Independent Schools Queensland
choice & diversity

Response to the Issues Paper

The civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse: Redress and Civil Litigation Report – understanding the Queensland context

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Indepeendent Schools Queensland Ltd ACN 614 893 140
96 Warren Street, Spring Hill Q 4000 PO Box 957, Spring Hill Q 4004
P (07) 3228 1515 **F** (07) 3228 1575 **E** office@isq.qld.edu.au **W** www.isq.qld.edu.au

About Independent Schools Queensland

Independent Schools Queensland (ISQ) is the peak representative body for the independent schooling sector in Queensland. ISQ provides leadership and support to member schools and represents and promotes the interests of independent schools to government and the community. Our 199 member schools are a vital part of the state's education system. Together, these schools educate nearly 120,000 students, or 15 percent of Queensland's school enrolments.

Further, over 100 independent schools offer early childhood care and learning programs, with this number increasing annually. Independent schools offer parents' choice in the education of their children. They enable families to select schools and early learning programs that best serve the child's needs.

Independent schools also enable families to choose school/early learning program that best promotes the values they believe are important. Independent schools are, therefore, a diverse group and include:

- Non-denominational schools
- Schools with church or ethnic affiliations. For example, Lutheran, Anglican, Baptist, Jewish and Islamic schools
- Montessori schools
- Steiner schools
- Schools that specialise in serving students with learning difficulties
- Special Assistance Schools
- Schools for Indigenous students
- Schools with programs for gifted and talented students

Introduction

Independent Schools Queensland supports the State government's initiative to address the issues of redress and civil litigation that were highlighted as recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse and ISQ welcomes the opportunity to input into government's considerations of the issues.

As we make this response to the *Issues Paper: The civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse: Redress and Civil Litigation Report – understanding the Queensland context*, ISQ recognises that the report includes imperatives to amend sections of legislation and the interpretation of how it is applied, to facilitate and ensure that access to justice is afforded to victims of child sexual abuse. However, it is also imperative that in ensuring this access to justice that the proposed changes continue to recognise the extensive legal precedents of procedural fairness and presumption of innocence which have evolved over significant time and through extensive case law.

Some of the recommendations included in the paper need to be considered further to ensure that changes to the legal structure bring about the required access to justice, without enacting unintended consequences for future generations of children and the schools they will attend. The *Issues Paper* contains a number of questions with respect to the recommendations which ISQ addresses below.

Short Answer Responses to Questions 1- 6

1. Recommendation 85 is limited to child sexual abuse. Should other forms of abuse, for example, physical abuse and related psychological abuse be considered? If so, should there be a threshold of seriousness of abuse and how might that be defined?

The amendments should be limited to child sexual abuse and related psychological abuse.

2. Recommendation 85 is limited to child sexual abuse that has occurred in an institutional context. Should child abuse in other or all settings, including the family setting, foster care and out of home care, also be included?

Child sexual abuse in all contexts should be included.

3. Should the removal of limitation periods be limited to child sexual abuse (and not physical or psychological abuse), but include abuse that occurred outside the institutional setting?

The amendment should cover child sexual abuse and related psychological abuse in any setting.

4. For child sexual abuse not in an institutional context and for abuse, other than child sexual abuse, should the limitation period be removed, or should there be expanded judicial discretion to extend the limitation period in either of these circumstances?

ISQ recommends extending the limitation period to 25 years from the cause of action arising.

5. Does the Personal Injuries Proceedings Act 2002, create additional or unnecessary obstacles for parties? Should alternative procedures be adopted?

No.

6. What processes and procedures could be adopted for dealing expeditiously (to avoid unnecessary costs) with matters where a stay of proceedings may eventuate?

The current system is adequate for this.

