SUBMISSION

to the

LEGAL AFFAIRS AND COMMUNITY SAFETY COMMITTEE

in the matter of the

CIVIL LIABILITY (INSTITUTIONAL CHILD ABUSE) AMENDMENT BILL 2018

2018

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CONTENTS

Attachments

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1. Executive Summary / Recommendations

1. That the Committee and Parliament consider both the Civil Liability (Institutional Child Abuse) Amendment Bill 2018 [the Private Member's Bill] and the Civil Liability and Other Legislation Amendment Bill 2018 [the Government Bill] cognate.

2. That the Committee recommend the Private Member's Bill be passed at Third Reading, with amendment.

3. Amendments to include:

   (a) Inclusion of a clause creating statutory Vicarious Liability for prescribed institutions consistent with Recommendations 89 and 90 of the 2015 Redress and Civil Litigation Report of the Royal Commission.

   (b) Amendment of definition of institution to ensure that foster care and kin care are excluded as per the Recommendation of the Royal Commission Report.

4. That the Committee publish the Report of the Government "Issues Paper" full title: "*The civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse: Redress and Civil Litigation Report – understanding the Queensland context*" or if there is no report, to publish this fact.

5. That the Committee publish every submission to the "Issues Paper" (redacting the identifying details of submissions by survivors of abuse) in the interest of transparency and accountability given that the submissions are directly relating to the reforms addressed by the clauses of the Private Member's Bill (and the Government Bill).

2. Request for anonymity/non-publication of identity

I request that the Committee make this submission public so that stakeholders are able to read the contents, provide responses (either to support or rebut this submission) to contribute to debate on the bill; however, I ask the Committee to redact all identifying personal details (eg, name, age, occupation) to respect my privacy and also to comply with relevant privacy legislation including:

- Section 10(1)(a) of the *Criminal Law (Sexual Offences) Act 1978* (Qld)

Any person reading this Submission who knows me or is able to identify me from its contents is hereby reminded of their obligations under law including:

> Section 10(1)(a) of the *Criminal Law (Sexual Offences) Act 1978* (Qld) prohibits **any person** from disclosing to **any person**, **at any time,** my:
>
> - name, address or employment;
> - **any other particular** that is likely to lead to my identification
>
> **An offence is punishable by 2 years imprisonment.**

The reason for my request for anonymity is because I would like to retain the opportunity for my life to be defined by what I achieve as an adult, not by what was perpetrated against me as a child.

I accept full accountability for my evidence and am available to give direct testimony to the Committee (*in camera* requested).

3. Credentials to provide a submission

3.1 Background, qualifications and experience

My name is [redacted], I am [redacted] years old and am a qualified [redacted].

Legislation Review and Law Reform

I have assisted with drafting legislation and amending legislation which has been passed by the Parliament. I have contributed to policy formulation including briefing Members of Parliament (Government, Opposition and Independents/Cross Benchers) both State and Federal and providing evidence-based submissions and testimony (*in camera*) to Parliamentary Committees.

I have provided background briefings to media including print, television and radio. I have provided evidence to the Royal Commission. I have participated in Government Working Parties, Round Tables and other consultation processes in Queensland, interstate and Commonwealth.

Supporting survivors

I have provided direct personal support for other survivors including being requested to act as support person when they gave evidence to the Royal Commission, when giving testimony in criminal prosecution, and when making statements to media. Further insight to the needs of survivors has been gained from working closely with the leaders and members of key advocacy organisations. I have formal qualifications and experience as a [redacted].

Surviving abuse & knowledge of the misconduct of institutions

As a child I was regularly assaulted over a number of years in a religious institution. The offender's primary focus was sexual assaults although to achieve this he used psychological abuse as well as physical assaults, some having left permanent scarring on my body.

I attempted to report the assaults to a senior official and was silenced – the Royal Commission later made formal findings that this person already knew of the offender's widespread behaviour (hence why this official silenced my attempt to report) and had protected another offender.

In fact the offender's assaults on other children had been repeatedly reported for a ten year period before the assaults upon me commenced; a number of children reported the assaults upon them to senior staff who took no action to stop the offenders and took no action to report the offenders to police. Those who disclosed were silenced and punished for disclosing. All of this is the subject of formal findings of fact by the Royal Commission including a multitude of adverse findings against staff, the institution and **senior leadership** within the church.

All of the guilty adults have enjoyed a lifetime of income, title and status from the church. I am aware of current criminal investigations into senior officials for perverting the course of justice and accessory to the fact offences but so far charges are yet to be laid by Queensland Police.

For twenty years senior officials of the institution ignored written medical advice - that victims would likely suffer psychiatric injuries and that these were best treated as early as possible. The institution was advised by competent and qualified health care professionals that, without treatment, injuries would likely become entrenched and resistant to treatment. The institution chose to not offer health care to any of the victims. This denial of health care continued to be policy of the institution for over two decades causing – as the medical advice had predicted – the entrenchment of pathology in many victims.

These injuries create significant financial losses for victims – accessing effective health care costs money. Psychiatrists cost money. Medications cost money. As well, many victims suffer under-employment, often as a consequence of the injuries remaining untreated for so many years as a result of the institution's cover-up and denial. For the past decades and currently, in the absence

of laws making institutions properly liable, these health care costs and income losses are borne by the victim of abuse themselves and their families.

When victims have attempted to hold the institution to account and recover these losses the institutions have fought through lawyers using every available legal tactic to obstruct victims from accessing justice – all the while fully aware of the fact of their liability.

Institutions have lied to victims, saying they were unaware that the abuse was occurring, when in fact they were in possession of internal communications confirming the truth of the abuse and the guilt of the perpetrator. Other times the institution made admissions and apologies to victims – but fought them in court anyway.

The Recommendations 89 – 94 of the Royal Commission are designed to set these legal obstacles aside and to put on to institutions the level of legal liability that is appropriate and proportionate.

The Committee should be aware that at no time in my life have I ever applied for or accepted any category of welfare or unemployment benefits. I have never applied for Centrelink funding or support. I have never expected the tax payer to carry the burden of responsibility for the wrongful actions of a private institution (who already receive substantial tax relief and direct funding from the tax payer).

Recommendations 89 – 94 of the Royal Commission are designed to appropriately ensure that the cost of repairing the harm caused by an institution is borne by that institution as much as is possible.

Failure to fulfil this objective this will have the effect of perpetuating that the cost of child abuse is borne by the tax payer – and by victims and their families.

3.2 Consultation with key stakeholders

In preparation of this submission I have consulted with a wide range of stakeholders including:

Legal:

- Law associations
- Senior lawyers (barristers and solicitors) and legal academics

Government:

- Members of Parliament
- Senior Government Policy Advisors

Religious Institutions & Secular Institutions

- Archbishops and Bishops of Catholic and Anglican dioceses
- Lay managers, staff responsible for child protection and grass roots members
- Whistleblowers (people who care about the rights and safety of children)

Survivors:

- Individual survivors from various institutional backgrounds
- Survivors of non-institutional abuse
- Prominent advocacy organisations – leaders and members

I have reviewed a range of documents including:

- Royal Commission Case Study reports
- Reports of various official inquiries into child abuse
- Legislation of various jurisdictions – past and current
- Government departmental policies
- Australian Institute of Criminology papers
- Law Reform Commission reports
- Medical, psychological and scientific literature
- Church Canon, risk management policies and protocols for responding to child abuse
- Victim impact statements in which the child's disclosures to adults were not acted upon
- Parliamentary Committee submissions by various parties, including institutions

4 General Matters

4.1 Civil Litigation versus Redress Scheme – what's the difference?

There are two distinct and separate paths for survivors of institutional child abuse seeking restitution for the abuse and their losses arising from the abuse:

- The National Redress Scheme
- Civil litigation against the institution

These are entirely separate and distinct from each other. Each survivor must make their own decision about which path will best secure the most fair and reasonable outcome for them according to their individual circumstances.

To have capacity to make this choice, certain barriers to accessing civil litigation must be removed – as the Royal Commission have recommended (Recommendation 46).

