



Department of Justice and Attorney-General
Office of the Director-General

In reply please quote: 566532/19, 4654428

14 JAN 2019

Mr Peter Russo MP
Chair
Legal Affairs and Community Safety Committee
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Dear Mr Russo

The Legal Affairs and Community Safety Committee (the Committee) has requested a departmental response to the written submissions received by the Committee as part of its inquiry into the Civil Liability and Other Legislation Amendment Bill 2018.

Please find enclosed a table that summarises the key issues raised in the written submissions to the Committee and provides a response from the Department of Justice and Attorney-General (DJAG).

Should the Committee Secretariat require any further information, they should contact Ms Imelda Bradley, Director, Strategic Policy, DJAG, on [REDACTED], or at: [REDACTED].

I trust this information is of assistance.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Peter Cook".

Peter Cook
A/Director-General

Enc.

Civil Liability Amendment and Other Legislation Amendment Bill 2018

Response to Legal Affairs and Community Safety Committee:

Issues raised in written submissions

The following 11 submissions were received in relation to the Civil Liability and Other Legislation Amendment Bill 2018 (the Bill):

1. Care Leavers Australasia Network
2. Australian Lawyers Alliance
3. Queensland Catholic Education Commission
4. Queensland Cricket
5. Independent Schools Queensland
6. Queensland Law Society
7. Name suppressed
8. Queensland Child Sexual Abuse Legislative Reform Council
9. knowmore
10. Chris Kohler
11. Bravehearts

| Submission Number / Submitter | Submission Key Points | Department of Justice and Attorney General Response |
|--|---|---|
| <p>001: Care Leavers Australasia Network (CLAN)</p> | <p>CLAN submits that all forms of child abuse (including physical) should be covered.</p> | <p>The issue of including other forms of abuse is beyond the scope of the Bill.</p> |
| | <p>CLAN submits that the duty of institutions should be retrospective, as in Western Australia (WA).</p> | <p>The reverse onus of proof provisions for institutions will apply prospectively as recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) in its <i>Redress and Civil Litigation Report</i> (Report).</p> <p>Institutions will need to consider the policies, practices, procedures and documentation they will need to have in place in relation children under their care, supervision, control or authority in order to demonstrate that they have taken all reasonable steps to prevent the sexual abuse of the children by persons associated with the institution.</p> <p>The corresponding reverse onus provisions which have been legislated in New South Wales (NSW) and Victoria also apply prospectively.</p> <p>The other provisions in the Bill (relating to, for example, the proper defendant and liability of associated trusts) will apply to a cause of action whether it arose before or after the commencement of the Bill. This is consistent with equivalent provisions in NSW, Victoria and WA.</p> |
| | <p>CLAN submits that the associated trust provisions should apply to both incorporated and unincorporated institutions.</p> | <p>The Bill provides for how an abuse claim can be instituted against an unincorporated institution, for the unincorporated institution to nominate an appropriate defendant and for the court to order that an associated trust of the unincorporated institution is the institution's nominee if the institution fails to nominate a defendant or nominates a defendant with insufficient assets to satisfy liability for the claim.</p> |

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| | | <p>This is necessary where unincorporated institutions do not have legal personality.</p> <p>Corresponding provisions in NSW, Victoria, and the Australian Capital Territory (ACT) only apply to unincorporated institutions.</p> <p>New section 33J will allow an institution (whether incorporated or unincorporated) to satisfy liability under a judgment or in settlement of an abuse claim out of the assets of the institution or the assets of an associated trust that the institution uses to carry out its functions or activities.</p> |
| 002: Australian Lawyers Alliance (ALA) | <p>The ALA recommends that the definition of abuse should be extended to include physical and associated psychological abuse.</p> | <p>The issue of including other forms of abuse is beyond the scope of the Bill.</p> |
| | <p>The ALA prefers a vicarious liability approach combined with a close connection test as a means of holding institutions liable for child abuse.</p> | <p>The issue of vicarious liability for institutions is beyond the scope of the Bill.</p> |
| | <p>The ALA recommends adopting the definition of person <i>associated with</i> the institution from the New South Wales (NSW) legislation - section 6E and 6G of the <i>Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018 (NSW)</i>.</p> | <p>The Department notes that the current definition in the Bill is similar to that in NSW section 6E. This comment is under consideration to the extent of additional categories in NSW section 6E.</p> <p>NSW section 6G relates to vicarious liability and is beyond the scope of the Bill.</p> |
| | <p>The ALA recommends that insurance be a mandatory requirement for all institutions that provide services to children.</p> | <p>The Department notes these comments as beyond the scope of the Bill.</p> |
| | <p>The ALA recommends that all of the above should apply retrospectively.</p> | <p>The Department notes these comments. See comments on retrospectivity for submission 001.</p> |
| 003: Queensland Catholic Education Commission (QCEC) | <p>QCEC supports the overall aims of the recommendations, including the prospective application of the reverse onus provisions.</p> | <p>The Department notes this comment.</p> |