Comments on the Responses to Questions 1-6

Recommendation 85 focusses on the removal of the limitation period with respect to personal injury resulting from sexual abuse. The recommendation to remove the limitation period is proposed to ensure victims of sexual abuse are afforded access to justice without creating barriers such as being required to go through the courts to request an extension to the limitation period. This is recognised as being an important change in reducing the trauma for the victim associated with commencing a civil claim. The research indicates that the average length of time for disclosure of sexual abuse is 22 years as compared to the current limitation period of 3 years from achieving majority age.

ISQ is supportive of a limitation period which allows victims of childhood sexual abuse to be able to bring a civil claim without significant barriers to that process. However, it is important for schools,

for insurance and for operational purposes, that they be able to clarify and quantify possible exposure to civil claims and a limitation period of 25 years would support schools in this, while still allowing victims appropriate time frames in which to bring a claim against the school. As noted in the *Issues Paper*, "the removal of the limitation period only creates the opportunity to argue the merits of the case, not guarantee the success of the action." [1]

The imposition of a 25 year limitation period would still allow the courts to rule on situations outside that 25 year window, but would assist schools in areas such as record keeping, insurance, liability etc. and also mean that there is still a likelihood of being able to contact and seek information from staff who may have been at the school at the time in question. The longer the period between the sexual abuse and the civil claim being lodged, the less likelihood that schools would have documentary evidence to support the proceedings and the greater the chance that staff may not be contactable or even still be living.

While the Commission has had as its focus sexual abuse in an institutional context, the removal of the limitations period should be extended to include sexual abuse in all contexts, including those outside of the institutional context such as the family setting. This is supported by the findings of research on the incidence and setting of child sexual abuse.

Short Answer Responses to Questions 7 - 14

7. Is the imposition of a non-delegable duty the best way to ensure that institutions take reasonable steps to prevent harm caused by child sexual abuse?

Schools are already subject to a non-delegable duty.

8. Should legislation define 'non-delegable duty' and the extent of the duty or, should defining the nature and extent of a non-delegable duty be left to the courts? Please explain which approach you favour and why.

This should be left to the courts. They then have the ability to develop the law and apply it to different circumstances as they arise.

9. Recommendation 90 of the Commission identifies which institutions should be in scope for the purpose of imposing a non-delegable duty. Are there any institutions or types of institutions that should be in or out of scope? Please explain why you think an institution should be included or excluded?

Schools are already included.

10. Recommendation 92 of the Commission identifies the types of 'relationships' (e.g. employees, members, officer holders, volunteers) that should be captured under the proposed statutory non-delegable duty. Are there any relationships that should be in or out of scope? Please explain why you think the relationship should be included or excluded?

[1] Issues Paper: The civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse: Redress and Civil Litigation Report – understanding the Queensland context p8

The High Court has recently defined the vicarious liability for institutions such as schools. That should be the best mechanism for dealing with liability for criminal misbehaviour of employees[2].

11. If implemented should the legislation include a test for what constitutes reasonable care to prevent child sexual abuse in an institutional context? What would the test include?

The current law relating to schools is adequate.

12. Should a complementary code of practice or standards be developed to provide guidance to institutions in respect of discharging the duty? What should the code or standards cover?

Schools are already required to develop procedures for caring for students. They need to be adaptable to particular circumstances. More legislative intervention here will not assist.

13. Should the implementation of recommendation 89 be broadened to include other forms of abuse, for example, to impose a non-delegable duty on institutions to prevent serious physical and related psychological abuse in an institutional context?

The current non-delegable duty of care for schools is sufficient.

14. What are the financial and other associated impacts for institutions in implementing recommendations 89, 90, and 92 as regards to non-delegable duty? What are the implications for the cost and availability of insurance?

Any further extension of liability for schools will have a cost which ultimately will be born by parents.

Comments on the Responses to Questions 7 - 14

It is stated in the explanatory notes to this proposal that recommendations 89 and 90 are sought to ensure that not only do institutions owe a duty to ensure reasonable care is taken to prevent child sexual abuse in the institutional context, but also that institutions ensure reasonable care is exercised by others in the performance of the institution's duty.

Schools are already required by a number of significant pieces of legislation as well as common law to enact a duty of care and specifically to ensure the health and safety of students.