Summarised bluntly:

The **National Redress Scheme** offers victims a less adversarial process, with a lower standard of proof and will offer a very small amount of 'redress' that does not come anywhere close to compensating for the true financial losses or health care costs they have and will continue to suffer. This scheme may be suitable for victims who would struggle to prove their case in court (for a variety of reasons, such as passage of time, death of witnesses, destruction of evidence or records by the institution, lack of psychological wellbeing to endure litigation, etc).

By contrast, **civil litigation** has the capacity to allow survivors to access reparations that more closely reflect their true and provable losses and health care costs (no plaintiff ever gets their full true financial losses under Queensland litigation law). This may be more suitable for survivors who: have the evidence to prove their case to the standard required, have the capacity (with health care support) to endure an adversarial process, have significant provable losses and health care costs making the Redress Scheme completely inadequate.

The two paths should not be confused.

The Royal Commission in its 2015 Redress and Civil Litigation Report made 99 Recommendations: 1 – 84 were about the construct of a National Redress Scheme. 85 – 99 were about removing inappropriate legal barriers that for decades have obstructing survivors from accessing justice through litigation.

Recommendations 85 – 88 address removing statutory time linitations. These recommendations were legislated by Queensland Parliament in November 2016 – however the reform remains incomplete as the time limits were only removed for victims of child sexual abuse and not for victims of serious physical or connected other abuse. In this respect the current Queensland legislation is out of step with the rest of the nation meaning that the Queensland Parliament is treating its survivors of child abuse with less respect and dignity than other jurisdictions. *Please see Attachment – Table One.*

The Queensland Parliament (led by the Opposition and cross benchers) did create a nation-leading provision to give Queensland survivors of abuse the statutory right to set aside past unjust settlements and judgements – a legal provision that has been copied in Western Australia, and is now being examined in Victoria, Tasmania and other jurisdictions. Queensland should be proud to be nation leaders in respect to that particular legislative provision.

Recommendations 89 – 94 address issues relating to the Duty of Institutions, Liability of Institutions and accessing assets held in trusts by institutions who seek to evade fulfilling their liability through certain corporate structures. These are the focus of this Private Members Bill.

4.2 Why is the focus of these policy objectives financial liability?

A common question from those lucky enough to be peripheral to these issues is: 'why does this always come down to money?'

The first answer is: it *doesn't* always just come down to money – victims also pursue criminal prosecution of offenders to see their abuser convicted, for punishment of that offender but also to protect other children from that offender. Victims are put through hell by the legal system to achieve this justice and protection of others.

The second answer is: It is the legal system that reduces justice to a monetary unit, not victims. An 'institution' cannot be put in jail. The current legal system directs victims of abuse to sue for financial reparations. So it is 'blaming the victim' to only give victims of abuse one avenue for restitution/justice and then criticise them for pursuing that avenue.

Many victims of abuse have said they would forgo their civil reparations in exchange for seeing certain senior institutional leaders jailed for the rest of their lives.

The present legal system does not easily allow victims to put senior institutional leaders in jail for their crimes of concealing child abuse (the Royal Commission has recommended criminal law reforms to enable this). The delay of the Queensland Police Service of two years to lay charges against certain senior institutional leaders in Queensland is proof of this. So again, it is improper for Parliamentarians to fail to give Queenslanders the laws needed to jail senior institutional leaders and then criticise the efforts of victims of abuse in holding that institution to account.

The third answer is: child abuse causes real, tangible costs to the victim: health care is expensive, psychiatrists are expensive, medications are expensive, lost earnings due to sick leave, or under-employment due to untreated symptoms all contribute to victims suffering real financial loss which impacts their families and children and the sort of opportunities they may access.

It is fair and just that a wealthy and large institution cover up the abuse of children, lie and compound injury through deceitful conduct for decades, and then once caught simply 'apologise' leaving the victim to continue paying their expensive health bills?

The fourth answer is: Money is the only language the 'corporate head office' of institutions understands and is the only language the senior institutional leaders understand and care about.

For large institutions, including and particularly religious institutions, it is important to understand they have two distinct manifestations:

- there is the 'grass roots' organisation made up the genuinely faithful, who would be, and are, horrified by the rape of children by their organisational staff;

- then there is 'head office' which is more a corporate entity focused on financial management and protection of the 'brand' run by CEOs and General Managers.

The cover-up misconduct by senior institutional leaders is perpetrated in 'head office' – out of sight of the 'grass roots' membership. Grass roots members (those not abused by paedophiles) often have positive experiences within the institution. Both truths (the truth of the victim of abuse and the truth of the non-abused) are not mutually exclusive – they are simultaneous truths.

People (and some Parliamentarians) when confronted with the truth of the criminal and immoral behaviour of an institution exposed by the Royal Commission may struggle to reconcile this truth with the truth of their own experience of the institution at the 'grass roots' level. This is because they have only experienced the 'grass roots' organistation, which is usually: genuine, not financially wealthy, and uninformed of the misconduct of 'head office'.

'Making child abuse expensive' is a key child protection strategy to motivate institutions into the future to not repeat their behaviour of the past – including the very recent past and sadly up to the present, with some institutions still rejecting key recommendations of the Royal Commission.

The policy approach of making incidents expensive in order to motivate senior leaders to prevent incidents has been proven to work in a range of industries (Aviation, Medicine, Construction, Occupational Health & Safety across all industries, etc). There is every reason to expect the same dynamic would have similar positive effect in the child services industry.

4.3 Institutional liability is a pillar of child protection

One of the sad truths exposed by the Royal Commission is that institutions caring for children could not be trusted to be motivated to keep children safe based purely on their internal motivations or their 'moral values'. Institutions for who moral values are at the core of their identity are among the worst offenders against children and have had the worst corporate culture of concealing crimes to 'protect the brand'.

Senior institutional leaders of every institution examined had been involved in protecting child abusers, covering up abuse, denying knowledge of matters they have since been proven to have had knowledge, failing to report crimes to police, obstructing victims' access to court, etc.

Usually the misconduct of senior institutional leader was not done because they themselves were a paedophile protecting their own – the misconduct of senior institutional leaders was perpetrated because they wanted to 'protect the brand' and protect the assets and reputation of the institution.

This is perhaps even more sinister – one could understand (without condoning) the criminal collusion of a sex offending Bishop protecting a sex offending Priest – but here we have seen across all institutions non-offending leaders protecting known offenders and placing children in harm simply because they are acting as corporate CEOs and put the institution ahead of the child.

The corporate CEOs have proven through their own conduct, time and time again, that they are not motivated by considerations such as: the welfare of children; the 'right' moral thing to do; honesty or accountability. They have shown they want to conceal embarrassing truths and protect assets – money. The culture is such that they were personally rewarded for doing this.

This is disappointing but is not a new phenomenon never before encountered by Parliament – it has been encountered in every field of human endeavour and industries such as: Aviation, Health Care; Construction; Mining; Manufacturing, etc.

In those industries Parliament's have driven safety by appealing to what motivates the corporate CEOs – money. By making incidents expensive, corporate CEOs are self-motivated to reduce the number of incidents, to reduce the risk of incidents, to reduce the severity of incidents and to respond to incidents openly, swiftly and honestly – if only to reduce the cost of those incidents.

This has led to improvements in safety in aviation, motor vehicles, medicine, construction and occupational health and safety universally.

One of the principal causal factors in why institutions have not made child safety a priority for the past few decades is because it is cheaper to let children be abused than to spend resources protecting them. Institutions have known for decades that child abuse could occur and the institution is protected from any consequences by a raft of laws (passed by the Parliament) aimed at protecting the institution from liability – for example, statutory time limits, absence of statutory vicarious liability, and other protections.

The laws proposed by the Royal Commission (and put forward in the Private Members Bill) are not revolutionary laws creating a one sided legal framework in favour of victims and at the expense of institutions – the law reforms are actually nothing more than a moderate framework creating the sort of accountabilities of institutions providing services for children that should already exist. The reforms remove the situation that has been in place for decades where institutions have enjoyed inappropriate protections from the law from accountability.

Institution's moral values cannot be relied on – moral values of institutions in the absence of a robust statutory framework have not protected children for the past fifty years.

If the Parliament passes the Private Member's Bill, the result will simply be that institutions will carry appropriate and proportionate liability and this will drive the corporate CEOs to invest in child protection, reducing incidents of child abuse from occurring in the first place and improved responses to meritorious claims.

4.4 Will institutions be bankrupted if they are made appropriately liable?

No.

