Submission to the Legal Affairs and Community Safety Committee

Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill 2016

(the Government Bill)

Limitation of Actions and Other Legislation (Child Abuse Civil Proceedings) Amendment Bill 2016

(the Private Member's Bill)

5 October 2016

My name is [redacted], I am [redacted] years old and I am employed professionally as a [redacted].

I thank the Legal Affairs and Community Safety Committee (the Committee) for inviting me to make a written submission arising from my Private Hearing of 26 September 2016.

Disclosure statement and my background on this issue:

I was sexually, physically and emotionally abused as a child in an institution. I have litigated my case against the institution and the matter is now settled. The time limits defence was invoked against me, so I am well aware of what it feels like to have no right of action despite being in possession of significant evidence (evidence of the abuse and evidence of negligence) including admissions from the institution. As a result of the time limits defence my 'settlement' of damages was for a significantly lower quantum than my financial losses and health care costs arising from the abuse.

Having said that, I consider myself to be 'one of the lucky ones', in that I was able to access the health care that I needed to heal much of the trauma of the abuse, and to begin to become a functional person and productive citizen.

The institution did not in any way provide for this health care. Quite the opposite: I drifted for ten years as a young adult coming to terms with my experiences in the institution. The institution has admitted that for these ten years they were aware that I had been a victim of abuse in their care (my name had been documented in the offender's diaries). For this same ten years the institution was in receipt of advice from a psychologist that there were many victims in the institution and that they would likely suffer significant mental injury and would require prompt psychological intervention. The institution was advised by its insurance company and lawyers to not go 'looking for victims'. The institution decided to ignore the advice of the psychologist and decided to follow the advice of its insurance company and lawyers. Many victims were abandoned for over a decade as a result of this decision and several victims of the same offender died by suicide.

So it was through no assistance from the institution that I was able to access health care. It was through a process of self-realisation that I had been injured and that I needed medical care and that I had private health insurance, that I was able to access specialised health care to deal with complex childhood trauma. The public healthcare system is not able to adequately cater for the treatment and maintenance needs of survivors of complex childhood trauma. The public system

is underfunded and overloaded by the demands of acute crisis care with no real capacity for longer term treatment or resolution of the underlying trauma.

My situation was unusual in that I was able to afford private health insurance. Many survivors cannot. In fact most cannot.

It was because of my being able to access appropriate health care that I have been able to become the functioning professional that I am today. There are still recurrences of traumatic symptoms.

This is why reforming survivor's access to health care must be a top priority of government in setting the standard of conduct of institutions, and why it should be a top priority of institutions themselves (both government and private) to make specialist medical care available to survivors of abuse and reduce the burden of the trauma on the survivor, on the institution, on the community and on taxpayers.

All institutions should immediately develop policies to comply with Recommendation 9 of the 2015 *Redress and Civil Litigation Report* of the Royal Commission into Institutional Responses to Child Sexual Abuse.

I am not making this submission because of the potential impact of either the Government's Bill or the Private Member's Bill upon my personal situation. I am involved in arguing for reform for the many survivors who are suffering far more than me, who were subjected to unjust settlements as I was, but who have not had access to health care as I have and who therefore have not been able to heal and gain functional employment as I have. In short, I am helping simply because I can, and they cannot. If the roles were reversed I would like to think they would do the same.

The Committee will not hear from the many voices who the Committee needs to hear from. I hope to be the conduit for some of those voices.

My knowledge of the experience and needs of survivors of abuse comes from a combination of my own direct personal experiences, my observations in assisting other survivors, such as in a support role, or with making submissions to the Royal Commission, or in seeking justice directly from institutions, as well as in my professional capacity.

Through my professional work as a [redacted] working in [redacted] I am familiar with the experiences and needs of a large number of survivors of physical and sexual abuse, both in institutional and non-institutional settings.

It is on this basis that I have credibility to speak of the true needs of survivors of abuse, of the behaviour of abusers and institutions and of what law reforms are needed to end decades of injustice and to begin to focus on health and healing.

Recommendations:

I recommend that the Government amend its Bill to adopt the policy objectives as put forward by the Private Member's Bill.

