Speech By

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CIVIL LIABILITY AND OTHER LEGISLATION AMENDMENT BILL

Mr JANETZKI (Toowoomba South—LNP) (6.38 pm): I rise to contribute to the Civil Liability and Other Legislation Amendment Bill 2018. The Royal Commission into Institutional Responses to Child Sexual Abuse made 99 recommendations in their 2015 *Redress and civil litigation report* for improving the capacity of the justice system to provide fair access and outcomes to survivors of child sexual abuse wishing to pursue a claim for civil damages for personal injury arising from the abuse.

In Queensland, too many survivors have experienced extreme difficulties in seeking redress or damages through civil litigation. Sadly, the current civil litigation system has not provided justice for many of these survivors. More needs to be done to achieve better outcomes for victims of institutional child abuse and to ensure there are appropriate mechanisms for a victim to seek justice. That is why the opposition will be offering its support for the bill and the amendments as outlined by the Attorney-General, although I note I will be moving a couple of amendments during consideration in detail, and I will detail those general concerns later.

Since the release of the report, Queensland and other Australian jurisdictions have legislated in a staged approach to incorporate some of the recommendations. The first stage of the reforms in Queensland occurred on 8 November 2016 when the Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill 2016 was passed. I will refer to that bill as the 'limitation of actions bill'. The limitation of actions bill provided for the removal of the limitation periods for when a claim may be made, which is founded on the personal injury of the person resulting from institutional child sexual abuse. It meant that survivors are not limited to when they can make a civil claim.

This bill comprises another stage of the implementation process, which specifically relates to recommendations 91 to 94. I note that the commission recommended, through recommendations 89 and 90, that state and territory governments should introduce legislation to impose a strict non-delegable duty on certain institutions for institutional child sexual abuse despite it being the deliberate criminal act of a person associated with the institution. The commission recommended that the non-delegable duty should apply to institutions that operate certain facilities or provide certain services and that this duty be owed to children who are in the care, supervision or control of the institution. Some of these facilities include residential facilities for children and any facilities operated or provided by religious organisations. The commission, however, noted that the duty should not apply to foster care or kinship care despite these being high-risk environments because of the lack of supervision or control an institution has on a home environment. The government has not sought to act on these recommendations of the commission, despite the action of other jurisdictions, through legislative reform.

The commission recommended, through recommendations 91 and 92, making institutions liable for institutional child sexual abuse by persons associated with the institution unless the institution proves it took all reasonable steps to prevent the abuse, a recommendation supported by the government and which this bill implements. The commission further recommended, through recommendation 94, that states and territories implement legislation to assist in identifying a proper defendant.

The bill provides for two main amendments which implement recommendations of the report. It does so by amending the Civil Liability Act 2003 to introduce a reverse onus of proof, applied prospectively, under which an institution must prove it took reasonable steps to prevent the sexual abuse of a child in its care by a person associated with the institution to avoid legal liability for the abuse. New South Wales and Victoria have adopted this principle. Currently, a survivor can bring a claim to a court for negligence on the basis that an institution has breached its duty of care owed. This was made possible by removing the limitation periods for civil actions, as previously discussed. However, in Australia there are very few cases in which a claim in negligence for child sexual abuse has proceeded to judgement in court. If they have, very few have been successful. This prompted the commission to recommend that legislation be introduced to make institutions liable for institutional child sexual abuse by a person associated with the institution unless the institution proves it took all reasonable steps to prevent the abuse.

The bill inserts a new section 33D into the Civil Liability Act to provide that an institution has a duty to take all reasonable steps to prevent the sexual abuse of a child by a person associated with the institution while the child is under the care, supervision, control or authority of the institution. A person associated with an institution includes an officer, representative, leader, member, employee, agent, volunteer or contractor of the institution, religious leader of the organisation, a delegated entity or delegated individual. If the duty is breached, the onus of proof will be reversed, which would require that an institution prove that it did not breach its duty to prevent child sexual abuse.

The reverse onus of proof addresses the power imbalances and ensures that a survivor does not have to prove the wrongdoing, as the survivor is generally underresourced and at a considerable financial and administrative disadvantage. It also has the effect of encouraging institutions to engage in higher standards of compliance. I note that the commission asserted that, while reversing the onus of proof may lead to increased insurance premiums for institutions, it would create a strong incentive for organisations, including even those that provide foster or kinship care, to take reasonable steps to prevent abuse from occurring. This would also provide greater certainty for victims of abuse to seek compensation through litigation.