Under the *Education (Accreditation of Non State Schools) Act 2001 s9(c)* schools are required to comply with prescribed criteria about the school's educational program and student welfare processes and the associated regulation sets out the requirements about training of staff, awareness of students, parents and staff and required reporting by staff of sexual abuse, likely sexual abuse and harm. *[Education (Accreditation of Non-State Schools) Regulation 2001 s10]*

Similarly, under the *Education (General Provisions) Act 2006 Part 10,* there are legislative obligations imposed on all staff members to report sexual abuse and likely sexual abuse of students at the school. This obligation is non-delegable and rests on every staff member of a non-state school.

[2] Prince Alfred College v ADC High Court A20/2016

Under the *Child Protection Act 1999* s13E, teachers are named as mandatory reporters for a reportable suspicion about a child that the child—

(a) has suffered, is suffering, or is at unacceptable risk of suffering, significant harm caused by physical or sexual abuse; and
(b) may not have a parent able and willing to protect the child from the harm.

It is therefore suggested that schools and their staff are already subject to a non-delegable duty to prevent harm caused by sexual abuse to children in the care of the school.

This current non-delegable duty rests on all staff of the school and requires reporting to police (and to the relevant State government authority) with an attached legal penalty for failure to comply with the law. The scope of this non-delegable duty is subject to the test of a "reasonable suspicion" with the legislation including a non-exhaustive definition of sexual abuse to support the reporting responsibility. This legislation has been extended in recent years to ensure that there is a strict non-delegable regime of reporting in response to child sexual abuse claims.

Short Answer Responses to Questions 15 - 18

15. Recommendation 91 of the Commission provides that all institutions should be liable for child sexual abuse, unless the institution can prove that it took reasonable steps to prevent the abuse. Do you agree that the reverse onus should apply to all institutions? Please explain why you agree or disagree with the Commission's recommendation and which institutions should be included or excluded?

The onus should not be reversed. It will make a defence unfairly difficult, especially with the extension of the limitation period.

16. Recommendation 92 of the Commission identifies the types of 'relationships' (e.g. employees, members, officer holders, volunteers) which should be captured by the proposed reverse onus requirement. Are there any relationships that should be included or excluded from the types of relationships captured? Please explain why you think a relationship should be included or excluded?

The onus should not be reversed.

17. Should the scope of recommendation 91 be broadened to include liability for other forms of abuse, for example, serious physical and related psychological abuse in an institutional context?

No.

18. What are the financial and other associated impacts for institutions in implementing recommendations 91 and 92 as regards to the reversal of the onus of proof? What are the potential implications for the cost and availability of insurance?

There would be significant financial and other associated impacts, including potential limitation of parental involvement in school activities and increased insurance costs .

Comments on the Responses to Questions 15 - 18

As stated above, schools have a duty of care responsibility in law and under common law to children in their care. The responsibility to take reasonable steps to prevent abuse (harm) is currently described in legislation as encompassing areas including training of staff, awareness of students, parents and staff and required reporting by staff [*Education (Accreditation of Non-State Schools) Regulation 2001*]. The way that this is enacted in schools may vary from school to school, depending on factors such as school location, size, use of technology, size and location of staff, and community expectations.

Schools often have significant parent volunteer communities that are not required to undertake the same child safety checks as the staff of a school and are not required to undertake the same training in child protection as school staff. To require a school to provide evidence that it took reasonable steps to prevent abuse of a child by a parent of the school as proposed in the definition of "relationships" would seem to offer no procedural fairness to the school organisation, and would result in an unintended consequence of schools no longing inviting the input of parents into the school community. ISQ would therefore recommend that the definition for schools encompass only those over whom the school has a direct employment contract.