Based on the overwhelming support of the submissions to the Committee this should include, as a minimum:

1. Adopt the definition of child abuse as used in the Private Member's Bill, being the definition within the NSW *Limitation Amendment (Child Abuse) Act 2016*. This is simple, straight forward and should be an immediate amendment to the Government bill and should not be placed on the Issues Paper;

2. a) Adopt the framework for re-actioning matters subject to a judgement or 'settlement' deed where the application of the time limits defence resulted in an unjust settlement, as per the framework as put forward by the Private Member's Bill. This is well worded, is straight forward and should be an immediate amendment to the Government Bill and should not be placed on the Issues Paper;

   b) Place on the Issues Paper the consideration of all other circumstances in which it might be reasonable to revoke a past deed, other than simply the use of the time limits defence;

3. Re-instate juries for civil trials for cases of personal injury arising from child abuse. This is an uncontroversial 'exemption' of child abuse civil trials from the exclusion of juries. It represents a return to the equality of judicial procedures offered pre-2003 and would have no alarming consequences of implementation. This should be an immediate amendment to the Government Bill and should not be placed on the Issues Paper;

4. As well, I urge the government to either adopt the Private Members Bill's mechanism for addressing issues regarding stays of proceedings, OR to come up with a solution to this problem. The current plan of the Government – to do nothing – is not a viable solution because it will allow defendants to continue to benefit financially from their historic cover-up of child sexual assault in institutions. The problem that this reform of the Private Member's Bill seeks to address is a very real problem confronting survivors of abuse and is a barrier to justice.

I ask the Committee to make the above recommendations in its Report.

I urge the Committee to listen to the overwhelming support of the stakeholders.

Consider the below evidence base. There are **24 stakeholder** organisations and individuals who have made submissions or position statements on the policy objectives of the Private Member's Bill. Please see the **Summary of Stakeholders** for a quick visual guide to the position of each stakeholder on each policy reform.

1. Immediately, as an amendment to the Government bill, expand the definition of abuse beyond institutions and to include serious physical and emotional abuse – preferring the NSW definition over the Victorian, and to not leave this issue for the 'Issues Paper';

   17 submissions support expanding the definition to <u>non-institutional abuse</u> in legislation now

   0 submissions oppose the expansion of the definition

   Only 3 submissions support it being on the Issues Paper rather than in legislation now

   4 submissions don't comment specifically on this issue

   18 submissions support <u>including serious physical and emotional abuse</u> in legislation now

   0 submissions oppose the expansion of the definition

   Only 3 submissions support it being on the Issues Paper rather than in legislation now

   3 submissions don't comment specifically on this issue

2. Immediately amend the Government Bill to include a framework for revoking past settlement deeds, or re-actioning past actions, where the time limits defence was invoked creating an unjust settlement, and to not leave this issue for the 'Issues Paper';

   18 submissions support this being in legislation now and not on the Issues Paper

   2 submissions oppose this (one is the Government; the other is an individual who opposes every law reform including opposing that Queensland comply with the Royal Commission's recommendation for retrospective removal of time limits)

   Only 1 submission supports it being on the Issues Paper rather than in legislation now

   3 submissions don't comment specifically in this issue

3. Immediately amend the Government Bill to reinstate juries for civil trials for personal injury from child abuse and to not leave this issue for the 'Issues Paper';

   13 submissions support this being in legislation now and not on the Issues Paper

   2 submissions oppose this (one based on the 'cost' of administering juries, not any moral or legal opposition; the other is the individual who opposes everything)

   Only 1 submission supports it being on the Issues Paper rather than in legislation now

   8 submissions don't comment specifically on this issue

4. Implement a legislative strategy for addressing the issue of institutions who may apply for a stay of proceedings, based on the passage of time, where they have knowingly caused that passage of time.

   12 submissions support this being in legislation now and not on the Issues Paper

   3 submissions oppose this (two on the basis that the courts would determine this on their own anyway; one is the individual who opposes everything)

   Only 1 submission supports it being on the Issues Paper rather than in legislation now

   8 submissions don't comment specifically in this issue

Please see below the one page **Summary of Stakeholders** that provides a quick and easy visual reference guide as to the position of each stakeholder on each policy objective.

In compiling this summary I have been made aware that a small group of stakeholders were initially not informed of the existence of the Private Member's Bill and so initially provided a public submission to the Committee that only commented on the Government's Bill. These are the submissions currently posted on the Committee website at the time of writing this.

It is my understanding that upon being made aware of the existence of the Private Member's Bill, these stakeholders then examined the policy objectives in the Private Member's Bill and amended their written submissions to support the Private Member's Bill.

This summary has been updated to include those stakeholders who are known to have amended their initial written submission.