This same fear was raised in 2016 in opposition to reforms to remove statutory time limits. Queensland now has the advantage of two years of evidence since the time limits were removed – including providing survivors of abuse the right to set aside past unjust settlements and judgements. Institutions remain financially viable.

It will be the same with these reforms. The large institutions have assets far in excess of their potential liability for child abuse.

All institutions remain protected by the legislation relating to calculating damages. Damages such as for 'General Damages' (often referred to as 'pain and suffering') are strictly capped in Queensland. Also, in Queensland damages must be proven; for example specific economic losses and specific health care costs must all be proven.

4.5 Will the reforms expose institutions to vexatious litigation?

No.

Civil litigation requires the victim / survivor to prove their claim. They must be able to prove that the abuse happened, that the abuse has caused an injury and that the injury has resulted in some sort of economic loss (such as lost earnings or health care costs).

Nothing about these reforms or the Private Member's Bill alters this.

Survivors of abuse who struggle to prove these matters (for example because of the death of witnesses) will most likely self-select to apply for redress through the National Redress Scheme rather than civil litigation.

Institutions retain the right to defend a non-meritorious claim.

4.6 Safeguards for institutions against non-meritorious claims

The Private Member's Bill does not alter the existing safeguards of institutions to defend against non-meritorious claims as well as the safeguards inherent in the law to prevent against the bringing of a non-meritorious claim by a plaintiff in the first place.

These safe guards include:

- The right of an institution to defend a claim is maintained
- This includes powerful rights such as the right to apply to a court to stay proceedings
- The obligations upon a plaintiff (the victim) to prove their claim
- This includes requirement to prove:
    - the abuse occurred
    - an injury is suffered
    - the abuse caused the injury
    - any claimed quantum of damages must be proven and justified with evidence
- The quantum of damages must still be calculated in accordance with existing legal frameworks – financial losses must be proven, health care costs must be proven and general damages are capped.

All that the Private Member's Bill changes is that institutions are deemed to have a non-delegable duty of care to ensure a child does not suffer abuse at the hands of an employee. Surely this is consistent with the level of accountability we as a community expect of our institutions?

The provisions relating to trusts being available to meet the liability of their associated institution only becomes relevant once the plaintiff has met the evidential standard to prove all of the elements above, proving they have a meritorious claim and proving the liability of the institution.

4.7 True impact of these reforms

The Private Members Bill will have two main positive impacts: one looking forward and one looking back. Both are important.

- Looking forward, to future children in the care of institutions, the reforms will drive child protection as institutions become motivated to prevent child abuse in order to prevent the cost of child abuse.

- Looking back, at survivors of child abuse that has already occurred, the reforms will motivate institutions to treat survivors of abuse with dignity and respect, which until now, they have not done. To-date institutions have hidden behind lawyers, denied matters they knew to be true, etc. Under these reforms, such dishonest tactics will no longer be relevant or helpful, and so institutions, deprived of such tactics, will be motivated to sit at the negotiating table with a victim, examine the evidence honestly and arrive at an appropriate settlement without delay.

These are good outcomes and are what the community expects, and are in fact entirely consistent with the stated moral values of the institutions themselves.

5 Critique of the Private Member's Bill

5.1 Amendment of *Civil Liability Act 2003*

Clause 3 of the Private Members Bill amends the *Civil Liability Act 2003*.

Definition of child abuse

The definition of **child abuse** is commended to the Committee as the best possible definition. It is consistent with the definition proposed by Clause 6 to be used in the *Limitation of Actions Act 1974* with regards removing time limits to bring an action. This would maintain consistency between legislation dealing with similar matters in Queensland.

The definition ensures the reforms are applicable to:

- Sexual abuse
- Serious physical abuse
- Other abuse 'connected' with either the sexual or serious physical.

This is a sensible definition that is neither too narrow nor too wide.

This definition ensures that institutional liability is maintained for serious physical child abuse – which would be in keeping with community expectations.

The Royal Commission was narrowly constrained by their Terms of Reference to only examine sexual abuse – but the Parliament is not so narrowly constrained and in fact has a duty to ensure the legislation meets the needs of all victims of abuse, including victims of serious physical abuse. In fact, the Royal Commission also recommended that Parliaments look beyond only sexual abuse and to apply lessons learnt to other forms of abuse.

The definition has a sensible qualifier of 'serious' in relation to physical abuse. This protects institutions against claims for what may be considered minor physical abuse such as one-off acts or actions that did not cause serious injury.

Legislators should remember also that the additional safeguard against non-meritorious claims is that if no injury has been caused then quite simply there is no right of action to pursue civil litigation.

Whether the physical abuse is 'serious' is a matter of fact to be determined by a court and would include considerations of factors such as the 'action' (the physical act) and the 'consequence' (the impact on the victim). For example, sustained, prolonged beatings as regular, repeated occurrences may be regarded by the court as serious, whereas a single strike or act of caning may not be regarded by the court as 'serious' – unless the single instance resulted in 'serious' injury (for example broken bone, or head injury).

Legal experts have recommended that the definition of 'serious' not be narrowly prescribed in statute but left to the court to determine on a case by case basis to ensure adequate flexible of the law to be applied as the law is intended.

Other jurisdictions have included physical abuse in their approach to Recommendations 89 – 94 (duty of institutions and liability of associated trusts) and almost all jurisdictions include physical and psychological or other abuse in their approach to Recommendations 85 – 88 (removing statutory time limits). So the Private Member's Bill is simply in step with the rest of the nation in this definition. *(Please see Attachment One)*

Definition of institution

The definition of institution is commended to the Committee with possible amendment to ensure the definition does not include 'foster care or kinship care' as per Recommendation 90 of the Royal Commission.

The definition appropriately excludes 'individual'.

The definition appropriately focuses on the function of an institution (eg providing care or services to children, having a child in its care, supervision or authority) rather than institutional structure. This approach has also been adopted in other jurisdictions. This definition is appropriate to cater for the changing organisational structures – institutions are moving towards

devolving child care services in an attempt to remain 'arms-length' for legal liability reasons (while still branding, promoting and benefitting from the service).

Definition of official

The definition of official is commended to the Committee.

Together with the definition of institution, it ensures the changing organisational structures used by institutions remain within the scope of the legislation.

The definition of the Private Member's Bill is superior to definitions used in other jurisdictions and is superior to the definition in the Government Bill which mention religious titles specifically. Those definitions are dangerously narrow and create real risk of legal argument and loopholes for institutions. The definition in the Private Member's Bill is more flexible and encompassing and ensures that religious titles of any kind may be covered, as are situations where an institution out-sources or contracts child services to attempt to evade legal liability.

Definition of related entity

The definition of related entity is commended to the Committee.

This definition works in conjunction with the definitions of institution and official to ensure the legislation applies to changing organisational structures and attempts by institutions to evade liability through the use of tricky corporate structures, out-sourcing of child services or contracting.

None of the definitions in the Private Member's Bill are too wide – they simply ensure the application of the legislation as intended.

Duty of Institutions (proposed s49D)

This section is recommended to the Committee.

S49D(1) creates the statutory non-delegable duty of care of an institution to ensure that a child does not suffer abuse perpetrated by an official of the institution (the non-delegable duty of care).

S49D(2) stands out as an excellent part of this proposed section:

> *applies to an institution whether the child abuse was perpetrated before or after the commencement.*

This very astutely makes it clear that the provision applies to abuse regardless of when it has occurred. This prevents the accidental consequence of the legislation accidentally wiping out common law rights applying to those survivors.

The Private Member's Bill is not being reckless or novel in this approach – the approach has already been applied in Western Australia.

There is a risk that if any legislation creates a non-delegable duty of care and fails to ensure the provision acts in relation to all abuse (including that already having occurred) then the existing common law rights of those survivors could be interefered with as an *unintended consequence*.

For example, the Government Bill dangerously overlooks this and creates exactly that risk.

This approach of the Private Member's Bill is measured and sensible and is commended to the Committee that it be recommended to the House.

The proposed section provides a defence to a breach of the duty of care and sets out sensible examples of what the court may take into consideration. This is an identical approach to that applied in other jurisdictions (and the Government Bill has adopted an almost identical approach).