The second major amendment establishes a statutory framework for the nomination of a proper defendant by an unincorporated institution to meet any liability incurred by the institution. Specifically, the bill provides for a variety of mechanisms in which defendants may be liable including, among other things, the liability of an incorporated institution that was unincorporated at the time of the abuse, liability of current and former office holders, court discretion in allowing a claim to proceed against trustees and the satisfaction of a judgement from assets of an associated trust. It will assist in identifying a proper defendant to sue in circumstances where an entity is unincorporated or where there is a sufficient link between the alleged damage and, for instance, a property trust associated with a defendant that has sufficient assets to meet any liability from proceedings.

By doing so, it will assist issues victims normally face in identifying a proper defendant to sue, for example, due to the lack of perpetual succession in unincorporated associations. This also overrides the ‘Ellis’ defence, so known, which organisations have been relying on to protect institutions from being recognised as a legal entity and, therefore, being sued; and I note the Attorney-General’s comments in that regard. Bravehearts and the Australian Lawyers Alliance supported these amendments, arguing that they have the effect of removing barriers many victims have faced throughout the years in their pursuit of justice.

There is an argument that the bill does not go far enough—certainly for many survivors and victims. There are two main grounds that support this argument. Firstly, there is the ground of definitional technicalities. Under the bill, an institution only has a duty to take all reasonable steps to prevent the sexual abuse of a child. Notably, the bill narrows the definition of ‘abuse’ to only sexual, whereas the majority of Australian jurisdictions define ‘child abuse’ for the purposes of institutional liability to mean either sexual or physical. I note the Attorney-General’s remarks in this regard and that the government continues to reflect on these recommendations of the royal commission. My only comment on that is that it has been nearly 18 months since the final report of the royal commission and up to five years since the initial reports of the royal commission. Surely it is time for the government to make decisions in this regard on such an important matter that other states have already legislated upon.

Although the commission did not explicitly recommend ‘child abuse’ be extended to include physical abuse or, for that matter, psychological abuse, it must be noted that the letters patent issued to it were restricted to the context of considering child sexual abuse that might have occurred in institutional settings. The commission did, however, suggest that governments who impose a strict liability, a non-delegable duty, could apply the duty more broadly to include acts such as criminal physical or psychological abuse that causes damage to a child.

Stakeholders expressed concerns about 'child abuse' being limited to sexual abuse, arguing that its application is too narrow because it excludes non-sexual abuse. For example, knowmore and the Australian Lawyers Alliance submitted that the proposed duty should extend to physical and psychological abuse in order to recognise the experiences of survivors to ensure proper access to justice and to promote consistency with reform in other jurisdictions.

I note that when the limitation of actions bill was debated in 2016 the LNP raised concerns with broadening the definition of 'child abuse' to include physical abuse. That position, which has now changed, focused specifically on the limitation of actions, arguing that it is generally offenders who have suffered from sexual abuse who would benefit from the removal of the limitation period. The then shadow attorney-general, the former member for Mansfield, articulated this position, although he did note that there were valid points for discussion and room for further debate.

My personal view and change of mind on the need to broaden the definition of 'child abuse' to include physical abuse was drawn from a number of meetings with stakeholders and survivors including Mr Allan Allaway. His suffering and those of many survivors with whom I have met may not have constituted sexual abuse but it was physically violent, horrific and life changing. Mr Allaway was in fact mentioned by the Premier as a friend whose stories had touched her life when she introduced the limitation of actions bill in 2016.

I struggle to understand why the Premier would cite Mr Allaway as an inspiration for that legislation and yet ignore his calls and the calls of other survivors by not considering the broadening of the definition of child abuse to include 'physical abuse' in this particular bill. Essentially, the law proposed by the Attorney-General and the Labor government does not go anywhere near the needs of the people the Premier met and referred to in her first reading speech for the limitations of actions bill—not just Mr Allaway but others referred to including Micah and the Brisbane Grammar network. A person at the Brisbane Grammar network meeting referred to by the Premier in 2016 was severely beaten for having a physical disability. As foreshadowed, I will move amendments in this regard during consideration in detail.

The second ground supporting the argument that this bill does not go far enough relates to the introduction of a strict non-delegable duty, namely strict liability. Again, I note the comments of the Attorney-General in her second reading contribution. As I already discussed, the commission recommended that state and territory governments should enact legislation to impose a strict non-delegable duty on certain institutions for institutional child sexual abuse despite it being the deliberate criminal act of a person associated with the institution. The Labor government has not adopted this recommendation. A non-delegable duty is a duty born by the institution. It cannot be delegated. Generally, the defendant will be said to owe a non-delegable duty where a defendant has a higher degree of control over the risk and there is either a special dependence or special vulnerability on the part of the plaintiff. The commission found that certain institutions have a higher degree of control and, as such, these institutions should owe a non-delegable duty.

