

**NSW Government submission in  
response to the  
Royal Commission into Institutional  
Responses to Child Sexual Abuse  
*Consultation Paper: Redress and civil  
litigation***

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March 2015



**Premier  
& Cabinet**

## Introduction

NSW thanks the Commission for its work to understand the nature and extent of institutional child sexual abuse and the impacts on such abuse on survivors. NSW is closely following the accounts of child sexual abuse emerging from the Commission.

NSW has announced that it is examining options for a redress scheme. The Commission's *Consultation Paper: Redress and Civil Litigation* illustrates the extensive research, consultation and thought that the Commission has devoted to the question of how best to provide redress to survivors. NSW will carefully consider the insights in the Commission's Paper. The following comments may assist the Commission in its deliberations.

## NSW actions to date to support survivors

NSW acknowledges the terrible and often lifelong impacts of such abuse on survivors. In November 2014, NSW announced a suite of measures to help support survivors, including:

- encouraging survivors of child sexual or physical assault to access the unlimited free and confidential counselling available through the NSW Victims Support Scheme
- making care records available as soon as possible, and doubling the resources of the Department of Family and Community Services with the aim of clearing the backlog of applications from survivors to access their care records
- committing to establish a place of recognition at the Parramatta Girls Home to pay tribute to the children who experienced sexual and physical abuse at this site
- consulting with other survivors of institutional child sexual abuse and advocacy groups to examine options for a state-wide place of recognition or memorial
- introducing eighteen Guiding Principles (*Guiding Principles for Government Agencies Responding to Civil Claims for Child Sexual Abuse*) (**attached**) which aim to ensure a more compassionate and consistent response for survivors of abuse who bring civil claims. The Principles provide, amongst other things, that agencies will not generally rely on the statute of limitations, and reiterate the *Model Litigant Policy* obligation to offer an apology where agencies are aware the State has acted improperly.

Further, NSW recognises that many survivors of child sexual abuse do not report the abuse until many years later, such that existing limitation periods may pose a barrier to legal action against those responsible for the abuse. On 23 January 2015, the NSW Attorney General released a discussion paper, *Limitation periods in civil claims for child sexual abuse* (**attached**). The Attorney General seeks input from the community by 10 March 2015.

## Potential for a national scheme

The NSW Government has announced that it is examining options for a redress scheme. NSW would be open to discussing with other jurisdictions the potential for a national scheme, including contributions from Commonwealth, state and territory governments and non-government organisations. NSW acknowledges the potential benefits for survivors of a national scheme, including consistency of approach and less complexity for survivors.

Given that survivors are ageing and have immediate needs, any redress scheme would most meaningfully assist survivors if it is put in place relatively quickly.

NSW is also committed to working with survivor groups in developing any redress scheme.

## **Counselling and psychological care**

NSW recognises that survivors of child sexual abuse may have a lifelong need for counselling and psychological care. In addition to the unlimited and free counselling available through the NSW Victims Support Scheme, other sources of counselling available in NSW include:

- NSW provides approximately \$900,000 per annum funding to Wattle Place, a non-government service based at Harris Park, Sydney that provides free support (including some counselling) to people who grew up in orphanages, children's homes, institutions and foster homes in Australia from the 1920s to the 1990s.
- NSW Health Sexual Assault Services provides free counselling for people who have been sexually assaulted, subject to eligibility criteria (priority is given to children).
- NSW's 'Guiding Principles' for NSW agencies who receive claims of child sexual abuse require agencies to facilitate access to free counselling for survivors.

While NSW intends that any NSW survivor should already be able to access counselling through the Victims Support Scheme, NSW supports further consideration of:

- expanding existing services through Medicare or a stand-alone Australian Government scheme, and
- the potential to seek financial contributions towards counselling from the institutions where abuse occurred.

## **A broad support package for survivors' needs**

NSW notes the Commission's separate project to assess the adequacy of existing support services in meeting survivors' needs. Consideration could be given to the provision of packages of practical supports for survivors as part of a redress scheme, to complement any recognition payment. Such supports could include counselling as well as practical assistance with employment, housing, literacy, family reunions, drug and alcohol treatment, funeral expenses and dental and medical needs (noting that survivors have told the Commission they have found these types of support beneficial).

