defence to be re-actioned is also an important step towards justice, and one which aligns with the findings of the Royal Commission into Institutional Response to Child Sexual Abuse.

### **The inadequacy of a three-year time limitation**

The time limitation that has been imposed in Queensland law, of three years from the date the person reaches maturity – that is, when the child reaches 21 years of age – is grossly inadequate.

Prof. Ben Matthews', an academic from the Queensland University of Technology Law School, research paper indicated that child sexual abuse cases are qualitatively different from other types of civil claims – most people who have experienced abuse as a child take many years after reaching maturity to understand and process their experience, and often many more years to have the confidence and support to seek a legal outcome. Prof. Matthews argues that the time frame does not acknowledge the inherent power imbalance between perpetrator and victim in child sex abuse cases and the time that is needed to begin to equalise this. He explains that most child sexual abuse victims cannot commence their claim within the current time limitation as they may experience post-traumatic stress disorder, anxiety, depression and avoidance, in addition to time taken to understand the nature and extent of their injury and the connection of this injury to their abuse. Indeed, Prof. Matthews cites the average time taken to initiate a claim as being 22 years.<sup>8</sup>

These research findings are consistent with the Explanatory Notes accompanying the *Limitation of Actions and Other Legislation (Child Abuse Civil Proceedings) Amendment Bill 2016* (Qld), where it is noted that, particularly for cases of recurrent abuse by an authority figure who is protected within an institutional hierarchy, the resulting significant psychological barriers that deter the child from reporting the abuse or mounting a legal action can continue until many years into adulthood. As the Premier noted in introducing the *Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill 2016* (Qld), the timeframe that presently exists is 'woefully inadequate to allow victims of childhood sexual abuse to even come to terms with their abuse on a personal level, let alone to find the enormous strength needed to address their pain to move forward and to commence the daunting and often arduous task of commencing litigation in the courts.'<sup>9</sup>

The imposition of a time limitation (and especially a very short time limitation that finishes before the significant majority of potential claimants are in a position to make a claim) is particularly unjust when we consider that there are also many other obstacles people face in attempting to gain legal redress for their abuse, discussed above.

## **2. The introduction of 'class actions'**

The *Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill 2016* (Qld) also proposes to introduce a comprehensive statutory regime designed to facilitate the effective conduct and management of representative proceedings ('class actions') in Queensland. QAI also fully endorses this proposal.

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<sup>8</sup> Speech presented at the 'Statute of Limitations Forum: Seeking Justice for Adults who Experienced Sexual Abuse as Children in an Institutional Setting'. Undumbi Room, Parliament House, Brisbane, Queensland. 10 May 2016.

<sup>9</sup> Explanatory speech by the Hon. Anastacia Palaszczuk MP. Hansard, 16 August 2016 at [2746]

Vulnerable and disempowered people, which survivors of child sexual abuse and serious physical abuse certainly are, can face many additional barriers to initiating and progressing a civil claim. For most non-lawyers, the prospect of initiating a court case is a daunting one. This is compounded when the subject matter of the claim is considered, and the likelihood of continuing damage experienced by the person as a consequence of the abuse. The old adage that there is 'safety in numbers' is apt here. The ability to be part of a class action brings with it comfort that the person is not alone in their journey. For some individuals or collectives, the outcome could well provide the means to redress ongoing trauma from the abuse.

### **3. The reintroduction of the right to trial by jury for civil actions for personal injury arising from child abuse**

The *Limitation of Actions and Other Legislation (Child Abuse Proceedings) Amendment Bill 2016* (Qld) also proposes to reintroduce the right to trial by jury for civil actions for personal injury arising from child abuse. QAI supports this proposal.

The jury system has always been a way by which the community is involved in the administration of justice in our society. The engagement of ordinary members of the community helps to act as a check on the power of the judicial arm of government and to help to ensure a fair trial.<sup>10</sup> The involvement of the community in an area such as this is particularly important, given that the abuse was perpetrated by persons in positions of authority, exercising power over vulnerable people in their trust and care. It is also appropriate that cases of civil liability for institutional abuse are likened in this way to criminal proceedings and distinguished from other civil cases, which usually concern less horrific subject matter.

This is not a new initiative, but seeks to reintroduce a right to trial by jury which was removed in 2003, reportedly as an unintended consequence of the removal of a right to trial by jury more broadly. However, we agree with the sentiments of Mr Rob Pyne that the unique circumstances of child abuse (including the often repeated nature of the assaults, the malicious intent and the vulnerability of the child) sets child abuse cases apart from other civil cases and therefore the trial procedures should reflect this.<sup>11</sup>

### **4. Proposed amendments to the *Civil Proceedings Act 2011* (Qld)**

The Government also proposes to make amendments to the *Civil Proceedings Act 2011* (Qld), to:

- prevent an 'institution' (which is broadly defined in the Bill to include a public or private body, agency, association, club, institution or organisation, or any other entity or group of entities, however described and whether or not incorporated) from having civil proceedings stayed on the basis of passage of time where the institution was the cause of the passage of time; and
- prevent an institution from having civil proceedings stayed on the basis of seeking to question facts (either facts of the child abuse or facts of liability) where the institution

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<sup>10</sup> See Explanatory Notes to the Bill; see also *Brown v The Queen* and *Kingswell v The Queen*.