	Repeal the SoL immediately & retrospectively	Child abuse to include non-institutional	Child abuse to include physical abuse	Allow unjust deeds to be reopened	Reinstate civil juries	Restrict stay of proceedings
Govt	Yes	Issues Paper	Issues Paper	No	Doesn't comment	Doesn't comment
Opposition	Yes	Yes	Yes	Yes	Doesn't comment	Doesn't comment
Mr Pyne MP	Yes	Yes	Yes	Yes	Yes	Yes
1. Name suppressed	No	Doesn't comment	Doesn't comment	No	No	No
2. Terry McDaniel	Yes	Doesn't comment	Yes	Yes	Doesn't comment	Doesn't comment
3. Johnston, QCSALRC	Yes	Yes	Yes	Yes	Yes	Yes
4. GCCASV	Yes	Yes	Yes	Yes	Yes	Yes
5. Legal Aid Qld	Doesn't comment	Doesn't comment	Doesn't comment	Doesn't comment	Doesn't comment	Doesn't comment
6. Qld Advocacy	Yes	Yes	Yes	Yes	Yes	Yes
7. PACT	Yes	Yes	Yes	Yes	Yes	Yes
8. ILA Qld	Yes	Yes	Yes	Yes	Yes	Yes
9. Tzedek	Yes	Yes	Yes	Yes	Yes	Yes
10. Peakcare Qld	Yes	Doesn't comment – Issues Paper	Doesn't comment – Issues Paper	Doesn't comment	Doesn't comment	Doesn't comment
11. Qld Family and Children's Commissioner	Yes	Yes	Yes	Yes	Yes	Yes
12. ZigZag	Yes	Yes	No comment in submission – was unaware of PMB and now says **YES**	No comment in submission – was unaware of PMB and now says **YES**	No comment in submission was unaware of PMB and now says **YES**	No comment in submission – was unaware of PMB and now says **YES**
13. Soroptimist	Yes	No comment in submission At public hearing says likely **YES**	No comment in submission At public hearing says likely **YES**	Doesn't comment	Doesn't comment	Doesn't comment
14. CASV	Yes	Yes	Yes	Yes	Yes	Yes
15. Confidential	Yes	Yes	Yes	Yes	Yes	Yes
16. ATSI Legal Service	Yes	Doesn't comment	Doesn't comment	Yes	Doesn't comment	Doesn't comment
17&21. Qld Law Society	Yes	Cautiously supports – Issues Paper	Cautiously supports – Issues Paper	Cautiously supports – Issues Paper	No	No
18. Aust Lawyers Alliance	Yes	Yes	Yes	Yes (and wants it even broader)	Yes	Issues Paper
19. Knowmore	Yes	Yes	Yes	Yes	some victims want jury, some may not	No
20. Micah Projects	Yes	Yes	Yes	Yes	Doesn't comment	Doesn't comment
22. Bravehearts	Yes	Yes	Yes	Yes	Yes	Yes
Total against	1	0	0	2	2	3
Total in favour	**22**	**17**	**18**	**18**	**13**	**12**
Total "not commented on"	1	4	3	3	8	8
Total for Issues Paper	0	3	3	1	1	1

Comments on some submissions placed before the Committee:

There is no need to comment on the majority of submissions which support the policy objectives of the Private Member's Bill – other than to say I entirely concur and support those submissions.

Presumably the Committee would want me to make some comment on the issues raised by those stakeholders who either oppose a policy objective or who recommend that a policy objective should be placed on the Issues Paper rather than be made legislation now.

I prefix all below comments with a statement of absolute respect for each stakeholder and for the right of every stakeholder to hold their own learned opinion on these matters. Each stakeholder's opinion, including my own, will be based on our respective experience, knowledge, roles, consideration of the evidence, etc.

Some of the matters being addressed by the Bills before the Committee are quite straight forward however some of the issues are not straight forward and have levels of complexity and so differing opinions are to be expected.

There has been some unfortunate confusion in some of the submissions and some of the evidence put before the Committee has either been contradictory or in some instances has been based on apparent misunderstanding by the stakeholder of the actual function or intention of the policy objective.

The Committee has the unenviable task of trying to balance these conflicting views and trying to make sound recommendations regarding important proposed legislation. Therefore I will seek to clarify the true function or intent of these policy objectives and highlight any apparent stakeholder misunderstandings for the benefit of the Committee.

I will address relevant stakeholder positions on each of the four policy objectives in turn.

1. Definition of abuse to include all victims of child abuse

The **Summary of Stakeholders** shows that there is no objection by any stakeholder to expanding the definition of abuse to include serious physical, associated emotional and non-institutional abuse.

Queensland Law Society, Peakcare Inc and the Government themselves are the only stakeholders recommending that this issue be discussed through the Issues Paper rather than immediately writing the definition into the new legislation.

Importantly, the Royal Commission's legal service Knowmore supports immediate legislation to include the New South Wales definition of child abuse and sees no need for further conversation such as the Issues Paper, noting that there has already been extensive consideration of all issues in Victoria and New South Wales, with both states coming to the conclusion that an expanded definition was appropriate. Knowmore's submission is strongly evidence-based.

There is no need for Queensland to waste time or money reinventing that process. Nor is it wise for Queensland to create interim discrimination by passing its current Bill giving rights to some victims of abuse but not others, while it awaits some outcome of its Issues Paper. Such discrimination would likely result in widespread public condemnation.