Some survivor advocacy groups have told the Commission that some survivors may have difficulty in handling large lump-sum payments. A package of support services, in addition to recognition payments, could lead to better outcomes for survivors than a cash recognition payment alone. If a package of supports were to be delivered through a redress scheme, this would inevitably affect the proportion of funding allocated to recognition payments.

## **How payments should be assessed: severity of impact**

NSW notes that there are arguments for and against assessing payment amounts by reference to severity of impact (as opposed to the nature of the abuse). NSW has no settled position on these issues. Arguments for including consideration of severity of impact include:

- a scheme focused on the nature of the abuse alone could create anomalies, for example, a person who suffers one serious incident could receive a significantly higher payment than a person who experiences a pattern of less serious incidents which cumulatively cause serious ongoing impairment, and
- evidence about the current-day impacts of abuse may be more readily accessible to survivors than evidence about the nature of the abuse itself, especially for survivors of historical abuse.

Arguments against including consideration of severity of impact include:

- this could require survivors to provide significant additional information, leading to a more complex application process. A simpler process may reduce consistency of outcomes but could be speedier and less traumatic for survivors.
- this could increase the discretionary nature of payments, with potentially increased administrative costs and applications for review (NSW's shift from the Victims Compensation Scheme, which considered severity of impact, to the Victims Support Scheme in 2013, which did not, significantly reduced processing times).

If severity of impact was excluded from the assessment of monetary payments, the need for greater assistance for those who suffer greater impacts could perhaps be addressed separately through a 'support package' of various types of practical assistance.

## **Eligibility for redress and redress scheme processes**

NSW notes that the Commission's discussion of eligibility for redress, such as the institutions to be included, and the degree of connection required between the institution and the abuse, is substantially determined by its Terms of Reference.

NSW supports the Commission's consideration of the sustainability of any scheme. NSW notes the Commission's view that the best approach is to limit a redress scheme to past abuse rather than applying it to all future abuse, and that potential reforms to civil litigation provide an opportunity to improve access to justice for future survivors of abuse.

Decisions about redress scheme processes are of fundamental importance, since they will directly affect how survivors feel they are treated. The design of any redress scheme will need to consider:

- a 'cut off' date that provides sufficient opportunity for survivors to seek redress while ensuring the scheme is sustainable
- the balance between ensuring there is appropriate expertise to aid decision-making and the importance of efficient and timely decision-making (to limit adverse impacts on survivors)
- how the level of payment relates to the standard of proof required, and how this will impact on survivors' experience (e.g. whether a simple application process with lower level payments is preferable to a scheme with higher level payments after a rigorous assessment process)
- whether Deeds of Release may be required, noting that the arguments for requiring a Deed of Release are weaker if recognition payments are significantly lower than civil litigation payments (NSW notes the Actuaries Institute's submission that a redress scheme is less likely to be sustainable if successful claimants can also litigate; this may require further investigation)
- whether, instead of a Deed of Release, an 'offset' or repayment of redress scheme payments should be required if a person also receives a payment through civil litigation
- the sustainability of the scheme, including the level of recognition payments that will provide effective redress while being financially sustainable, acknowledging the potential costs to the State of implementing other recommendations of the Commission, and
- the financial impact on NGOs, including the potential impacts on NGO services providers' ongoing capacity to partner with Government in the delivery of key community services.

## NSW GOVERNMENT GUIDING PRINCIPLES FOR GOVERNMENT AGENCIES RESPONDING TO CIVIL CLAIMS FOR CHILD SEXUAL ABUSE

These principles will promote cultural change across NSW Government agencies.

The 18 Guiding Principles will make litigation a less traumatic experience for victims and ensure a compassionate and consistent approach across NSW Government when dealing with civil claims for child sex abuse.

### **These principles apply to current and future claims.**

The principles are as follows:

