QUEENSLAND LEGISLATIVE ASSEMBLY
LEGAL AFFAIRS AND COMMUNITY SAFETY COMMITTEE

Civil Liability (Institutional Child Abuse) Amendment Bill 2018

30 November 2018

Public Submission

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OBJECTIVE OF THE BILL:

The objective of the **Civil Liability (Institutional Child Abuse) Amendment Bill 2018 ("the Bill")**[1] is to implement Recommendations 89-94 of the 2015 *Redress and Civil Litigation Report* (the Report) of the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission).

Implementation of these recommendations before the National Redress Scheme comes into effect is imperative to remove barriers to civil litigation and ensure survivors of child abuse are not denied any potential avenues for redress.

Recommendation 46 of the Royal Commission makes clear that the National Redress Scheme should not commence until after the Parliament legislates the reforms relating to time limits and the duty of institutions.

In 2016 time limits were removed, but the duty of institutions remains unaddressed in Queensland. The Bill seeks to address this as soon as possible in light of the imminent commencement of the National Redress Scheme.

MEMBERSHIP

- Mr Peter Russo MP, Member for Toohey, Chair
- Mr James Lister MP, Member for Southern Downs, Deputy Chair
- Mr Stephen Andrew MP, Member for Mirani
- Mr Jim McDonald MP, Member for Lockyer
- Mrs Melissa McMahon MP, Member for Macalister
- Ms Corrine McMillan MP, Member for Mansfield

[1] **https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2018/5618T1773.pdf**

KEVIN LINDEBERG

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30 November 2018

The Secretary

Parliamentary Legal and Community Safety Committee

Parliament House

George Street

BRISBANE QLD 4000

Dear Secretary

RE: Comment on the *Civil Liability (Institutional Child Abuse) Amendment Bill 2018*

1. On its face, the objective of ***Civil Liability (Institutional Child Abuse) Amendment Bill 2018*** ("**the Bill**") appears to be commendable, sensible, just and long overdue. But, as in all things, the devil is always in the detail, and certain unintended consequences may arise which are too compelling to ignore. I submit such circumstances arise here.

2. As is generally exposed much later after the event, by one means or another including whistleblowing, if one goes on the past performances of certain Queensland entities (including the State/Crown itself in their youth detention centres) responsible for the care and protection of vulnerable children, they have made cruel, unjust devilment out of that detail leaving the victim high and dry. This includes engaging in serious abuse of office and breaches of trust in their own interests as the circumstances have (and still) allow by the twisting of definitions and misinterpreting the law, or out of sheer bastardry, delay, dissemble and intimidate because of the abuser holding the upper hand over those in their care, or others attempting to get the truth told.

3. So, no one in the Queensland Parliament (with an awareness of history), Queensland's public administration or the public at large should delude themselves into thinking that this Bill comes to Parliament with clean hands (i.e. devoid of double standards) or with any outstanding relevant matters still in existence being covered up within the system so as to avoid political/administrative/judicial embarrassment, or worse.

4. That is, cases exist showing a denial of justice (to abused children in the care and protection of the State/Crown and its contracted agents) having occurred where either by their acts or acts of omission from their seemingly impregnable positions of power and money and aided in having

their improper conduct (i.e. as authorised care-givers) covered up which, on compelling evidence, may amount to wilful obstruction of justice. That is to say, watchdog bodies (i.e. CJC/CMC/CCC, police, government departments or even occasional commissions of inquiry), far from being trusted to hold State/Crown/agent care-givers to account, either turn a blind eye or cannot see the obvious before their very eyes when the wrongdoing involves those at the apex of power.

5. In other words, the pursuit of justice in cases where the child abuse involves persons in positions of power and influence always start from a position of very great disadvantage. In such circumstances, cover-ups are not uncommon but expected. For example, I was told at a private hearing on 12 November 2013 by a Commissioner that my unresolved case (i.e. "the Heiner affair") would be recommended for advancement before the recent **Royal Commission into Institutional Responses to Child Sexual Abuse** due to its relevance and seriousness. However, despite compelling evidence before it and indisputable relevance to its Terms of Reference, including fresh highly disturbing material emerging from the 2012/13 Carmody Inquiry and from **public** evidence adduced in ***LSC v Bosscher*** [2016] QCAT 75[2] *inter alia* involving an extraordinary intrusive June 2013 agreement sought by the current Queensland Chief Justice the Hon Catherine Holmes, and agreed to by Commissioner Carmody himself in secret between them during the life of the 2012/13 Carmody Inquiry into my shredding-of-evidence/child abuse complaint, the Royal Commission decided to do nothing further.