Large and respected NGOs, such as Bravehearts and Micah Projects (who the Government cited in the opening speech to their Bill) have made submissions in support of immediate expansion of the definition of abuse and state there is no need for delay via an Issues Paper. Their submissions are evidence-based. The many other respected NGOs similarly support immediate implementation of the expanded definition.

The Queensland Family and Child Commission, a Queensland Government statutory authority supports the broad and equitable definition of child abuse as per the Private Member's Bill.

It is my submission that on an issue that has such overwhelming support, and which is such a straight forward issue, and where there has already been extensive widespread public consultation in like jurisdictions, there is absolutely no excuse for further delaying this reform by questioning it via the Issues Paper.

On this issue there is nothing more to be learnt, we have all the available facts, and the evidence all points to expanding the definition of child abuse beyond the Government Bill's narrow focus and creating equal rights for all victims of child abuse as the right and proper thing to do.

In other words, just do it.

2. Revoke past unjust settlements subjected to time limits

Similar arguments apply to this policy objective. Again, stakeholders overwhelmingly support this as immediate law reform, not something that warrants further delay on an Issues Paper.

The only stakeholders who object are the Government themselves, who are supporting their own initial policy, and the submission by a private individual who objects to every reform without providing any evidence for their objection.

The Government's approach to the issue of unjust past settlements is unacceptable.

The Government makes NO legislative provision to revoke past unjust settlements that were subjected to time limits. This leaves victims stranded.

The Government's latest position is to have a *policy* to not raise past settlements as a barrier to revisiting unjust settlements for victims of abuse in government institutions.

The first failure of the Government's approach is that it only applies to victims of child abuse in government institutions. The many victims of child abuse in Queensland's private institutions (churches, church orphanages, church schools, private schools, cultural and sporting clubs, etc) are abandoned by the Government's policy. There is nothing forcing these institutions to do the right thing with respect to unjust past settlements.

The second failure of the Government's approach is that it creates arbitrary discrimination between victims of abuse in the same institution based on whether they have previously pursued a right of action or not.

Any victim who bravely tried to take their abuser and institution to court to hold them to account, had time limits invoked and was subjected to a small inequitable damages settlement that in no way reflected their true health care costs or financial losses arising from the abuse.

Under the Government's bill and policy those people are trapped forever in those settlements – they are trapped forever by the time limits defence.

Under the Government's method for removing time limits a victim of the same abuser in the same institution (perhaps a child in the next bed in an orphanage) who has never before attempted to litigate the institution, now finds themselves with a full right of action able to litigate the institution for full health care costs and damages with no time limits defence as a barrier.

This is a bizarre discrimination created by the Government's approach to this issue and can be remedied immediately by simply amending the Government Bill to include the policy objective of the Private Member's Bill for removing past unjust settlements based on time limits.

The third failure of the Government's approach is that it still mistreats the survivors of government abuse. The bill creates no rights, and the policy only offers to not raise past unjust settlements as a barrier IF the survivor participates in a new Government redress scheme. The Government's policy does not allow survivors of government institutional abuse to have a true right of action to re-litigate their case should they have the evidence and the motivation to do so.

This is disrespectful and is a continuation of the paternalistic abusive relationship between government and individual that this cohort of survivors has experienced from the commencement of their abuse as children in a government institution.

The lack of true commitment to reform in the Government's policy is evidenced by their statement in the policy that they reserve the right to raise a past settlement as a bar to action, which completely runs contrary to the stated intent of the policy.

Survivors deserve better assurance and deserve to be given – for the first time in their lives – true autonomy to have a right of action and decide for themselves whether to litigate or participate in redress.

This is a question of the Government respecting the citizens of this State.

As a minimum the Parliament must give ALL survivors of child abuse the right to re-action unjust past settlements. This must be done as *legislation* not as *policy*. The reason this must be done as legislation is to bind all the private institutions to comply with the Parliament's intent.

Government *policy* over government victims has no binding influence on the conduct of private or church institutions and will result in a chaos of ad hoc responses from institutions ranging from a reluctant copying of the government policy at best through to no adoption of the government policy at all at worst and every permutation in-between.

Under the Government's current approach, victims of abuse will experience highly variable rights based on which institution abused them. There will be broad and arbitrary discrimination across the state.

As the submission of Knowmore states, the issue of responses to child abuse has already been plagued with jurisdictional inconsistencies for decades. Government policy and legislation should be removing these inconsistencies, not creating new ones.

The courts need the guidance of Parliament to be able to properly overturn past unjust settlements. Current legislative frameworks are inadequate as this situation has never before been faced by the courts.

Institutions need to be compelled by Parliament to not raise past unjust settlements as a bar to action. (This will also potentially protect their insurance policies). They cannot be trusted to just do the right thing on their own.

The community deserves an actual solution to the issue of historical child abuse that is going to bring about true reform and the community expects its government to provide effective legislation that makes things better not worse.