1. Agencies should be mindful of the potential for litigation to be a traumatic experience for claimants who have suffered sexual abuse.
2. Agencies will regularly make training available to lawyers who deal with child sexual assault matters. This training will address, for example, the effects of child sexual assault and the use of a trauma-informed framework when working on matters involving adult survivors of child sexual assault.
3. Agencies will consider resolving matters without a formal Statement of Claim.
4. Agencies will consider any requests from victims for alternative forms of acknowledgment or redress, in addition to monetary claims (for example, this could include requests for site visits).
5. Agencies should provide early acknowledgement of claims, including:
  - information about initial steps needed to resolve the claim (such as the estimated time for any necessary historical investigations by agencies) and where possible, potential timing (noting that for litigated matters timing will be governed by the court timetable); and
  - Information about services and supports available to claimants.
6. Agencies will communicate regularly with claimants (or their legal representatives) about the progress of their claim.
7. Agencies will facilitate access to free counselling for victims.
8. Agencies should facilitate access to records relating to the claimant and the alleged abuse to the claimant, subject to others' privacy and legal professional privilege.
9. In accordance with the Model Litigant Policy, agencies should consider paying legitimate claims without litigation. Agencies should consider facilitating an early settlement and should generally be willing to enter into negotiations to achieve this.
10. State agencies should not generally rely on a statutory limitation period as a defence;  
State agencies can rely on a statutory limitation period as a defence in matters involving multiple defendants, where there is a risk that the State could bear a disproportionate share of the whole liability owed to the plaintiffs.  
Principle 10 applies to defences under the *Limitation Act 1969* (NSW), and does not affect any other applications that a defendant may make at common law (for example, an application that a court strike out or stay proceedings that are an abuse of process).
11. Agencies will resolve all claims as quickly as possible, and will seek to resolve the majority of claims within two years, or for matters proceeding to hearing, to have the matter set down for hearing within two years. Progress may depend on the conduct of plaintiffs' lawyers and police investigations.

12. To reduce trauma to victims and to reduce unnecessary cost and delay, agencies will suggest to claimants a range of potential experts, being both acceptable to agencies and providing genuine choice to claimants, to facilitate agreement on the use of a single expert where practicable.
13. Agencies will, in accordance with the Model Litigant Policy, act consistently in the handling of claims and litigation. In particular, agencies will consider verdicts and settlements in other cases involving similar harm to victims of child sexual assault, both within and across agencies. Agencies will also take account of the individual circumstances of each case.
14. Agencies should consider the use of confidentiality clauses in relation to settlements on a case by case basis, taking into consideration:
  - The claimant's preference
  - Whether there is a cross claim or other related proceedings

In the event a confidentiality clause is used, it should not restrict a claimant from discussing the circumstances of their claim and their experience of the claims process.
15. Agencies should pursue alleged abusers for a contribution to any settlement amount where this is practical and where a perpetrator is clearly culpable.
16. In accordance with the Model Litigant Policy, agencies should offer an apology in all cases where they are aware the State has acted improperly.
17. Agencies acknowledge they are required to report claims of any serious indictable offence to the NSW Police Force.
18. Compliance with this policy and the Model Litigant Policy will be overseen through annual reports to the Senior Management Council or Social Policy Cabinet Committee (subject to the need to protect privacy and legal professional privilege) outlining:
  - the progress of civil matters involving child sexual assault
  - explanations for any significant delay in resolving matters
  - statements of compliance with Model Litigant Policy and these Principles.

These principles:

- A. Apply to all NSW Government agencies that deal with civil claims involving child sexual abuse.
- B. Apply to current and future claims from the date the principles are published, but should not apply to any claim that has been judicially determined or settled by the State.
- C. Complement the Model Litigant Policy and Premier's Memorandum *M1997-26 Litigation Involving Government Authorities* (which obliges agencies to be model litigants).
- D. Are binding but, as a policy document, are to be applied flexibly according to the circumstances of the case. They do not prevent NSW Government agencies from protecting the proper and legitimate interests of the State, which include legitimate steps to defend claims, including where a claim is vexatious, unmeritorious or an abuse of process.
- E. Are to be reviewed in light of any relevant recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.



**Justice**

**Discussion Paper**

**Limitation periods in civil claims for child sexual abuse**

**January 2015**



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## 1. Introduction

The terms of reference of the royal commission into institutional responses to child sexual abuse (**the Royal Commission**) require consideration of the extent to which victims of child sexual abuse have achieved justice under the existing civil litigation system, and whether reforms are required. The evidence gathered by the Royal Commission to date suggests that many victims have been unable to pursue civil compensation, and of those who have, many have found the process of civil litigation to be traumatic.

The NSW Government is looking at possible measures to address the barriers to litigation that victims of child sexual abuse may experience. The purpose of this paper is to seek community views in relation to potential amendments to the *Limitation Act 1969 (NSW)* (**Limitation Act**) regarding claims based on child sexual abuse.<sup>1</sup>

The discussion paper is not intended to provide an exhaustive analysis of legal and other issues surrounding the operation of statutory limitation periods in relation to civil claims for child sexual abuse.<sup>2</sup> Rather, the paper identifies the advantages and disadvantages of particular reform options and seeks community input regarding the merits of each approach.