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| | <p>Concern was noted on the impact that the broad definition of person <i>associated with</i> an institution may have on contributions to education made by community members and in relation to the role and management of contractors in schools.</p> | <p>Volunteers and contractors are included as people ‘associated with’ an institution, which means that the institution must take all reasonable steps to prevent the abuse of a child in their care, supervision, control or authority by a volunteer or contractor.</p> <p>What constitutes ‘reasonable steps’ will vary from situation to situation. It is likely that there will be some impact on institutions as they seek to address and mitigate the risk and to keep records of what has been done.</p> |
| <p>004: Queensland Cricket (QC)</p> | <p>QC generally supports any legislation to ensure safety of children but is concerned that the reverse onus provisions may result in an additional burden on community cricket clubs and the volunteers who run them.</p> | <p>The Department notes these comments.</p> |
| | <p>QC is also concerned that the proper defendant amendments may deter people from volunteering for executive positions as this would involve taking on the risk of defending future claims relating to past incidents.</p> | <p>Where an action is commenced against a current office holder on the basis of a liability of the former office holder, the current office holder will not be personally liable and will be able to satisfy any liability out of the assets of the institution and, if applicable, the assets of an associated trust that the institution uses to carry out its functions or activities.</p> |
| | <p>QC raises two issues about Blue Cards.</p> | <p>The issues relating to Blue Cards are beyond the scope of the Bill.</p> |
| <p>005: Independent Schools Queensland (ISQ)</p> | <p>ISQ notes that other legislative requirements are focused on reporting, rather than preventing, abuse and that the Bill will introduce increased expectations of preventative actions without defining what the actions should be. ISQ submits that there is a need for clarity regarding defining or determining ‘all reasonable steps’.</p> | <p>While new section 33E(3) provides some guidance as to relevant matters, there is no one size fits all for ‘all reasonable steps’.</p> <p>In this regard, the Bill follows the Royal Commission’s Report: <i>The steps that are reasonable for an institution to take will vary depending on the nature of the institution and the role of the perpetrator</i> (56).</p> <p>Institutions need to consider the scope of their duty and adopt and implement practices, policies and procedures to comply with their obligations.</p> |

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| | <p>ISQ has noted the broad definition of 'institution' and commented on the need for clarity with respect to activities offered at a school, using school facilities, but run by another organisation.</p> | <p>The issue regarding school facilities used by another organisation is raised in the context of the definition of institution. However, attaching liability to an institution will require that the child or claimant was under the care, supervision, control or authority of the institution when the abuse occurred and that the perpetrator was a person associated with the institution. Such questions are likely to turn on the facts in the case including as to the liability of the other organisation (as an institution).</p> |
| | <p>ISQ has raised an issue about Blue Cards.</p> | <p>The issue relating to Blue Cards is beyond the scope of the Bill.</p> |
| <p>006: Queensland Law Society (QLS)</p> | <p>The QLS does not support the reverse onus amendment (but if it is implemented, supports the prospective only application).</p> | <p>The Department notes these comments.</p> |
| | <p>The QLS suggests that the factors relevant to whether the institution took all reasonable steps should include the degree of control the institution has (or could reasonably be expected to have) over the person in the place of the abuse.</p> | <p>See comments on 'all reasonable steps' above for submission 005.</p> |
| | <p>The QLS notes that there is no precise definition of unincorporated bodies, which do not have fixed or defining characteristics but normally have a management committee who will be the relevant office holders.</p> <p>The QLS submits that the Bill should reflect that the individuals comprising the management committee at the time the relevant tort was committed are typically liable.</p> <p>The QLS submits that the use of the term 'management member', as defined in the <i>Legal Identity of Defendants (Organisational Child Abuse) Act 2018 (Vic)</i> would be a more appropriate way of</p> | <p>This comment is under consideration.</p> |