Survivors deserve legislation that affords them rights, reliable safe-guards and dignity.

The Queensland Law Society (QLS) is the only stakeholder suggesting putting this issue on the Issues Paper. 18 stakeholders disagree, calling for unfair deeds to be revoked as part of the current legislation now.

I agree with these majority stakeholders that the framework as put forward by the Private Member's Bill should be adopted as part of the Government Bill to revoke past unjust judgements or settlements where time limits were invoked.

I would also agree that there is scope for the Issues Paper to include consideration of any other circumstance where it is considered morally appropriate for a past unjust settlement to be re-actioned beyond those impacted by the time limits defence.

Examples of some scenarios where it may be appropriate, according to community values of fairness and justice, for past unjust settlements to be reopened include:

- Situations where there is a concurrent civil action and criminal prosecution and the victim has prematurely settled their claim on the basis of advice (such as from the Director of Public Prosecutions) that the civil action may be jeopardising the criminal prosecution;
- Situations such as the use of the so-called 'Ellis Defence' (as identified by ALA);
- Situations where a judgement or settlement was unjust due to a manifest lack of understanding by the court or legal representatives of the true dynamic of childhood trauma (as identified by Bravehearts).

It is my submission that I absolutely support the eventual reopening of past deeds such as on the grounds stated above, but I acknowledge that the issues are slightly more complex than the simple 'time limits defence' and so may warrant further consideration in the Issues Paper.

The placing of these additional circumstances on the Issues Paper should not be an excuse for placing the whole issue on the Issues Paper (particularly when you only have 1 stakeholder out of 24 asking for this) as the framework provided in the Private Member's Bill for revoking past settlements where time limits was a factor is a very safe law reform, it is well worded and it is consistent with the policy objectives of both Bills which is to comply with Recommendations 85-88 of the Royal Commission and remove all past time limits.

The benefit of this approach (revoking 'time limits' unjust settlements now as an amendment to the Government Bill, and placing other grounds for revoking settlements on the Issues Paper) is that by the time the Issues Paper comes to seriously consider the impact of implementing any broader basis for revoking past unjust settlements, there will be an evidence base of the impact of revoking unjust settlements more narrowly (the time limits settlements).

3. Juries for civil trials (child abuse personal injury)

So far the Committee has heard some conflicting opinion regarding whether or not to reinstate juries for civil trials for child abuse personal injury.

In terms of submissions, 13 stakeholders support immediate law reform versus 2 who oppose it. However there are 8 stakeholders who don't comment on the issue at all.

Of the stakeholders who oppose reinstating civil juries, one is the stakeholder who opposes everything without evidence, the other is the Queensland Law Society.

The individual stakeholder (Submission 001 'Name suppressed') does make an error of fact when they state that juries would *"bring to Australia the outrageous levels of damage reached in the United States, where damage awards exceed the actual quantifiable loss to the victim"*. In making this statement the stakeholder is unfortunately grossly misinformed and is obviously unaware that all damages under Australian law (including Queensland) are very tightly capped under Schedules to the *Civil Liability Act 2003*. Juries cannot exceed these caps. Queensland damages caps are among the lowest in Australia.

The stakeholder also errs when stating that the High Court comments in support of the role of juries are not applicable as they refer to a criminal case not a civil case. The comments of the High Court absolutely are relevant as they are not talking about the technical specifics of a criminal trial, they are talking about matters of fundamental principles of justice that are broad across all jurisdictions and the application or administration of justice and the important role of juries in this, and therefore the observations are most certainly applicable in equal measure to criminal and civil juries.

Full respect is given to the eminent status of the Queensland Law Society and their considerable experience in all matters pertaining to the law.

However their arguments must be assessed on the merits of the arguments, not simply on who is making the argument. If there is an argument unsupported by evidence it should be afforded due proportional consideration compared with an argument supported by evidence.

For example the main reason provided by QLS for opposing this reform was the 'cost' of implementing it. In his public evidence on 26 September 2016 Mr Tony Deane, Chair of the Litigation Committee of the QLS put forward this argument, stating that it would cost money to supply a jury to every child abuse personal injury civil action. He did not offer any argument against the reform based on any social justice concerns or any belief that juries were unreliable.

He then contradicted his own reasoning on costs by correctly stating that only the minority of litigations ever make it all the way to court. He put forward 5 -10% as an estimate, a figure that was later supported by Mr Warren Strange, CEO of Knowmore.

Therefore if only the minority of child abuse civil actions proceed beyond the mandatory Personal Injury Proceedings Act mediation proceedings and actually go to a court room, then any argument against a jury trial based purely on cost becomes a less convincing argument. For the

few cases that do go forward to trial, the survivors deserve the best quality of justice administration available and often that is a jury over a judge-only trial.