This protects institutions and ensures the legislation is moderate and balanced – the institution would not be expected to have taken measures that are considered disproportionately burdensome, or not consistent with the standards of the day, for example.

Institutions must nominate a proper defendant (proposed s49E)

This section is recommended to the Committee.

S49E(1)(b) is vitally important to be passed by House. This provision of the Private Member's Bill addresses a major oversight of the legislation of other jurisdictions (and a major oversight in the Government Bill). The oversight is that the legislation so far only applies to 'unincorporated' institutions, or at best 'incorporated institutions that were unincorporated'.

The unintended consequence of this oversight is that the legislation likely may not apply to institutions who are incorporated, and were incorporated at the time of the abuse, but who maintain an inability to meet their financial liability such as through the use of associated trusts (ie hiding all of their money in a trust fund and maintaining a low operating float).

The reason this oversight has occurred is because most legislators have been focused on closing the so-called 'Ellis Defence' loophole in relation to the Catholic Church. This is the loop-hole in which the Catholic Church successfully argued that it could not be sued because it did not exist.

It is appropriate that the loop-hole be closed however legislators have developed 'tunnel vision' and failed to notice that, in addition to Catholic and other institutional structures being unincorporated, there are also many institutions who are incorporated and therefore would be completely accidentally exempt from being held to account by the legislation.

For example Anglican Dioceses who are incorporated would not be covered by legislation that only applies to 'unincorporated' institutions. It is a matter of record that some Anglican Diocese carry significant child abuse liability and have hundreds of millions of dollars in trust funds – more than enough to meet their legal liability – but intentionally maintain only small amounts in their institutional operating accounts. These institutions would be accidentally exempt if Queensland adopted the wording of other jurisdictions or the wording of the Government Bill.

The Private Member's Bill is to be commended for identifying this loophole and closing it – simply ensuring that the reforms are applied equally to all institutions as should be the intent of the legislation and is the expectation of the community.

Trusts liable for the breach of duty of care of institution (proposed s49F)

This section is recommended to the Committee.

This provision of the Private Member's Bill ensures that if the institutions named at s49E(1) – ie those not able at law to be sued, or those who are not in a financial position to meet a claim – do not nominate a proper defendant who is able at law to be sued and able to meet a claim, then an associated trust may be able to be sued and may be able to be directed to meet the liability of the institution.

The approach of the Private Member's Bill is sensible.

In particular, s49F(3) is commended to the Committee:

> *The trustee … is responsible in law for any liability arising out of a breach of the institution's duty of care, whether the breach happened before or after the trustee became trustee of the trust property*

This makes it very clear that the trust is responsible, removing doubt. Clear law is good law as it reduces cost and stress associated with legal argument.

The bill protects trustees by ensuring that the release of assets from a trust to meet the liability of the institution is lawful and does not breach their duty as trustee – in fact it is their duty as trustee.

The bill ensures consistency and provides clarity that this applies to abuse that has occurred regardless of when the abuse occurred. This approach has already been applied in the majority of other jurisdictions who have passed legislation so far. *(Please see Attachment Two).*

5.2 Amendment of *Limitation of Actions Act 1974*

Clause 6 of the Private Members Bill amends the *Limitation of Actions Act 1974*

This Clause is recommended to the Committee.

This clause determines the types of child abuse for which statutory time limits are removed as a barrier to commencing civil litigation to seek reparation for economic losses arising from injuries.

For decades survivors of abuse have been statute barred from commencing action in Queensland after reaching the age of 21 (18 years + 3 years). This is a woefully inadequate time limit and has served only to protect institutions from appropriate accountability for causing and concealing abuse – this level of protection has in turn fueled child abuse by contributing to the culture of 'immunity' in which institutions and senior leaders have felt safe from consequence.

To protect children into the future, and to give rights of access to justice for current adult survivors of past child abuse, these time limits need to be removed.

The Royal Commission recommended that they be removed (recommendations 85 – 88 of the 2015 Redress and Civil Litigation Report). As the Royal Commission Terms of Reference were restricted to commenting on sexual abuse, the recommendations were only made in relation to sexual abuse. However the Royal Commission in their final report and elsewhere advised that in the course of their enquiries into sexual abuse they also heard evidence of shocking and horrific physical abuse – often used to enforce the sexual abuse, or sometimes as part of the general culture of abuse and background violence and deprivation in the institution in which sexual abuse also occurred. The Royal Commission encouraged Parliaments to apply the lessons learnt in relation to sexual abuse to all forms of child abuse.

Indeed, the Parliament has a fundamental responsibility to do so – to represent *all* Queensland survivors of child abuse, not only survivors of child *sexual* abuse. There is no logical reason why the Queensland Parliament should remove the statutory time limits for children who suffered sexual assault in an institution but not remove the statutory time limit for children who were beaten severely and traumatised with permanent injuries, either physical or psychological from serious physical abuse at the hands of adults who should have been caring for the child.

Moral justification for Parliament to remove time limits for all forms of abuse

I am aware of a number of survivors of abuse in Queensland orphanages who were not sexually abused but were physically beaten, severely, and regularly. I ask the Committee members – and all Members of Parliament – to visualise the reality of life for one small boy. This happened. Imagine yourself, as the adult that you are today, a Member of Parliament, standing in the same room of that Queensland orphanage, while a young boy is belted with a bull whip by an adult priest. The belting could come at any time, at the unpredictable whim of the priest. It will happen many times per week. It will be for 'transgressions' as minor as whether the child dresses fast enough, or how they ate their dinner or if they wet their bed. The priest will make this child sleep outside with animals and eat from the animals slops. This child was never sexually abused – he avoided sexual abuse because he was aware of what the priest was doing to other children and when it was his turn to be called to 'see' the priest he ran away, resulting in capture and more beatings.

In that environment the child also suffered neglect and deprivation of basic human rights, such as dignity, nurturing and a sense of hope and future. The impact of such sustained abuse was that, upon reaching 18 years of age the person was not suddenly in a position to have capacity to launch civil action against the institution. They were struggling with the psychological after-effects of years of physical abuse at a formative age – and were still struggling 3 years later at age 21 when they 'ran out of time' to access justice under Queensland law.

This is still Queensland law today.

It is immoral and is an embarrassment to Queensland when just about every other Australian jurisdiction has removed these time limits for serious physical abuse.

In 2016 the Queensland Parliament removed time limits, and created the right to set aside past settlements and judgements, but only for survivors of child *sexual* abuse. Survivors of serious physical abuse were ignored by the Government and have been ignored once again in the currentl Government Bill.

The Private Member's Bill is to be commended for putting forward a definition of child abuse that is sensible, moderate, and balances the rights of child victims with the needs of institutions.

The Private Member's Bill and Clause 6 replaces the words 'child sexual abuse' with 'child abuse' and then defines child abuse as 'sexual', 'serious physical' and 'connected other'.

This is consistent with almost every other Australian jurisdiction.

Please see attached Attachment One which highlights that current Queensland legislation is out of step with the nation and is an embarrassment that we are still so backward in failing to provide dignity and equality of rights to these survivors.

New South Wales, Victoria, Northern Territory, South Australia and Tasmania all remove statutory time limits for survivors of child abuse, defined as:

- Sexual
- Physical or serious physical
- Psychological or 'other'

Of all the interstate definitions to choose from the Private Member's Bill has sensibly applied the qualifier of 'serious' to the physical abuse, as previously mentioned. This shows that the Private Member's Bill is being moderate and measured in its approach and acting in the interest of sensible, sustainable legislation that balances the needs of survivors with the needs of institutions.

It is appropriate to limit the provision to 'serious' physical abuse to ensure the legislation applies for the purpose intended, which is to give rights of access to justice to victims of abuse that was serious enough to cause lasting injury, or injury that has had lasting impact requiring financial reparation (ie under the existing civil litigation framework).

As well, the Private Member's Bill sensibly protects the appropriate interests of institutions by restricting the provisions to 'other' abuse (eg psychological, emotional, neglect, etc) to that which is 'connected' to either of the first two types. This limits the effect of the provision to cases where the primary underlying sexual or serious physical abuse is proven. This is to allay concerns by institutions about the potential for a wide scope of definition of 'psychological' abuse or injury if psychological abuse were a category in its own right.

The definition has received wide support from a wide range of NGOs and stakeholders.