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| | accounting for the diversity in structure and membership of unincorporated bodies. | |
| | The QLS suggests that ' <i>in the name of the institution as if it had legal personality</i> ' should be added at the end of new section 33H(2). | This comment is under consideration. |
| | <p>The QLS notes that where there is a nominee: the liability of the institution is incurred by the nominee; anything done by the institution is taken to have been done by the nominee; and a duty or obligation on the institution in relation to the proceeding is a duty or obligation on the nominee.</p> <p>The QLS suggests that a 'catch-all' provision should provide that to the extent an institution has liability, duties or obligations under the Bill, that these may be enforced against the current office holder.</p> | This comment is under consideration. |
| | The QLS suggests that new sections 33F(3) and 33G(3) should make clear that the institution and the current office holder(s) enjoy the defences and insurances that were also enjoyed by the former institution or office holder(s). | This comment is under consideration. |
| | <p>The QLS suggests that the following new provisions, which apply to a nominee, should also apply when the proceeding is against a current office holder or an associated trust:</p> <ul style="list-style-type: none"> • section 33I(e) which requires an unincorporated institution to continue to participate in a proceeding when there is a nominee; | These comments are under consideration. |

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| | <ul style="list-style-type: none"> • section 331(g) which gives the nominee the right to rely on any defence or immunity that would have been available to the institution; and • section 331(h) which extends any right of the institution to be indemnified in respect of damages awarded in an abuse claim to the nominee. | |
| | <p>The QLS submits that the limiting words <i>'that the institution uses to carry out its functions or activities'</i> in several new sections does not go far enough to protect specific charitable purpose trust assets.</p> <p>The QLS view is that the definition of 'associated trust' could be limited to a trust the charitable purposes of which include / are the same as the general charitable purposes of the institution.</p> <p>Anti-avoidance provisions could be included in the Bill to prevent institutions from placing assets out of reach by changing the charitable purposes of associated trusts.</p> | <p>This issue was considered during stakeholder consultation.</p> <p>Generally, stakeholders did not support restricting the definition of associated trust in this way due to a concern about narrowing the survivor's access to the institution's assets. There was a sense that institutions could be expected to be mindful of their diverse responsibilities in deciding which trust assets, if any, to access.</p> <p>Other jurisdictions either do not limit the use of associated trusts or limit access to the assets of an associated trust that the institution uses to carry out its functions or activities' (see the definition of 'associated trust' in the <i>Legal Identity of Defendants (Organisational Child Abuse) Act 2018 (Vic)</i>).</p> <p>Stakeholders also expressed concern that anti-avoidance provisions may not be effective.</p> <p>See also comment regarding anti-avoidance for submission 007.</p> |
| | <p>The QLS submits that the continuity of institutions provision in new section 330(2) should apply prospectively only after a transition period and be limited to the current dollar value of any assets acquired from an old institution.</p> | <p>This issue was also considered as part of stakeholder consultation.</p> <p>Generally, there was a perception that it may be unfair if, for example, due to the acquisition of assets, an institution became liable for an unknown, and potentially unknowable, liability for</p> |

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| | | <p>historical sexual abuse that occurred in an institution that has now been wound up.</p> <p>However, it may also be unfair if institutions with significant historical liability for child sexual abuse could 'phoenix' and leave victims without an avenue to seek compensation. Striking an appropriate balance between these competing interests is a matter of policy for Government.</p> |
| | The QLS supports the amendment to the <i>Civil Proceedings Act 2011</i> . | The Department notes these comments. |
| 007: Name suppressed | The submission recommends amending the Bill to create statutory vicarious liability consistent with recommendations 89 and 90 of the Report. | The issue of vicarious liability for institutions is beyond the scope of the Bill. |
| | The submission recommends extending the provisions of the Bill to all forms of child abuse (including physical) and removing the statutory time limits in the <i>Limitation of Actions Act 1974</i> . | The issues of including other forms of abuse besides sexual abuse, and amendments to the <i>Limitation of Actions Act 1974</i> , are beyond the scope of the Bill. |
| | The submission recommends the retrospective application of all provisions of the Bill. | See comments on retrospectivity above for submission 001. |
| | The submission recommends the inclusion of anti-avoidance provisions (such as section 6N(2)(b) of the <i>Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018 (NSW)</i>) to prevent institutions from altering trust arrangements to fall outside of the definition of an 'associated trust'. | <p>The Department notes that other jurisdictions do not have a general anti-avoidance provision.</p> <p>The Department notes NSW section 6N(2) has limited anti-avoidance application. Where an unincorporated institution has not nominated a proper defendant, or that nominee ceases to be a suitable proper defendant, a court may appoint either: the trustees of an associated trust as the proper defendant; or the trustees of a trust that was formerly an associated trust if the court is satisfied that: it would not be unjust to appoint the trustees; and the trust ceased to be associated of the institution in an attempt to avoid trust property being used to satisfy liability that may be incurred in the proceedings. This comment is under consideration.</p> |