The NSW Government is aware that the Royal Commission is meeting with a range of groups to look at issues relating to redress and civil litigation, and will publicly consult on a proposed approach before it releases its final report in mid-2015. The Royal Commission's report could include proposals to address concerns arising in relation to civil litigation for victims of child sexual abuse. It may also include proposals for a redress scheme. In considering any reform in this area the NSW Government will need to consider recommendations made by the Royal Commission and, in particular, the combined impact of any reforms in this area. The Department of Justice invites interested individuals and organisations to respond to the issues raised in this discussion paper.

Submissions should be sent to: Justice Policy, Department of Justice, GPO Box 6, Sydney NSW 2001, or [justice.policy@agd.nsw.gov.au](mailto:justice.policy@agd.nsw.gov.au) by 10 March 2015.

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<sup>1</sup> In this paper, the term 'child sexual abuse' includes conduct that would constitute sexual assault and sexual misconduct, including acts that would be classified as an indecent assault under the criminal law. Further, as the focus of the paper is the operation of limitation periods in civil claims for child abuse, the terms 'victim' and 'plaintiff' are used to refer to survivors of child abuse. The term 'defendant' can include the perpetrator of the abuse and/or any institution that may be responsible for the abuse.

<sup>2</sup> However, a background paper detailing the operation of the relevant legislative provisions of the Limitation Act is Attachment 1. A table summarising the available statutory provisions is Attachment 2. Examples of legislative provisions from other jurisdictions are contained in Attachment 3.

## 2. The issue

### ***Statutory limitation periods – general considerations***

In common law jurisdictions people who have been injured by the actions or negligence of another have a general right to bring a claim for compensation and for that claim to be determined by a court.

At the same time, common law jurisdictions also commonly enact statutes that restrict the maximum time after an event that legal proceedings may be initiated.

The purpose of statutory limitation periods is to protect defendants from having to defend claims when they should not reasonably be required to do so. In Australia, the High Court has identified the following four broad rationales for imposing limitations on the time allowed to plaintiffs to bring a claim:

- a. The public interest requires that disputes be settled as quickly as possible.
- b. Delays are likely to lead to relevant evidence being lost.
- c. People should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them. This applies particularly to insurers, public institutions and businesses, particularly limited liability companies, and applies even to personal injury claims, as it may be 'unfair to make the shareholders, rate payers or tax payers of today ultimately liable for a wrong of the distant past'.
- d. It can be 'oppressive' or 'cruel' to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed.<sup>3</sup>

In addition, it is sometimes argued that plaintiffs should be expected to pursue their claims with reasonable diligence.

However, statutory limitation periods must strike a fair balance between these considerations and the general right of all people to have breaches of their civil rights determined by a court.

Many jurisdictions, including NSW, provide for extensions of limitation periods where certain exceptional circumstances apply, for example, where the plaintiff is a minor or is under a disability (such as a psychiatric illness). Extensions are also available for 'latent' injuries, where the plaintiff is unaware of an injury until many years after the incident that caused it (such as injuries caused by exposure to tobacco). For some limited classes of matters (relating to dust diseases) the *Limitation Act* no longer applies at all.<sup>4</sup>

These exceptions were developed in response to victims with particular characteristics or injuries that meant they could not reasonably be expected to make a claim within the standard limitation period.

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<sup>3</sup> *Brisbane South Regional Health Authority v Taylor* [1996] 186 CLR 541 at 552 per McHugh J.

<sup>4</sup> Section 12A of the *Dust Diseases Tribunal Act 1989* (NSW) provides that proceedings concerning dust related conditions may be brought at any time and that this is not affected by anything in the *Limitation Act*.

Without these exceptions, the strict application of limitation periods would result in a large proportion of these kinds of plaintiffs being, for practical purposes, unable to litigate their legitimate claims for compensation. Such plaintiffs would also be disproportionately affected by the strict application of limitations periods compared to other personal injury victims.