6. As a follow-up on 23 September 2016, I lodged my submission on the Royal Commission's consultation paper "***Records and recordkeeping practices***". It had attachments setting out the relevant and compelling details of matters referred to in **Point 5** (but were subsequently redacted before publication). I respectfully remind this Committee that these are elements not divorced from the workability and ramifications of this Bill when one recognises (as one must) that the conduct at issue on which redress is being sought by aggrieved parties (i.e. the abused children) undoubtedly falls into the category of being *prima facie* criminal.[3] Such matters cannot be seen or remedied strictly under civil law. Our democratic society governed by the rule of law contends that those who commit crimes should be held to account, not just pay their way out of it, especially by usage of public monies. Therefore, of relevance, I cite this passage from my aforesaid public submission at Point 3(i) on page 7: (Quote)

> ***"…it is strongly open to argue that there was never a time in any justice system, particularly one such as ours founded on English Common Law, when any book, document or thing known and/or foreseeable as known to be required as evidence in anticipated future judicial proceedings could be deliberately destroyed by anyone to prevent its use as evidence. Indeed, with such a state of knowledge, no competent lawyer could dare suggest such a course of action might be lawfully undertaken by the client/owner/possessor of the book, document or thing without breaching their professional code of conduct to protect and uphold the impartial administration of justice for all."***

7. On the point of disbursement of public monies involving an agreement between parties, as this Bill presently invites in relation to conduct which may normally attract criminal investigation, if

[2] **https://archive.sclqld.org.au/qjudgment/2016/QCAT16-075.pdf**

[3] I lodged a submission on 23 September 2016 with the Royal Commission concerning its consultation paper "***Records and recordkeeping practices***" which became the subject of heavy redaction before publication.
https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Consultation%20Paper%20-%20Records%20and%20recordkeeping%20Practices%20-%20Submission%20-%2021%20Kevin%20Lindeberg%20-%20Redacted%20%28revised%29.pdf

not penal sanction, Mason J in ***A v Hayden*** [1984] HCA 67; (1984) 156 CLR 532 at 23 relevantly said: (Quote)

> ***"… It is obvious that the public interest in the enforcement of the criminal law as an element in the administration of justice would be seriously impaired if the citizen were at liberty to assume in return for a benefit an obligation not to disclose information concerning the commission of a criminal offence. The enforcement of the criminal law cannot be allowed to hinge on the willingness of the citizen to make a profit out of his silence, whether the contract be made before or after the commission of the offence."***[4]

8. This may give rise to serious questions of the proposed Bill's constitutional validity not easily ignored by this Committee or Parliament. Such questions, I respectfully submit, would need to be satisfactorily resolved before enactment of the Bill by proper legal channels, especially when it concerns alleged *prima facie* crimes involving 'common assault' or 'deprivation of liberty' committed by the State/Crown against a child in its care and protection being covered up by the same State/Crown using public monies which were never paid or intended for such a purpose by the polity, let alone under *the Code* or *Financial Accountability Act 2009*[5]*,* including its preceding legislation (i.e. *the Financial Administration and Audit Act 1977*).[6]

9. Nevertheless, I submit, as a matter of administrative principle, that it is very important for loose definitions which may cause unnecessary impediments to justice to be assiduously avoided, or, have as little negative wriggle-room for counter legal argument which may be used as nothing more than an available abusive tactic to delay overdue justice from ever being done in a situation where it overwhelmingly cries out to be done.

10. In this case, the Bill seeks to widen the ability of those who were abused while in care to embark on legal redress and has set the threshold at unacceptable "serious" physical abuse outside of sexual abuse, with no time bar any longer applicable. As it stands, the relevant definition in the Bill at Part 6(c) says:

> "***any other abuse perpetrated in connection with sexual abuse or serious physical abuse of the child, whether or not the other abuse was perpetrated by the person who perpetrated the sexual abuse or serious physical abuse***."

11. Firstly, it is open to suggest that the present hurdle of what constitutes "serious" abuse may defeat, or tend to, defeat the objective of the Bill. This is because it currently suggests that there is a level of abuse against a child in the care and protection of others which may be acceptable. Consequently, its inclusion may arguably prevent this Bill from being triggered by the aggrieved person, or who would know (as a disincentive to seek justice in the first instance) that argument will be mounted with all the financial and legal resources capable of being mustered under the might and power of the State/Crown or their equally well-resourced agents, which, in all

[4] **https://jade.io/article/67150**
[5] **https://www.legislation.qld.gov.au/view/html/inforce/current/act-2009-009**
[6] **https://www.legislation.qld.gov.au/view/pdf/1995-12-08/act-1977-010**

likelihood for an ordinary citizen, would be too financially and emotionally daunting, stressful or dangerous a course to embark on.