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| | The submission recommends that the Bill be amended to require an incorporated institution to nominate a proper defendant when the incorporated institution is not in a financial position to satisfy a claim or future claim for damages. | See comment regarding incorporated bodies for submission 001. |
| | The submission recommends clarifying that new clause 33C regarding associated persons is not exclusive and adopting NSW definitions | See comment for associated persons for submission 002 above. |
| | The submission recommends that unincorporated institutions be required to disclose all trusts, similar to a requirement in the NSW legislation (section 6N(4)). | This comment is under consideration. |
| | The submission recommends amendment to new section 33O(5) to avoid a potential / perceived conflict of interest arising due to previous roles held by the current Governor of Queensland. | New section 33O(5) would allow the Minister to make a recommendation to the Governor in Council to make a regulation prescribing a current institution (with that institution's consent) to be the relevant successor of an old institution for the purposes of the continuity of institution provisions in new section 33O. |
| | The submission calls on the Committee to publically release an issues paper titled <i>The civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse: Redress and Civil Litigation Report - understanding the Queensland context</i> (Issues Paper) and all submissions received in response to the Issues Paper. | The Department notes that the Issues Paper was tabled in Parliament on 16 August 2016 (paper number 5516T1233), and is accessible on the Online Tabled Papers part of the Queensland Parliament website. The submissions to the Issues Paper have not been published. |
| | The submission states that Departmental officers who appeared before the Committee gave responses that were inaccurate when responding to a question about how the Bill provides for claims against incorporated institutions not in a financial position to meet a claim for damages. | <p>The question asked of the Departmental officers was what would happen if claims were made against an incorporated institution that is not in a financial position to meet the current or future claim for damages?</p> <p>The Departmental response correctly noted that in such situations there would be no assets to satisfy the claim.</p> |

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| | | <p>As noted for submission 001 above, corresponding provisions in NSW, Victoria, and the ACT only apply to unincorporated institutions.</p> <p>New section 33J will allow an institution (whether incorporated or unincorporated) to satisfy liability under a judgment or in settlement of an abuse claim out of the assets of the institution or the assets of an associated trust that the institution uses to carry out its functions or activities.</p> <p>The intent of the Bill is to remove legal impediments to access the assets of an associated trust and the absence of legal personality for an unincorporated institution.</p> |
| <p>008: Queensland Child Sexual Abuse Legislative Reform Council (QCSALRC)</p> | <p>The QCSALRC:</p> <ul style="list-style-type: none"> • does not support the Bill; • seeks inclusion of physical abuse within the scope of any amendment to the relevant provisions; and • queries why the 2016 Issues Paper has not been publically released. | <p>The Department notes these comments and that the issue of including other forms of abuse besides sexual abuse is beyond the scope of the Bill. See also response to submission 007 above with respect to the Issues Paper.</p> |
| <p>009: knowmore</p> | <p>knowmore recommends the implementation of all of the Royal Commission’s recommendations 89-95. However, knowmore also notes its support for an approach consistent with other jurisdictions.</p> <p>knowmore submitted that the Bill should extend to physical and psychological abuse.</p> <p>knowmore submitted that the definition of persons <i>associated with</i> the institution should specifically provide for abuse committed by children under the care, control or supervision of institutions.</p> | <p>The Department notes these comments.</p> <p>The issue of including other forms of abuse is beyond the scope of the Bill.</p> <p>The definition of ‘associated with’ is meant to be read inclusively and without limiting people who may be associated with an institution in the ordinary meaning of the term. The definition is drawn from the Royal Commission recommendation and corresponding legislation in other jurisdictions.</p> |

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| | | This comment is under consideration. |
| | knowmore submitted that the associated trust provisions include anti-avoidance requirements for institutions that seek to restructure existing associated trusts to avoid the trust property being used to satisfy liability. | See comments regarding anti-avoidance provisions for submissions 006 and 007. |
| 010: Chris Kohler | This submission suggests amendment to the <i>Limitation of Actions Act 1974</i> to require a court to consider the gravity of matters and the injuries alleged by the plaintiff when deciding whether to summarily dismiss or permanently stay an action for damages relating to personal injury resulting from the sexual abuse of the person as a child. | The issue of amendments to the <i>Limitation of Actions Act 1974</i> is beyond the scope of the Bill. |
| 011: Bravehearts | Bravehearts supports the introduction of the reverse onus amendments and the proper defendant provisions. | The Department notes these comments. |
| | Bravehearts submitted that defining 'reasonable steps' for the purposes of the reverse onus would provide clarification around expectations of organisational responsibility – and that the focus could be on instilling a child-safe culture through regular risk management audits and staff training. | See comments on 'all reasonable steps' above for submission 005. |