<sup>11</sup> Explanatory speech by Mr Rob Pyne MP. Hansard, 18 August 2016 at [2987].



has already admitted those facts, or an inquiry has made formal findings regarding those facts.

Safeguards are proposed – these provisions will only apply where the defendant is an institution and will not apply where the institution has acted ethically or where the delay in commencement of proceedings is caused intentionally by the claimant.

These are, at their heart, access to justice issues. In essence, they seek to help to mitigate the power imbalance that exists between a vulnerable person who has experienced an atrocious abuse of power and the perpetrator and the institution behind them. The importance of these justice safeguards are heightened given that the people concerned are vulnerable victims of serious offences who have sustained enduring psychological (and sometimes physical) injuries. As an administrator of justice, it is important that the courts are not unreasonably limited in their ability to bring about a just outcome. These amendments are all procedural in nature. They also all have the potential, if they are not approved, to stand in the way of a just outcome. The amendments are all necessary to ensure that the spirit of the more substantive amendments can be authentically translated.

We support the broad definition of ‘institution’ and consider it important that what constitutes an institution is widely construed to include all places where any person or people are living, who are receiving government funding.

The restriction on the right of an institutional defendant to obtain a stay of proceedings based on the passage of time, where the defendant was responsible for the passage of time, may be contentious (as recognised by Mr Pyne MP in introducing the Bill). QAI agrees with Mr Pyne’s sentiments that any arguments of procedural unfairness for a defendant institution are outweighed by the ‘gross procedural unfairness’ our system has tolerated against the claimant by denying them access to the court in circumstances where the defendant has intentionally caused the delay.<sup>12</sup>

QAI fully supports these amendments in the form proposed.

## **5. Defining child abuse as not restricted to an institutional context and as including both sexual abuse and serious physical abuse**

The *Limitation of Actions and Other Legislation (Child Abuse Civil Proceedings) Amendment Bill 2016* (Qld) also proposes to define child abuse in relevant civil proceedings as not restricted to an institutional context and as including both sexual abuse and serious physical abuse. QAI supports this proposed amendment.

As Mr Pyne MP noted in his explanatory speech when introducing the *Limitation of Actions and Other Legislation (Child Abuse Civil Proceedings) Amendment Bill 2016* (Qld), the Queensland Parliament has a responsibility to represent all survivors of child abuse and to ensure equal rights of access to justice, whether or not the child abuse occurred within an institution and irrespective of whether it involved sexual or serious physical abuse.<sup>13</sup> These issues go to the heart of justice and equality for all survivors of childhood abuse.

By including serious physical abuse that results in long-term psychological injury, the Bill acknowledges the seriousness of this kind of abuse and does not seek to delineate between

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<sup>12</sup> Explanatory speech by Mr Rob Pyne MP. Hansard, 18 August 2016 at [2987].

<sup>13</sup> Explanatory speech by Mr Rob Pyne MP. Hansard, 18 August 2016 at [2985].



the different types of serious abuse that can have lasting traumatic consequences for those subjected to them, insofar as the ability to seek redress for the injury is concerned.

## Conclusion

There is much work to be done to attempt to repair the damage done to children exposed to abuse, whether sexual or otherwise, within an institution charged with responsibility for their safety. The removal of legal requirements as to the timing of making the complaint and the requirement that complaints be individually lodged is the first step. Civil culpability for abuse is formal recognition by the Government that they have failed to protect their most vulnerable and will make amends for this. Aside from any other form of compensation that may be received, this acknowledgement and validation and sense that justice has been served is often, in and of itself, of greatest value to a person who experienced abuse as a child.

It is in the interest of government and community to ensure that redress is made for the victims of child abuse, not only in order to heal wounds but also to work towards the prevention of the proliferation of abuse. The health and wealth of community is measure by the quality and happiness of the lives of the individuals and families within it, and this can only begin to flourish when we redress the root cause of damage that inevitably affects us all.

It is highly unlikely that these reforms will open the floodgates to waves of litigation. Many survivors of childhood abuse will never, for personal or practical reasons, seek to bring a claim against their abuser. In many other cases where there is the desire to bring a claim, it will be deemed not viable on the basis that the perpetrators are impecunious, deceased, or otherwise not worth suing. Other victims will choose to seek a more accessible remedy.

Victoria and New South Wales have led the way by amending their respective statutes to remove the limitation periods on claims relating to child sex abuse (Tasmania is presently considering reform). In both states, the proposed amending reforms received wide, bi-partisan support. The amendments have not been followed by a flood of litigation. The explanatory speech by Mr Pyne MP documents bi-partisan support for the proposed amendments.<sup>14</sup> We anticipate that the weight of public opinion will similarly favour the removal of the time limitation period, with retrospective effect, in Queensland and we urge the Government to act accordingly on its proposal.

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<sup>14</sup> Explanatory speech by Mr Rob Pyne MP. Hansard, 18 August 2016 at [2985].