During the 2016 consideration of the legislation to remove time limits, the Parliamentary Committee received numerous stake holder submissions including from: legal associations, child protection organisations, Queensland Government Statutory Authorities, research bodies and individuals. *(Please see Attachment Three).*

Almost every stakeholder submission openly supported and called for the legislation to remove time limits from all forms of child abuse: sexual, serious physical and connected other. A small percentage did not comment on this reform but importantly: No stakeholder *opposed* that the time limits should be removed for all forms of abuse: sexual, serious physical and connected other. *(Please see Attachment Three).*

The Government ignored the evidence and ignored the community and passed the 2016 bill into legislation removing time limits for child *sexual* abuse only. Survivors of serious physical abuse, like the boy mentioned above were betrayed and ignored by their Parliament, in whom they had placed so much trust and hope.

Here we are two years later, 2018, and the Government bill put forward repeats this betrayal – they are applying their reforms to only *sexual* abuse, ignoring the needs of those who suffered serious physical abuse. The Government bill makes no attempt to remove time limits for those who suffered serious physical abuse.

The Private Member's Bill is commended for this Clause and it is recommended that the Committee embrace this Clause.

Legal justification for Parliament to remove time limits for all forms of abuse

In addition to simple moral justice, this aspect of the Private Member's Bill is also sound legislation from a legal perspective – it will end two years of legal anomaly created by the Government when they removed time limits only for sexual abuse.

Legal experts cautioned against the Government's approach at the time, identifying that removing time limits for sexual abuse but not the other forms would create the bizarre legal anomaly where a victim who suffered sexual abuse and physical abuse would be able to bring an action for the sexual abuse but *not* the physical abuse – they would still be legally 'out of time' in relation to the physical abuse.

It would then be necessary for the plaintiff, institution and ultimately a court to 'disentangle' what percentage of the child's injuries had been caused by the sexual assaults and what percentage had been caused by the physical beatings….

Clearly this is an absurd situation but it is one that has been created by the Government's obstinate refusal to listen to qualified stakeholders, refusal to follow the evidence, and refusal to pass sensible and encompassing legislation.

I am aware of a survivor of abuse that included beatings and sexual assaults who has suffered significant injury and deserves appropriate reparations – and is attempting to secure this from the institution, however they are trapped by this Government's inadequate legislation and have to navigate this traumatic labyrinth of pursuing reparation for the sexual assaults but not being able to also pursue justice for the beatings.

In fact the *unintended consequence* (which the Government love to cite in relation to any legislation they did not write) of the Government's bizarre approach of splitting abuse into different types and affording rights only to children who were sexually abused, has caused enormous detriment to this particular survivor and others like him.

The institution is actually using the fact of the beatings against the victim and claiming that the beatings will have caused a certain percentage of injury and therefore the damages they are negotiating for sexually abusing this child should be *discounted* by an amount for the harm they

caused him by beating him!

This is scandalous. Because of Government legislation, passed in the face of almost unanimous community opposition, institutions are actually profiting from having beaten children to *discount* their liability for having raped children.

What do you think the emotional and psychological impact on that victim is, having to endure this injustice? It is yet another example of the resilience survivors must have to endure these affronts again, and yet again.

The Government only escapes protests of angry survivors of abuse because the insidious nature of child abuse is that the ingrained shame causes most survivors to recoil from any public display or activism. As a consequence so many are suffering in silence and out of sight.

This lets the Government off the hook from any embarrassing public activism but it does not let the Government – or the broader Parliament – off the hook in terms of having been informed.

Child protection stakeholders and legal experts have repeatedly informed the Government of this situation, since 2016 and again now in 2018.

In 2018/2019 as this Private Member's Bill is being considered the Government holds the majority of the Queensland Parliament – this means the Government has no-one else to blame if it fails to vote up this reform and remove time limits for all forms of child abuse.

In 2019, if the Government continues to refuse to support fair and sensible evidence-based legislation then the Government will be required to *actively vote down this Clause*, and will be acting contrary to every other jurisdiction in Australia; contrary to the advice of every child protection organisation; contrary to legal experts; and contrary to the obvious needs of victims of serious physical abuse.

Other states and territories are smart enough to know this is unacceptable morally and legally and hence they found it a no-brainer to remove time limits for all forms of child abuse. Our Parliamentarians should have some pride in being Queenslanders and want to be responsible for passing sensible, just laws that afford Queenslanders at least the same rights as everyone else!

5.3 Amendment of *Personal Injuries Proceedings Act 2002*

Clause 9 of the Private Members Bill amends the *Personal Injuries Proceedings Act 2002*

This clause amends the definition of child abuse in the Act to ensure legislative consistency across Acts in Queensland that the reforms apply to ***child abuse*** (as defined) and not only sexual abuse.

The reasons and evidence are the same as provided above at 5.2.

6 Responses to Committee Member's Questions at Public Briefing

On 12 November 2018 the Legal Affairs and Community Safety Committee conducted a public briefing of the Civil Liability (Institutional Child Abuse) Amendment Bill 2018 during which Mr Michael Berkman MP presented and answered questions from the Committee. Committee members raised some interesting questions to which I provide some responses, in the order that the questions were asked.

Member for Southern Downs

Question relating to:

Defences available to an institution that it took reasonable steps (s49D)

Response:

The Private Member's Bill offers a defence to a breach of duty of care if the institution can prove that it took all reasonable steps. This is consistent with Recommendation 91 of the Royal Commission.

The Private Member's Bill offers four examples of factors a court may consider:

> *(a) the resources that were reasonably available to the institution;*
>
> *(b) the relationship between the institution and the relevant child;*
>
> *(c) whether the institution had delegated the care of, supervision of or authority over the relevant child to another institution or an individual;*
>
> *(d) the role, in the institution or a related entity, of the official that perpetrated the child abuse.*

The Private Member's Bill does not restrict a court to only considering these four factors; the bill provides that a court may also consider any other factor if justified as relevant (by either plaintiff or institution).

Specifically, s49D(4) states (where subsection (3) creates the defence for an institution of proving it took all reasonable steps):

> ***Without limiting subsection (3)*** *in determining whether an institution has taken reasonable precautions and exercised due diligence, a court may consider the following as at the time the child abuse was perpetrated—*

The other sensible safeguard for institutions here to note is that the Private Member's Bill makes clear to the court that these factors are to be considered "…*as at the time the child abuse was perpetrated*" – this is a sensible safeguard for institutions moderating the consideration of factors present in cases of child abuse that occurred in the past.

This approach by the Private Member's Bill is entirely consistent with the approach taken in other jurisdictions where the total effect of the section is essentially the same in each jurisdiction despite mild nuances in specific wording.

Indeed, the proposed Government Bill closely reflects the approach of the Private Member's Bill with the addition of a provision lifted from the High Court test in Prince Alfred College Inc v ADC [2016] HCA 37. This addition in the Government Bill is interesting but not superior to the wording of the Private Member's Bill as the Private Member's Bill is worded such that the test set out by the High Court would of course be available to be considered as would a range of considerations that may yet no have been envisioned (and are not included in the Government Bill).

Similarly, all of the provisions in the New South Wales Bill that the Member for Southern Down's cites in his question are able to be considered by virtue of the Private Member's Bill.

The Private Member's Bill is worded to ensure flexibility of the court to consider a range of relevant considerations rather than be restricted to an overly prescriptive list.

Member for Mansfield

Question relating to:

definition of institution appears wider than that proposed by Royal Commission

Response:

I don't believe the definition of institution put forward by the Private Member's Bill is any wider than that put forward by the Royal Commission. If the Committee looks to the Royal Commission Recommendations for guidance on this question it can be seen that at Recommendation 90 the Royal Commission lists very specific institutions (residential facilities, day and boarding schools, early childhood education and care services, disability services, health services, ***any other facility*** operated for profit, and, ***any facility*** operated by religious organisations). This is very broad and should be noted that this is what the Royal Commissioned considered to be their *narrow* list solely in relation to Vicarious Liability/Non-Delegable Duty at Recommendation 90.