As indicated above, schools already have liability for sexual abuse and other forms of harm and ISQ sees no reason to widen the scope of recommendation 91. The imposition of a reverse onus of proof flies in the face of hundreds of years of legal precedent, and will mean that scarce school funds will need to be allocated to sourcing and paying high insurance policies to bring some level of protection to the ongoing concern of the entity. As not-for-profit entities, the majority of Queensland independent schools operate on a small gross profit margin which is then used for providing the physical resources of the school.

A significant increase in a recurrent cost such as insurance will threaten the livelihood of a number of small to medium sized independent schools which are stand-alone and not part of a "system" which has the capacity to provide a "buffer" against substantial cost increases. This will increase pressure on all levels of government (state and commonwealth) and fee-paying parents to increase funding.

Short Answer Responses to Questions 19 - 24

19. Should the claimant/plaintiff be required to enquire as to the correct defendant, or the nature of entities related to the defendant in order to identify any related property trusts, before commencing proceedings? Should the defendant have a responsibility to nominate an additional related entity with capacity to meet any award of damages or costs?

Defendant identification is not an issue in the case of independent schools, each of which is an incorporated entity. (In view of this, responses are not required to Questions 20 – 23).

20. Should the court have the power to appoint an expert to investigate and identify the appropriate entity to be joined in proceedings, upon application by the claimant/plaintiff? (Note the current powers contained in the Uniform Civil Procedure Rules 1999 (Qld) (UCPR), in particular, rule 429G Appointment of experts and rules 429J to 429M dealing with powers to facilitate the preparation of the report.)

21. Should the court have the power to direct the related entity to make a payment in satisfaction of any award of damages or costs, notwithstanding the terms of any deed of trust, or statutory instrument establishing the trust?

22. Are the existing powers of the court contained in the UCPR sufficient for these purposes?
23. For example, the UCPR provide for the court to include a person as a party at any stage of a proceeding (rule 69). If the recommendation is adopted, would it be desirable to have an additional provision that specifies that, in exercising its discretion to join an entity as a party to proceedings, the court should give consideration to the following factors:

- *whether the entity has sufficient connection with the institution named as the defendant;*
- *whether the entity has sufficient resources to meet the potential liability; and*
- *whether it is fair and reasonable in all the circumstances for the entity to be joined in the proceedings.*

24. With respect to recommendation 95, would the imposition of a requirement for government funded organisations providing children's services to have insurance to cover liability for child sexual abuse, have any operational consequences for those organisations? What are the implications for the cost and availability of insurance?

The cost of insurance will increase with these proposed changes to limitation periods and onus of proof. An obligation for a school to have a certain kind of insurance will effectively mean the insurers become licensors for the schools.

Comments on the Responses to Questions 19 - 24

As indicated above, as not-for-profit entities, the majority of Queensland independent schools operate on a small gross profit margin which is then used for providing the physical resources of the school. A significant increase in a recurrent cost such as insurance will threaten the livelihood of a number of small to medium sized independent schools which are stand-alone and not part of a "system" which has the capacity to provide a "buffer" against substantial cost increases. This will increase pressure on all levels of government (state and commonwealth) and fee-paying parents to increase funding.

Conclusion

ISQ appreciates the opportunity to provide a response to the *Issues Paper: The civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse: Redress and Civil Litigation Report – understanding the Queensland context.*

ISQ recommends that the limitation period be extended to 25 years in line with the average length of time for disclosure of sexual abuse being 22 years.

Child abuse limited to sexual abuse and related psychological abuse in all contexts should be included in this limitation period.

Independent schools already have a non-delegable duty to prevent harm caused by child sex abuse and ISQ would contend that the current law relating to schools is adequate.

Any further extension of liability for schools will have a cost which ultimately will be born by parents.

The onus of proof should not be reversed – this would overturn hundreds of years of legal precedent and have significant implications for schools, including increased costs and potentially the limitation of volunteer and parent involvement in school activities.

The identification of a defendant in the case of independent schools is not an issue as each is an incorporated entity.

ISQ would be pleased to provide further information or details and looks forward to further engagement in these important issues being considered by the Queensland Government.

Independent Schools Queensland Ltd
24th October 2016