QLS President Mr Bill Potts stated in his evidence that jury trials were an 'appeal to prejudice' however he then contradicted this stating that in his opinion and experience: "*my experience is that in fact juries do get it right"*.

I must make it clear that I do not appreciate the QLS minimising the subject matter of four years of the Royal Commission as being "mischief". The comment is made in their written submission (last sentence of page 4). It may be innate to a criminal defence barrister to minimise the seriousness of the repeated criminal sexual assaults of children on a widespread systemic basis as "mischief" but I disagree. I am concerned that this minimising language of a dire social scourge may reflect some deeper prejudice influencing the submission put before the Committee.

I also must take issue with the hyperbolic example proffered by the President in his statement before the Committee in which he cited an imaginary case of someone 40 years after the abuse with no evidence somehow having a right to litigate. This is inaccurate and unhelpful because the President would be well aware that in the hypothetical scenario of his creation the victim would have absolutely no right of action based purely on the Rules of Evidence, ie not being able to prove their claim. The Rules of Evidence are not in any way being changed by the Private Member's Bill. There is no chance of the imaginary circumstance the President raised ever occurring and he would be well aware of this. Therefore it is an unhelpful hypothetical as it is a circumstance that could never occur and the offering of such an imaginary circumstance risks potentially playing to any preconceived fears or prejudices of decision makers on this important law reform.

Of note for the Committee to consider is the makeup of the QLS panel attending to address these issues of law reform relating to personal injury arising from child sexual abuse.

With great respect to their experience in their fields and their personal integrity, the QLS panel comprised the President, who is a prominent criminal defence barrister (who will have represented people charged with child sexual offences) and the Chair of the Litigation Rules Committee, whose career has predominantly involved representing large institutions.

Of notable absence from the QLS panel was QLS Personal Injuries Law Committee Chair Terry Killian, who may have been able to provide an alternative or differently balanced perspective on the proposed law reforms for the Committee's benefit.

The QLS ordinarily and quite properly enjoys its reputation as an independent and expert organisation when making representations before Parliamentary Committees. On this occasion however, when giving weight to the submission of the QLS, I ask the Committee to consider whether this particular manifestation of the panel of the QLS was a truly balanced panel or whether there were perhaps some missing voices from the panel who may otherwise have been

able to provide the Committee with valuable information or perspective on the proposed law reforms.

In his opening statement the President advised the Committee that QLS represents over 9000 lawyers and "*the society proffers views which are truly representative of its member practitioners*".

With the greatest respect to the President of the QLS I doubt that 9000 lawyers would hold a unanimous opinion on any question. There are surely lawyers, members of the QLS, who would welcome a return of civil juries.

Finally, in terms of evidence, the question of the cost of providing and administering a jury to a civil trial can be easily estimated by an examination of the cost of this before the removal of civil juries in 2003.

It was not prohibitive then and it would not be prohibitive now.

The Committee heard some testimony from notable legal and advocacy NGOs including Knowmore and Micah Projects who stated that some survivors of abuse would want a jury while some would not. The reason put forward by those stating that a survivor may not want a jury was essentially the issue of privacy and the stress of telling one's personal intimate facts to a room of strangers.

However, this is going to occur whether it is to a room with a jury or a room with a judge and barristers. Whether it is with a jury or a judge, that line has been crossed and the victim will be telling their personal intimate story to a room full of strangers.

The truth is that the stress and anxiety of going to trial arises from the act of going to trial.

It is the fact that your childhood experiences are about to be exposed and scrutinised in an adversarial context.

It is the fact that your future hangs in the balance on the determination of the person or people in this room and how they discharge their duties.

The presence of a jury versus a judge does not necessarily increase a victim's stress – the victim's stress will absolutely be elevated merely by virtue of the process of the trial itself.

In my experience of supporting survivors, I have observed that most would prefer a jury.

This is because a common outcome of childhood abuse is often a deep mistrust of authority. This becomes even more entrenched if the child has reported the abuse to other adults and has been disbelieved or punished for reporting. It is even further entrenched when, as an adult, the victim approaches the abuser or the institution for justice and is still treated in an adversarial manner, rather than a caring manner.

So by the time that person enters the court room, the truth of their life experiences has taught them that authority cannot be trusted, that anyone in a position of power is corrupt and favourable towards the influential institutions.

A victim's fear and mistrust of authority is not a conscious thing but is deeply learned and ingrained.

Consider now that person facing a choice between a judge only trial or a jury trial.

What choice do you think they would make?

Facing a single judge (a person who represents authority and establishment) is far more stressful to a survivor of child abuse than having a body of ordinary people, a group of peers who are not necessarily part of the establishment and who can bring common sense into their deliberations.

The benefit of a jury is that they are not biased by the 'ongoing relationship'.