If the Committee then examine the Royal Commission's Recommendation 91, in which the Royal Commission recommend that the Parliament make institutions liable unless the institution can prove it took all reasonable steps to prevent the abuse, the Royal Commission says this 'reverse onus' should:

> *"be imposed on* ***all institutions****, including those institutions in respect of which we do not recommend a non-delegable duty be imposed'.*

So based on this examination of the breadth of institutions the Royal Commission has recommended the reforms apply to, I don't believe the definition of institution in the Private Member's Bill is any wider than the Royal Commission has intended.

Member for Mirani (also Member for Capalaba and Member for Mansfield)

Questions relating to:

Potential burden that a retrospective change may have on institution's insurance
Potential impact on community organisations if unable to obtain insurance

Response:

This is an excellent question/s and one that is very important to have been asked as it allows certain myths and misconceptions to be dispelled.

Elements of the myths and misconceptions include:

- Institutions currently are completely covered by insurance for child abuse risks
- Insurance policies will not cover any newly created risk, if created by legislation
- Insurers and institutions are not flexible enough to adapt to changing risk environments

The reality is:

Reality 1: The existing insurance coverage of institutions is already far from complete.

This is because most institutions have breached their own insurance policies in the past by failing to report risk events to the insurer when the institution was actively concealing child abuse – put simply, the senior leaders of the institution who were moving offenders around, not reporting to police, lying to parents, etc did not then pick up the telephone and advise their insurer 'we have raped another child'. This failure to report a risk event was invariably a direct breach of the institution's policy with the insurer and led to insurers adopting the position that the institution had voided its cover. So it is the misconduct behaviour of the institution itself that has already undermined its insurance coverage – it is not correct to blame sensible legislation for this.

Reality 2: Insurance companies like to keep their big ticket clients

Despite the breach of policy by their client, insurers have not walked away from their clients. These large institutions are big ticket clients and many insurers have negotiated to continue to provide coverage on renegotiated terms. Insurance companies will not just walk away from their clients as a result of the accountability provisions in the Private Member's Bill – they may renegotiate the terms of coverage, as is appropriate in any free market.

Reality 3: Insurance providers are flexible to changing risk environments

Insurers have the capacity to adapt – as they already have in the past 5 years adapting to the exposed risk of their institutional clients in relation to unreported child abuse. Insurance companies will not necessarily refuse to cover institutions but may renegotiate the terms of that cover.

Reality 4: These reforms are no surprise to institutions or insurers

The reforms were recommended in 2015 and institutions and insurers have anticipated the reforms and built that into their risk strategies and policies for two years now. If anything they are wondering what has taken the Government so long. So these reforms are no surprise and have already been factored in – they do not suddenly alter the risk environment unexpectedly.

Reality 5: The provision ***already exists*** in common law and so is not a new risk for insurers

Common law already provides that institutions are liable 'retrospectively' for child abuse, so this is ***not*** a new risk created soley by the Private Member's Bill. The Private Member's Bill simply preserves existing common law rights (which insurers have already factored in).

In 2016 the High Court of Australia handed down it's judgement in PAC v ADC [2016] HCA 37 in which the High Court provided a test for Vicarious Liability of institutions for the abuse of a child. Institutions have been 'retrospectively' liable for past abuse for two years already.

This decision overturned preceding common law which had held institutions accountable for accidental injuries but was conflicted on questions of intentional criminal actions by an employee.

Institutions and insurers adapted in 2016 to that altered risk environment.

Legal experts have advised that the High Court decision has retrospective effect in the sense that the decision applies to any person who brings an action after the decision – the action can relate to abuse that occurred *prior* to the decision. By definition child abuse claims brought by an adult will relate to a matter that occurred in the past, when the person was a child.

So the Private Member's Bill is not the tectonic shift in the insurance landscape that it may have been wrongly presumed to be.

It simply codifies in statute that which already exists in common law. In doing this it is more responsible than a bill that fails to do this, as such a bill would create the risk of the unintended consequence of wiping out the pre-existing common law right, if not expressly preserved. (for example the New South Wales legislation expressly preserves existing common law rights – the proposed Government Bill in Queensland does not).

Reality 6: The Private Member's Bill creates certainty which equals insurance stability

By legislating the effect of the bill (consistent with existing common law) clearly and precisely, the bill creates certainty for institutions and insurers creating stability so that risk can be assessed and accommodated.

This removes any uncertainty that may be inherent in common law. It also avoids the risk of unintended consequences inherent in the Government Bill which fails to address the problem of what would happen to existing Common Law rights relating to past abuse if a bill is passed which affords rights narrowly for future abuse but fails to at least preserve existing rights in relation to past abuse.

Reality 7: The HCA test came after the Royal Commission recommendation on prospectivity

The Committee needs to be aware that the Royal Commission handed down its recommendation 93 that the provisions be prospective in **2015** – at this time the High Court test handed down in PAC v ADV [2016] HCA 37 *had not yet occurred* and so was not in the purview of the Royal Commission.

At the time of publishing the 2015 Report the Royal Commission did not have the benefit of having the knowledge available to them that the such an important Common Law right was to come in to existence.

The High Court test was handed down in late 2016 – a full fourteen months ***after*** the Royal Commission released its Redress and Civil Litigation Report.

Therefore the landscape has altered materially since Recommendation 93 was written. The Parliament has the duty, when passing legislation, to consider *all* of the material factors existent at the time of passing that law.

The Private Member's Bill does this, and has the advantage of the HCA judgement that was not available to the Royal Commission and so seeks to ensure that important landmark decision is preserved in statute.

Failure to do so would be an enormous blunder by the Parliament and a backwards step for Queensland.

Member for Capalaba

Question relating to:

Effect of legislation on smaller institutions, eg risk of bankruptcy

Response:

The Private Member's Bill in fact offers as much protection as any legislation possibly can by ensuring in the definition of institution that it provides that where large organisations who intentionally delegate to smaller institutions, the larger institution does not evade liability for abuse perpetrated by the smaller institution.

This would appear to address the concerns raised by the Member for Capalaba.

A changing risk in the behaviour of institutions is that larger institutions (eg churches) who perform child services as an integral part of their operations, may seek to evade proper liability by moving to delegating those services to smaller organisations – for example an after-school care service conducted on church premises at the local parish, advertised and promoted through church publications and meetings, and run by an employee or volunteer from the church congregation, but run on an ABN with no assets.

When a child is abused in that smaller 'mums and dads' operation, to use the phrase used by the Member for Capalaba, and a victim seeks appropriate reparations for any losses or damages caused by the abuse, the Private Member's Bill ensures that the liability chain remains unbroken so that the smaller 'mums and dads' operation would not necessarily be able to be 'cut loose' by the institution to face the full risk, but the larger organisation would continue to be held liable.

This is the best protection legislation can afford smaller operators, short of protecting abusing institutions by not making them accountable at all (the current legislative approach). In relation to the Member's concerns about bankruptcy, no legislation can prevent that and the proposed *Government Bill* does nothing to address the concerns raised by the Member for Capalaba.

Member for Lockyer

Question relating to:

Haven't institutions already sufficiently reformed their behaviour?

Response:

The short answer is: No, institutions have not reformed their behaviour sufficiently to make legislation unnecessary.

I can provide the Committee with stark examples.

One is the public position of Mr Howard Stack, Chair of the Board of Trustees of Brisbane Grammar School. That institution was subject to Royal Commission Case Study 34. The Royal Commission found that many boys including those in the care of the boarding school were sexually assaulted by an employee of the school. The Royal Commission found that many students and even parents (including a General Practitioner) had informed the head master at the time of the abuse. In other words the school knew about the abuse yet took no action to prevent further offending.

A number of parents of abused children have asked that the school refund the school fees they had paid on the grounds that the school had breached its contract to educate their child and keep their child safe. They argue that allowing the child to be abused – particularly given the school knew the abuse was occurring – was a breach of that contract.

Despite the level of culpability exposed by the Royal Commission Howard Stack has stated that the school and the board of trustees would *not do any thing that it was not legally obliged to do*.

This shows a complete absence of compassion and actually draws the line in the sand that the recalcitrant behaviour of institutions requires the Parliament to set the expected standard – it is the institution's own words – they will not do anything unless the Parliament demands it.

I have noted already in this submission the case of the institution demanding to *discount* the damages they are liable for, having both physically and sexually assaulted a child, on the grounds that Queensland legislation only gives that survivor the right to pursue damages for the sexual abuse and not for the physical abuse.