The commission proposed that the non-delegable duty apply to institutions that operate the following facilities or provide the following services and be owed to children in the care, supervision or control of the institution in relation to the relevant facility or service. A relevant facility means a day school or a boarding school; a detention centre under the Youth Justice Act 1992; a residential facility; a facility operated by an entity for profit that provides services for children and involves the entity having the care, supervision, control or authority over the children; and, for an institution that is a religious organisation, a facility operated by the organisation at which a service or activity is provided by a participant of the organisation. However, 'relevant facility' will not mean a facility at which foster care or kinship care is provided. A relevant service means an approved education and care service under the Education and Care Services National Law (Queensland); a Queensland education and care service under the Education and Care Services Act 2013; a disability service; a health service; for an institution that is a religious organisation, a service or activity provided by the organisation including a service or activity provided by a participant of the organisation but, again similarly to the relevant facility, will not include a service for or to arrange foster care or kinship care.

I note that the commission recommended that liability not be extended to not-for-profit or volunteer institutions as to do so may discourage members of the community from coming together to provide or create facilities that offer opportunities for children to engage in valuable cultural, social and sporting activities. The strict non-delegable duty was recommended to be prospective only, meaning it will apply to child abuse that occurs after the commencement of the legislation. It is appropriate to consider the concept of retrospectivity further.

I note that the commission recommended that state and territory governments should ensure that the non-delegable duty and the statutory duty of institutions apply prospectively and not retrospectively. The commission provided several reasons for why retrospective application was not favoured.

Retrospective liability would impose a significant insurance related burden on institutions by substantially expanding their liabilities and setting a near impossible task for them to identify documents and witnesses about past practices in a reverse onus of proof environment.

I note that a survivor will still however have a retrospective cause of action available against the individual perpetrator or perpetrators of the abuse and the intentional tort of battery which includes sexual assault or negligence based on the institution's breach of duty of care. This right was protected through the government's 2016 amendments. While this may increase cost for certain institutions, the imposition of strict non-delegable duty on a prospective basis serves the policy ends of providing an adequate remedy to people harmed by an employee and of promoting deterrence.

The commission asserted that, by legislating strict liability, it would avoid a non-delegable duty being created through common law development as it did in the United Kingdom. Common law development carried great risk as it would likely result ultimately in retrospectivity being applied. As affirmed by the commission if the liability was left to the development of the common law, and applied retrospectively, relevant institutions would face potentially large and effectively new liability for abuse that had already occurred potentially over many decades.

An argument sometimes raised against imposing strict liability on a party is that it removes any incentive for the party that might be liable to prevent the event occurring. The effectiveness of its practices will ensure that this liability is considerably lower than it would be if the institution took no steps to reduce abuse. There is no doubt that institutions would respond to this statutory duty by implementing rigorous procedural safeguards around recruitment, training and supervision of staff. Any insurer that provides insurance in respect of a strict liability is also likely to require that the institution take all reasonable steps to prevent abuse.

The commission applied an appropriate rationale, that being if a court makes a solicitor liable for the criminal act of his clerk and the dry cleaner liable for the criminal act of his or her employee, could it be argued that it is not appropriate for institutions to be liable for the criminal abuse of a child when in their care? If the protection of an individual's property is an important priority of the common law, the protection of children should at least have the same priority. In the opposition's opinion, the community would today expect that the care of children ought to attract the highest standard of protection from the law.

As such I will move amendments which broadly follow the approach of New South Wales, which has legislated strict liability through the creation of vicarious liability which is extended to employees and those akin to employees who perpetrate child abuse. I am thankful to many survivors, advocates and friends who have offered input during the consideration of these most serious matters. They include, among others, Kelvin Johnston and Allan Allaway. I trust that the amendments, together with the government's bill, go some way to standing with the victims.

Frankly, I am staggered that the Labor government could be so dismissive of the royal commission recommendation, a royal commission that was the result of five years of detailed evidence and analysis. I am surprised that the Labor government would deny equality of access to justice to survivors of horrific physical abuse in institutions. I am surprised that the Labor government would make Queensland children second-class citizens compared with abused children in other Australian jurisdictions. I am determined and driven to stand with the defenceless, vulnerable and broken and will not walk away from this responsibility. There is more to be done, and the survivors of sexual and physical abuse in Queensland have waited far too long for justice. It is time they received it.