12. So, where is the balance to be struck if the proposers/law-makers of this Bill are determined to keep the qualitative word "serious"?

13. Firstly, in regard to whether or not "serious" will and/or must be included to satisfy acceptable community standards of how a civilised society should care for vulnerable children and justly compensate them from the public purse for improper harm, an authoritative guide might be secured from the **World Health Organisation ("WHO")** which defines child abuse and neglect as: (Quote)

> ***"…All forms of physical and/or emotional ill-treatment, sexual abuse, neglect or negligent treatment or commercial or other exploitation, resulting in actual or potential harm to the child's health, survival, development or dignity in the context of a relationship of responsibility, trust or power."***[7]

14. Secondly, another authoritative guide might be found in the **United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment** which defines torture as:

> ***"…For the purpose of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him, or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions."***[8]

15. Thirdly, Article 19(i) of the **United Nations Human Rights Convention on the Rights of the Child** as a guide might also suffice, which says: (Quote)

> ***"States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."***[9]

16. In summary, by citing these world authorities it ought not to be thought by anyone that I am engaging in either unnecessary or creative hyperbole. Why? It's because those citations should make clear to this Committee and the Queensland Parliament that it is not necessary to look beyond its own State jurisdiction to see what its own long-standing laws instructively have proscribed about abusive conduct against another involving 'common assault' and its similar companions, such a 'deprivation of liberty' and 'abuse of public office'.

[7] **https://aifs.gov.au/cfca/publications/what-child-abuse-and-neglect**
[8] **https://www.unhcr.org/protection/migration/49e479d10/convention-against-torture-other-cruel-inhuman-degrading-treatment-punishment.html**
[9] **https://www.ohchr.org/en/professionalinterest/pages/crc.aspx**

17. For example, the *Criminal Code 1899* (Qld) ("***the Code***") criminalises the very same conduct which children in care may experience in varying degrees, perhaps often, occasionally, once or be threatened with (to be repeated unless compliance occurs) which can have lasting psychological detrimental effects on them, and ruinously affect their lives into their adulthood as a debilitating (let alone undiagnosed) **post-traumatic stress disorder ("PTSD")** about, for example:

    i. being afraid and/or traumatised of confined spaces;
    ii. being afraid and/or traumatised of the dark, sleep and its recurring nightmares;
    iii. about having been handcuffed to an outside fence and stormwater grate for 10 hours overnight[10]; and
    iv. trusting others, especially those in positions of public trust, perhaps even being unable to accept love from others or being able to show love to others.

18. For example, it is not unheard of for a vulnerable child in care being improperly, physically (if not sadistically) constrained by use of excessive force, being locked in solidary confinement and/or confined in a closed space or place over time in some misguided belief that the child either:

    i. deserved it;
    ii. will provide sought-after information;
    iii. change their ways; or
    iv. just to demonstrate the superior power balance between the adult/care-giver and the child to engender unconditional obedience or silence out of fear.

19. Of course, there are further detrimental downstream consequences to society at large in such a situation. For example, if and when the official care-giver escapes all legal consequences for their abusive conduct against a minor by non-enforcement (of the law) by the State/Crown, it may have the very real likelihood of instilling or further entrenching a complete breakdown in trust of the child-cum-adult in government, its instrumentalities and lawful authority for good cause, let alone go on to become an abuser him/herself with a perverted-conditioned belief that such conduct is acceptable, or, can be got away with.

20. In Queensland, as mentioned earlier, such conduct normally falls within the scope of the crimes of **common assault** (i.e. physically hit *et al*) captured under section 335 of *the Code* and **deprivation of liberty** captured under section 355 of *the Code*.

21. Both offences, if proven, invite a maximum of 3 years imprisonment to punish the perpetrator or act as a deterrent to others. No time bar is applicable. Under the rule of law, it must follow that consistency and predictability should always apply when enforcing the law in materially similar circumstances.

[10] See page 172 of the **Forde Inquiry Report; https://www.qld.gov.au/__data/assets/pdf_file/0023/54509/forde-comminquiry.pdf**

22. That is, for example, if a public official were to engage in such conduct against a child in care, it would be expected, if all things are equal under the law in Queensland where no one is above the law (and that's a very big question), that his/her conduct would be disciplined under the *Crime and Corruption Act 2001* for official misconduct which would probably lead to termination, if not trigger potential criminal charges, potentially under the aforesaid provisions of the *Code*.