Catholic institutions are still opposing criminal justice law reforms such as mandatory reporting, seeking exemptions for child abuse discovered through the ritual of the seal of the confessional.

Many institutions are taking large steps to implement child protection policies. These steps are bringing them into line with what they should have always been doing. However in the absence of legislation to create consequences for wrongful behaviour, relying solely on the good will or internal motivation of institutions will simply not work – as it has not worked for the past fifty years or more, hence the need for the Royal Commission in the first place.

Also, while some institutions are embracing reforms, some are not – so legislation is needed for the recalcitrant institutions.

Also, while institutions are embracing reform today, while the Royal Commission is fresh in their minds, in the absence of legislation to create consequences there is nothing to prevent these reforms from falling away and being forgotten in the future.

So it is clear from the evidence that – "Yes", the Private Member's Bill is necessary to create the appropriate legislative framework to motivate institutions to reform, to ensure *all* institutions are motivated and to ensure this motivation lasts into the future.

Member for Mirani

Question relating to:

Does the bill create liability for instances such as 'caning'

Response:

Again, this is a very important question as it creates the opportunity to address certain myths or misconceptions about what constitutes 'serious physical' abuse and also about how civil litigation actually works.

The Private Member's Bill quite appropriately makes an institution liable, and removes statutory time limits, in relation to 'serious physical' abuse. By definition, for any civil action to be brought against an institution, the plaintiff must be able to prove that:

- the 'serious physical' abuse occurred
- the 'serious physical' abuse caused an injury
- that the injury has caused some form of economic loss that is recoverable under damages

As well, the plaintiff must prove that the act constituted 'serious phsyical' abuse. For example it occurred at such a frequency, duration or in such a context as to be considered serious, or it caused an injury that is serious.

To apply this to the Member for Mirani's question it can be seen, that for a plaintiff to have a right of action, or for the institution to be exposed to liability, the plaintiff must prove that:

The caning was 'serious physical' abuse – on the facts of the case. For example one-off caning that was consistent with the cultural context and left no discernable injury may be expected to be treated very differently at law as compared to sustained, repeated beatings done for such reason or in such a manner as to be unreasonably targeting the victim, and in a context of other tort such as humiliation, racial discrimination (a scenario raised in the Member's question) and having a provable impact of causing injury.

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ATTACHMENT ONE

TABLE:

COMPARISON OF LEGISLATION IN OTHER JURISDICTIONS –

REMOVAL OF TIME LIMITS FOR ALL FORMS OF CHILD ABUSE

Jurisdiction	Definition of Child Abuse (Sexual, Physical and other?)
Queensland (Private Members Bill)	Sexual Serious Physical Connected 'other'
New South Wales	Sexual Serious Physical Connected 'other'
Victoria	Sexual Physical Psychological – connected
South Australia	Sexual Physical Psychological – connected
Tasmania	Sexual Serious Physical Psychological – connected
Northern Territory	Sexual Serious Physical Psychological – connected
Australian Capital Territory	Liability of Trusts: Sexual and Physical
	Removal of Time Limits: Sexual only
Western Australia	Sexual only

ATTACHMENT TWO

TABLE:

COMPARISON OF LEGISLATION IN OTHER JURISDICTIONS –

RETROSPECTIVE EFFECT OF CERTAIN PROVISIONS

Jurisdiction	Liability of Associated Trusts / Duty to Nominate Proper Defendant – retrospective?	Duty of institutions – retrospective?
Queensland (Private Members Bill)	**Yes**	**Yes**
Western Australia	**Yes**	**Yes**
New South Wales	**Yes**	No ***But past common law vicarious liability is expressly preserved***
Victoria	**Yes**	No
Australian Capital Territory	**Yes**	Yet to legislate one way or the other
South Australia	Yet to legislate one way or the other	Yet to legislate one way or the other
Tasmania	Yet to legislate one way or the other	Yet to legislate one way or the other
Northern Territory	Yet to legislate one way or the other	Yet to legislate one way or the other

ATTACHMENT THREE

TABLE:

LIST OF STAKEHOLDERS

WHO SUPPORTED REMOVAL OF TIME LIMITS

FOR ALL FORMS OF ABUSE

IN 2016

NGO Support for Broader Definition of Child Abuse

From Submissions to Legal Affairs and Community Safety Committee 2016

The **Civil Liability (Institutional Child Abuse) Amendment Bill 2018** seeks to apply reforms for child abuse defined as:

> ***child abuse*** means any of the following perpetrated in relation to an individual while the individual is a child—
>
> (a) sexual abuse;
>
> (b) serious physical abuse;
>
> (c) any other abuse perpetrated in connection with sexual abuse or serious physical abuse of the child, whether or not the connected abuse was perpetrated by the person who perpetrated the sexual abuse or serious physical abuse.

This is the same as the definition in New South Wales as is closely similar to the definition in Victoria, Tasmania, South Australia and the Northern Territory.

It is the same definition first proposed in Queensland by the *Limitation of Actions and Other Legislation (Child Abuse Civil Proceedings) Amendment Bill 2016.*

On that occasion the definition received the overwhelming support from eminent stakeholders and NGOs as summarised in the attached lists.

At that time there were 22 submissions to the Parliamentary Committee.

Not one single submission opposed the definition of child abuse including 'serious physical' and 'connected other'.

Four of the submissions did not comment one way or the other (with some of them later advising they had overlooked the broader definition at the time of making the submission) – the remaining 18 stakeholders **all supported** the broader definition.

Eminent organisations supporting the broader definition include:

- 4 eminent legal services organisations (including Knowmore and QLS)
- 5 eminent child protection organisations (including Bravehearts)
- A Queensland Statutory Authority supporting the broader definition (QFCC)
- 5 eminent policy research and legal reform organisations (including Micah Projects)
- 3 private confidential submissions supporting the broader definition

Legal Organisations

Submission by	Support for definition of abuse to include: • Sexual • Serious physical • 'other' abuse connected to the sexual or physical
Knowmore Legal Service	Yes
Australian Lawyers Alliance	Yes
Indigenous Lawyers Association	Yes
Queensland Law Society	**Tentative support for broad definition** Recommended the matter be on the issues paper
ATSI Legal Service	Submission doesn't comment one way or other (unaware of the broader definition at time of writing submission)
Legal Aid	Submission doesn't comment one way or other (unaware of the broader definition at time of writing submission)

Child Protection Organisations

Submission by	Support for definition of abuse to include: • Sexual • Serious physical • 'other' abuse connected to the sexual or physical
Bravehearts	Yes
Protect All Children Today	Yes
Tzedek	Yes
Centre Against Sexual Violence	Yes
Gold Coast Centre Against Sexual Violence	Yes

Statutory, Policy, Research or other organisations

Submission by	Support for definition of abuse to include: • Sexual • Serious physical • 'other' abuse connected to the sexual or physical
Queensland Family and Children's Commission	Yes
Queensland Advocacy Incorporated	Yes
Micah Projects	Yes
Queensland Child Sexual Abuse Legislative Reform Council	Yes
Soroptimist	Yes (no comment in written submission – supported broader definition in oral presentation before Parliamentary Committee)
Zig Zag	Yes (no comment in written submission – subsequently advised it was unaware of the broader definition at time of writing submission and confirmed support for broader definition)
Peak Care	Submission doesn't comment one way or other Recommended the matter be on the issues paper

Individual or Private Submissions

Submission by	Support for definition of abuse to include: • Sexual • Serious physical • 'other' abuse connected to the sexual or physical
Terry McDaniel	Yes
Confidential (Submission #1)	Submission doesn't comment one way or other
Confidential (Submission #15)	Yes
Confidential (Submission #23)	Yes

ATTACHMENT FOUR

EXTRACTS OF ALL LEGISLATION IN OTHER JURIDICTIONS

Extract of current legislation nationally

Correct as at time of publishing – 6 November 2018

- Definition of 'child abuse' (*sexual, physical and / or other*)
- Duty of institutions +/- *retrospective effect*
- Nomination of proper Defendant / Liability of Associated trusts +/- *retrospective effect*

VICTORIA

Definition of child abuse (sexual, physical, other):

Limitation of Actions Amendment (Child Abuse) Act 2015

1 Purpose
The purpose of this Act is to amend the *Limitation of Actions Act 1958* to remove limitation periods that apply to actions in respect of causes of action that relate to death or personal injury resulting from child abuse

Limitation of Actions Act 1958

s 27O (b)
(i) an act or omission in relation to the person when the person is a minor that is physical abuse or sexual abuse; and
(ii) psychological abuse (if any) that arises out of that act or omission.