The judge and the lawyers in the court room are all part of the legal fraternity. They will all meet again multiple times throughout their careers arguing various cases. This may temper their conduct or advocacy.

By contrast the jury members owe no allegiance to anyone in the room, they owe allegiance only to the truth. They will never be back here again or have any ongoing relationship with any party. They are free to undertake considered and unfettered deliberation of the facts.

While any person on the jury will ordinarily have some bias this would likely be tempered by the presence of other members of the jury with different bias. By contrast a judge acting alone has no external safeguard against the influence upon their decision making from their own internal bias, which may well be subconscious bias (for example the fact that the judge comes from a vastly different socio-economic background to the plaintiff).

Ideally, the Committee would have heard from more victims of abuse as to what victims would prefer; judge or jury.

The Committee heard very impassioned public testimony from one survivor, Mr Terry McDaniel, about a range of reform issues. The Committee put the question regarding civil juries to Mr McDaniel and he responded with great passion about delays of various proceedings.

With the greatest respect to Mr McDaniel, I urge the Committee to review the transcript (page 14) of the question and answer on this issue as it is apparent that the Committee did not make it clear to Mr McDaniel that he was being asked to comment on whether he would prefer a jury or a judge to hear his matter. My understanding of Mr McDaniel's answer was that he was angry about any trial in general and the prospect of any delay to the resolution of a matter. For example he cites a number of current trials that are ongoing – clearly these are not jury trials as there are no jury trials. So his anger at the trials he names is not anger at jury trials.

Also, the Committee Member (Ms Pease MP) makes an error of fact when she states in her question to Mr McDaniel "*Mr Pyne's bill says that if any matters go to court they are heard by a jury*". It is my understanding that this is not true at all. The Private Member's Bill removes child abuse personal injury trials from personal injury matters excluded from having a jury. In other words an exemption from an exclusion. This is explained further below.

This means that a jury would be allowed (such as if a victim requested it) but would not be mandatory (such as if a victim did not want a jury). So the very question put to Mr McDaniel was materially misleading, albeit no doubt unintentionally.

Understandably in this circumstance, it was not clear that Mr McDaniel understood the question (I don't know that anybody could) or that the question was put clearly enough to him, and ideally at the conclusion of his answer the question should have been repeated or rephrased, but it was not and he was therefore unfortunately denied the opportunity to provide his true answer to the question.

I would recommend the Committee review the transcript of this question and answer and I counsel the Committee against misinterpreting Mr McDaniel's answer as being *against* wanting a jury over a judge as I don't believe he ever truly gave that answer.

I am a survivor of abuse and I can state unequivocally for the Committee that if my matter had ever gone to trial I absolutely without any doubt would have wanted a jury to consider the facts not a solitary judge only.

In fact having a jury could well have been the deciding factor in whether or not to face the emotional burden of going to trial – not because a jury is perceived as being favourable to the claimant, but because they are perceived as being fair and independent, while the judge is perceived (rightly or wrongly) as being favourable to the establishment, including institutions.

This is because of the mistrust issues described earlier.

So the bottom line is: trials will always be stressful; many survivors would prefer a jury; some may prefer a judge only.

The good news is that the Private Member's Bill's provision for reinstating civil juries is very safe legislation to support as it does not impose a jury on any victim of abuse who does not want a jury. Section 73 of the *Civil Liability Act 2003* excludes all civil actions from having a right to a jury trial.

All the Private Member's Bill does is create an exemption to section 73 for any personal injury case arising from child abuse. In other words the victim has a right to a jury if they wish. The victim does not have to have a jury if they do not wish.

Perhaps Knowmore (who do not offer a stance for or against the reform) say it best:

> *"We understand some survivors may wish to have their matter determined by a jury, and that wish must be respected."*

The reform put forward by the Private Member's Bill allows this.

4. Guidance to the court on applications to stay proceedings

Clearly this is a controversial area of reform, and was always going to be.

What is not controversial is that some solution is needed, whether or not it is the solution as put forward in the Private Member's Bill.

The issue underlying the need for the reform is a very real and foreseeable threat to the rights of victims of child abuse to access justice in Queensland.

If nothing is done in this space then the very threat facing Queensland is that the Parliament's reforms in removing time limits will be a short lived victory for justice. Victims coming before the courts seeking to re-action past claims, or those seeking to action a claim for the first time, may well find themselves facing a barrier to a right of action every bit as insurmountable and unjust as the time limits defence.

There would presumably be a huge public backlash to such an occurrence, particularly when the Government has been clearly informed of the problem and presented with a solution.

I am describing the situation where an institution claims that they cannot get a fair trial simply because of the passage of time between the criminal sexual assaults of a child and the time by which the action is being heard.

Bear in mind that much of the time delay for actions being heard for the first time has actually been caused by the time limits defence legislation itself (being legislation of the Queensland Parliament).