23. That said, an associated question for this Committee and Parliament to wrestle with may be this. Is 'common assault' and 'deprivation of liberty' against children in care and protection of the State/Crown and its agents, **always treated seriously** against its recorded history in Queensland, especially in youth detention centres (i.e. such as in "the Heiner affair"), which, I submit, ought to be a trustworthy code of conduct based on the law, so secure and comprehensive that is and/or would be a safe template for others to adopt and follow?

24. The sad answer is a resounding no. [redacted]

25. The better and more serious question may be, why haven't they always worked or been upheld, let alone why weren't the breaches of relevant provisions of the *Code* **enforced** (including section 129 concerning destruction of evidence) when known to concern abuse of children at the (now closed) **John Oxley Youth Detention Centre ("JOYDC")** in respect of the unresolved Heiner affair?

26. For example, the evidence in question (i.e. "public records" under the (then) *Libraries and Archives Act 1977*), had been lawfully gathered in late 1989/early 1990 by the Heiner Inquiry when looking into the running of the JOYDC. Some of the evidence concerned abuse of children. These records were ordered to be destroyed by Ministers of the 5 March 1990 (Goss) Queensland Cabinet (and aided and abetted by certain senior bureaucrats) to prevent its known and anticipated use as evidence in a foreshadowed and realistically foreseeable future judicial proceedings.

27. The record also shows that an extraordinary confidential agreement in February 1991 between the Queensland Government and the JOYC manager was entered into in which public monies were disbursed, on the precondition that both sides would never publicly disclose anything relating to "the events" leading up to surrounding the manager's sudden removal from the JOYDC. It is strongly open to conclude that the euphemism "events" was deliberate code for the interconnected illegal shredding of evidence and the illegal child abuse.

28. In conclusion, in his 31 October 2018 tabling speech, the Member for Maiwar said the following: (Quote)

> "…***The report also recommended reforms to remove barriers to civil litigation; for example, the removal of time limits and legislating the duty of institutions. In 2016 time limits were removed, however, until now the duty of institutions has not been legislated in Queensland***."

29. It is not correct for the Member to suggest that codes of conduct and disciplinary standards do not exist in Queensland concerning its relevant institutions responsible for the care and protection of children in State/Crown care. Such standards of care have a long legislative history.

30. These duty-of-care obligations were found in the *Children's Services Act 1965* (Qld) and in the *Children's Services Regulations 1966* and *Juvenile Justice Regulations*[11], and I am confident that those standards, if not enhanced since, are now to be found in their replacement legislation, such as the *Child Protection Act 1999* (Qld) and its *Regulations.*

31. For example, under section 9 of the *Child Protection Act 1999 (Qld),* it defines "harm" in the following terms: (Quote)

> ***(1)Harm, to a child, is any detrimental effect of a significant nature on the child's physical, psychological or emotional wellbeing.***
>
> ***(2)It is immaterial how the harm is caused.***
>
> ***(3)Harm can be caused by—***
>
> ***(a)physical, psychological or emotional abuse or neglect; or***
>
> ***(b)sexual abuse or exploitation.***
>
> ***(4)Harm can be caused by—***
>
> ***(a)a single act, omission or circumstance; or***
>
> ***(b)a series or combination of acts, omissions or circumstances.***

32. Accordingly, I respectfully submit that the inclusion of the adjective word "serious" to qualify the key word noun "abuse" in the Bill stands in complete disharmony and mischief with the aforesaid definition.

33. Therefore, it should be removed to let "abuse" stand on its own merits as the community at large readily knows it to be, as well as the Parliament. That is, "child abuse" is "child abuse" in whatever form it takes, just as "a crime" is "a crime" no matter who commits the act if the triggering elements can be satisfied.

RECOMMENDATION:

34. As a recommendation, it would seem to me therefore that such conduct of its kind, as the Bill seeks to include, would reach the threshold of being "serious" and such an adjectival descriptor to the noun "abuse" in the definition, by recognition of common community standards already in place and relevant laws, must be superfluous. Furthermore, unless dropped, it may cause unnecessary disharmony and mischief in the cause of justice and to the norms of the administration of justice otherwise double standards may be legitimised by this Committee, and perhaps, ultimately Parliament itself should the Bill be enacted as it currently stands.

[11] See Chapter 7 page 173 of the **1998/99 Forde Commission of Inquiry into the Abuse of Children in Queensland Institutions**. **https://www.qld.gov.au/__data/assets/pdf_file/0023/54509/forde-comminquiry.pdf**

35. I am prepared to appear before the Committee to speak to this public submission under oath and in public. To be clear, I have no objection to this submission being published.

Yours sincerely

KEVIN LINDEBERG

30 November 2018