Wrongs Act 1958
s 88
Definitions
In this Part—

"abuse" means physical abuse or sexual abuse;

Legal Identity of Defendants (Organisational Child Abuse) Bill 2018

child abuse means—
(a) an act or omission in relation to a person when the person is a minor that is physical abuse or sexual abuse; and
(b) psychological abuse (if any) that arises out of that act or omission—
and includes alleged child abuse

Liability of Associated Trusts/Nominating a Proper Defendant (retrospective):

Legal Identity of Defendants (Organisational Child Abuse) Bill 2018

4 Application of Act
(1) This Act applies to any proceeding for a claim founded on or arising from child abuse.
(2) This Act applies to an NGO if—
(a) a plaintiff commences or wishes to commence a claim against an NGO founded on or arising from child abuse; and
(b) but for being unincorporated, the NGO would be capable of being sued and found liable for a claim founded on or arising from child abuse; and
(c) the NGO controls one or more associated trusts.
(3) This Act applies to a claim founded on or arising from child abuse whether the child abuse occurred or occurs **before**, **on** or **after** the commencement of this section.

Duty of Institutions:

Wrongs Amendment (Organisational Child Abuse) Act 2017

Wrongs Act 1958

s 93 Transitional
This Part applies to abuse of a child that occurs on or after the day on which the ***Wrongs Amendment (Organisational Child Abuse) Act 2017*** comes into operation.".

NEW SOUTH WALES

Definition of child abuse (sexual, physical, other):

Limitation Act 1969 –

s 6A **No limitation period for child abuse actions**

(2) In this section,
"***child abuse***" means any of the following perpetrated against a person when the person is under 18 years of age:

(a) sexual abuse,
(b) serious physical abuse,
(c) any other abuse ("connected abuse") perpetrated in connection with sexual abuse or serious physical abuse of the person (whether or not the connected abuse was perpetrated by the person who perpetrated the sexual abuse or serious physical abuse).

Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018

Civil Liability Act 2002

6F Liability of organisation for child abuse by associated individuals34

(1) This section imposes a duty of care that forms part of a cause of action in negligence

(2) An organisation that has responsibility for a child must take reasonable precautions to prevent an individual associated with the organisation from perpetrating **child abuse** of the child in connection with the organisation's responsibility for the child

…

(5) In this section:

child abuse, of a child, means sexual abuse or physical abuse of the child but does not include an act that is lawful at the time it takes place.18

Liability of Associated Trusts / Nominate Proper Defendant (retrospective):

Civil Liability Act 2002

Proper defendant

Division 4 of Part 1B of this Act extends to child abuse proceedings in respect of abuse perpetrated before the commencement of that Division

Duty of Institutions (retrospective / preserving existing common law vicarious liability):

Civil Liability Act 2002

6H Organisations vicariously liable for child abuse perpetrated by employees

(3) This section does not affect, and is in addition to, the common law as it applies with respect to vicarious liability.

Liability of organisation for child abuse by associated individuals

Section 6F, as inserted by the amending Act, applies only in respect of child abuse perpetrated after the commencement of that section.2928

Organisations vicariously liable for child abuse perpetrated by employees30

Section 6H, as inserted by the amending Act, applies only in respect of child abuse perpetrated after the commencement of that section.31

Definition of institution/organisation – encompassing *all* associated institutions:

Civil Liability Act 2002

6D Organisations that are responsible for a child

(a) an organisation is *responsible* for a child if it (including any part of it) exercises care, supervision or authority over the child (or purports to do so or is obliged by law to do so), and

(b) if an organisation (including any part of it) delegates the exercise of care, supervision or authority over a child to another organisation (in whole or in part), each organisation is *responsible* for the child

WESTERN AUSTRALIA

Definition of child abuse (sexual, physical, other):

(Sexual abuse only, excludes physical, other)

Civil Liability Act 2002

Part 2A — Child sexual abuse actions

Limitation Act 2005

s 6A(1)

Liability of Associated Trusts / Nominate Proper Defendant (retrospective):

Assets not available for judgement or settlement already reached

BUT – assets **are** available for settlement or judgement for past abuse "regardless of when" where the judgement or settlement is reached after commencement (ie therefore this is **retrospective** regarding the abuse and the cause of action = **retrospective**)

Civil Liability Act 2002

15C. Assets available for judgments and settlements: office holders

(7) This section does not apply in relation to a judgment in or settlement of a child sexual abuse action given or reached before the day on which the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* section 5 came into operation.

15E. Assets available for judgments and settlements: institutions

(7) This section does not apply in relation to a judgment in or settlement of a child sexual abuse action given or reached before the day on which the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* section 5 came into operation.

Duty of Institutions (retrospective):

Civil Liability Act 2002

15B. Liability of current office holder in unincorporated institution

(4) This section applies —

(a) regardless of when the act or omission that constitutes the child sexual abuse occurred; and

(b) regardless of when the cause of action accrued.

Civil Liability Act 2002

15D. Liability of incorporated institution that was unincorporated at time of abuse

(4) This section applies —

(a) regardless of when the act or omission that constitutes the child sexual abuse occurred; and

(b) regardless of when the cause of action accrued.

SOUTH AUSTRALIA

Definition of child abuse (sexual, physical, other):

Limitation of Actions (Child Abuse) Amendment Act 2018

Limitation of Actions Act 1936.

Part 1A—Actions for child abuse

(5) In this section—

abuse includes any of the following:

(a) sexual abuse;
(b) serious physical abuse;
(c) psychological abuse related to sexual abuse or serious physical abuse.

South Australia are yet to legislate for the Duty of Institutions / Liability of Associated Trusts

TASMANIA

Definition of child abuse (sexual, physical, other):

Limitation Amendment Bill 2017

Limitation Act 1974

5B. No limitation period where sexual or physical abuse of minor

(1)(a) an action for damages for personal injury to a person arising from or related to the sexual abuse, or serious physical abuse, of the person when the person was a minor;
…
may be brought at any time.

(2) A reference in this section to the sexual abuse, or serious physical abuse, of a person when the person was a minor includes any psychological abuse that arises from the sexual abuse or the serious physical abuse.

Tasmania are yet to legislate for the Duty of Institutions / Liability of Associated Trusts

NORTHERN TERRITORY

Definition of child abuse (sexual, physical, other):

Limitation Amendment (Child Abuse) Act 2017

Limitation Act (no year in title)

s 5A (6) In this section:

"***child abuse***" means any of the following perpetrated against a person when the person is (or was) under 18 years of age:

(a) sexual abuse;

(b) serious physical abuse;

(c) psychological abuse that arises from abuse mentioned in paragraph (a) or (b).

Northern Territory are yet to legislate for the Duty of Institutions / Liability of Associated Trusts.

Northern Territory Department of Justice commenced an "Options Paper" in September 2018 with submission closed on 2 November 2018.

https://justice.nt.gov.au/__data/assets/pdf_file/0008/572840/options-paper-civil-litigation-reforms.pdf

AUSTRALIAN CAPITAL TERRITORY

Definition of child abuse (sexual, physical, other):

Civil Law (Wrongs) (Child Abuse Claims Against Unincorporated Bodies) Amendment Act 2018

Civil Law (Wrongs) Act 2002

114A Meaning of child abuse

child abuse means physical or sexual abuse of a child.

sexual abuse includes—
(a) an offence of a sexual nature; and
(b) misconduct of a sexual nature.

(3) For this chapter, it does not matter when the child abuse, or alleged child abuse, of the subject of a child abuse claim happened.

Limitation Act 1985

s 21C

"sexual abuse" includes the following:
(a) an offence of a sexual nature;
(b) misconduct of a sexual nature

Liability of Associated Trusts / Nominate Proper Defendant (retrospective):

Civil Law (Wrongs) Act 2002

114A Meaning of child abuse

(3) For this chapter, it does not matter when the child abuse, or alleged child abuse, of the subject of a child abuse claim happened.

ACT are yet to legislate for the Duty of Institutions.