In many situations institutions have been the instrumental cause of the delay in the victim having a right to bring an action, because institutions have lied to victims, denied knowledge of abuse, or destroyed evidence, and their words and conduct has since been exposed by examination of contemporaneous documents and testimony before the Royal Commission.

There is nothing stopping a defendant now from responding to a victim's litigation by applying to the court for an application to stay proceedings.

This is perhaps a slightly complex area of law and as a result receives the lowest support for immediate reform from submissions to the Committee – but it stills receives outright support from 12 stakeholders for immediate reform as put forward by the Private Member's Bill. This is compared with only 3 stakeholders who object to the reform – in the form that it currently takes. One is the individual who objects to everything without evidence. The other two are eminent and learned stakeholders whose opinions must be given due weight: the QLS and Knowmore. Only one stakeholder recommends the issue for the Issues Paper (ALA) while the remaining 8 submissions don't offer an opinion on this issue at all.

I will comment briefly on a material misunderstanding of the provisions of this reform evidenced in ALA's submission. They object to the wording of this reform in Mr Pyne's Bill but otherwise support the concept and want the matter on the Issues Paper. Their reason for objecting is that they are concerned that the provisions are onerous or burdensome on the plaintiff to prove.

In fact nothing could be further from the truth and this reveals a misunderstanding of the situations in which these provisions would apply. In practice these provisions would apply when the plaintiff already was in possession of evidence of the elements – in other words it would not be burdensome or onerous at all. If a plaintiff didn't possess the evidence, they wouldn't utilise these provisions.

For example, the provision relating to findings of an inquiry: if the Royal Commission handed down a formal finding of fact or negligence about an institution, that would be published such as in a Case Study Report and the plaintiff would have easy access to this finding. Not burdensome at all.

Similarly, the provision relating to an admission of fact or liability by the institution: the plaintiff would be in possession of a letter or other correspondence from the institution making the admission. So again, not burdensome. If they are not in possession of such a document then they do not use this provision.

By contrast, and perhaps more accurately, the concerns raised by Knowmore were at the opposite end of the spectrum – that the provisions were so soft as to be potentially unnecessary as a court, more likely than not, would make such a determination in the ordinary consideration of the facts.

I would very much like to hope this is true, and I respect the great knowledge base and integrity of Mr Warren Strange, CEO of Knowmore when he makes that observation.

It is my concern however that no one can predict what the court will or will not determine.

I was surprised by the stance taken by the ALA as it contradicts advice received from senior partners of prominent litigation firms (who are members of the ALA) during the consultation phase. These persons provided confidential advice in response to early concerns raised by Knowmore that the provisions may be unnecessary: they essentially agreed that the court *may*

rule similarly to the outcome as directed in the proposed reform, but that there was no guarantee and where there was any doubt they would rather have the legislation than not have it.

Ultimately the concerns and opinions of Knowmore and QLS on this policy objective must be taken seriously.

It is certainly an area that no one person or stakeholder can claim to know everything about and the opinions of the range of stakeholders should be considered.

The issue of historical child abuse, particularly the long standing systemic corruption of prominent Queensland institutions, in facilitating abuse and obstructing reform, is a unique social problem almost without precedent.

Therefore it requires and deserves courage from legislators to provide the requisite unique solutions to begin to address the problem.

Therefore I would request the committee recommend the Government either adopt the provisions in the Private Member's Bill and consider a sunset clause – to allow a period of time for this matter of correcting the wrongs of the past to be dealt with. After a natural passage of time, the majority if not all past cases could have been properly dealt with, to the satisfaction of community expectations and the more controversial of these provisions could then be retired.

Alternatively, I ask that the matter be put on the Issues Paper for consideration, noting that the danger with this approach is that in the meantime, the Government will be allowing and expecting victims to take their cases to court, and to be confronted with applications to stay proceedings, and once again victims will be required to shoulder all the risk and expense.

This is a far less desirable solution to the Government adopting the reform of the Private Member's Bill or providing its own alternative solution.

[redacted]

[redacted]

[redacted]

Conclusion

I recommend that the Government should amend its Bill to adopt the policy objectives as put forward by the Private Member's Bill. I ask that the Committee recommend this.

These amendments would improve the Government's proposed legislation in the following ways:

1. Adopt the definition of child abuse as used in the NSW *Limitation Amendment (Child Abuse) Act 2016*;
2. a) Adopt the framework in the Private Member's Bill for re-actioning matters where the judgement or 'settlement' was subject to the time limits defence resulting in an unjust settlement;
   b) Consider other potential circumstances for re-actioning matters on the Issues Paper;
3. Re-instate juries for civil trials for cases of personal injury arising from child abuse;

Adopt the Private Members Bill mechanism for addressing issues regarding stays of proceedings, consider application of a sunset-clause OR the Government propose its own remedy