### ***Child sexual abuse claims and limitations periods***

It is well documented that many victims of child sexual abuse do not disclose their experiences or act on them until decades after the abuse, if ever. For example:

- a. The Royal Commission's Interim Report states that, based on private sessions held between 7 May 2013 and 30 April 2014, the average time for a victim to disclose the sexual abuse was 22 years, with men taking longer than women.<sup>5</sup>
- b. In a study of sexual abuse allegations by 180 victims against Anglican clergy in Australia, the *average* time from the alleged sexual abuse to making a complaint was 25 years for males and 18 years for females.<sup>6</sup>

As a consequence, the application of statutory limitations periods to child sexual abuse claims can result in many claimants being statute barred and therefore unable to obtain civil remedies. As such, the impact of statutory limitation periods on claims for child sexual abuse can be disproportionate to their impact on many other personal injury claims.

Another factor that distinguishes child sexual abuse from other personal injury claims is that the reasons why victims fail to commence proceedings (or indeed report the abuse) are frequently connected to injuries caused by the abuse. For example, child sexual abuse victims may not commence proceedings because of depression, post-traumatic stress or other mental conditions resulting from the abuse. Arguably, denying a person the opportunity to have their claim determined by a court because of factors caused by the alleged misconduct for which compensation is sought can be a serious denial of justice.

One issue that has caused concern amongst victims is that, while there is a time limit on commencing a civil claim, there is no time limit for charging a person with a serious indictable offence, including sexual abuse of a child. It may seem incongruous that a perpetrator can be charged and convicted on the highest standard of proof for a historical act of child sexual abuse, but the same evidence relating to the same act is, based on the statutory bar, considered too prejudicial to permit civil proceedings.<sup>7</sup>

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<sup>5</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report: Volume 1*, pp.158 & 197 downloaded 28.7.2014: [http://www.childabuseroyalcommission.gov.au/about-us/reports/interim-report-volume-1-final-020714\\_lr\\_web](http://www.childabuseroyalcommission.gov.au/about-us/reports/interim-report-volume-1-final-020714_lr_web) ("Interim Report: Volume 1").

<sup>6</sup> P. Parkinson, K. Oates & A. Jayakody, 'Breaking the long silence: Reports of child sexual abuse in the Anglican Church of Australia' (2010) 6(2) *Ecclesiology* 183 accessed at: [www.anglican.org.au/docs/Study%20of%20Reported%20Child%20Sexual%20Abuse%20in%20the%20Anglican%20Church%20May%202009%20Full%20Report.pdf](http://www.anglican.org.au/docs/Study%20of%20Reported%20Child%20Sexual%20Abuse%20in%20the%20Anglican%20Church%20May%202009%20Full%20Report.pdf), quoted in Cashmore & Shackel, *The long-term effects of child sexual abuse*, (CFCA Paper No.11, Australian Institute of Family Studies, January 2013) accessed at: <http://www.aifs.gov.au/cfca/pubs/papers/a143161/index.html> on 28.1.2014.

<sup>7</sup> This has occurred in Queensland where, even though the offender, Bill D'Arcy, was convicted of sexual offences against the plaintiffs, the Court declined the plaintiffs' application to extend the limitation period on

### ***Existing exceptions***

As noted above, there are already a number of exceptions to the general statutory limitation periods in NSW. These include:

- a. The specific exception that removes the application of the Limitation Act to dust diseases claims (which has no application to child sexual abuse claims)
- b. The general exceptions in the Limitations Act that suspend the limitations period while a person is under a 'disability' (as a minor or due to physical or mental incapacity) or because of a latent injury.

Child sexual abuse victims may be, in some cases, able to satisfy a court that the general statutory exceptions apply. Courts have held that psychiatric injuries can constitute a disability and have held in a number of cases that child sexual abuse victims have satisfied the disability exception on these grounds. The High Court has also confirmed that latent injuries can include psychiatric injuries, although courts have decided both for and against plaintiffs regarding this exception in relation to child sexual abuse.

However there remain significant difficulties to relying on these exceptions for child sexual abuse victims. These include that the exceptions do not properly fit the circumstances of these matters in some cases and in some respects are too narrow. Specifically:

- a. The existing exceptions covering mental incapacity (disability and latent injury) may not adequately cover the range of reasons why a child sexual abuse victim may be unable to commence proceedings within the standard limitation period. While some child sexual abuse victims may be able to establish that they had a recognisable psychiatric injury sufficient to establish the definition of 'disability' or 'latent injury', other harms caused by the abuse that prevent a victim from commencing proceedings (such as intense feelings of shame or embarrassment) may be insufficient to establish the exception.
- b. There appear to be specific difficulties with the operation of the exception for minors. The exception for minors was modified in 2002 so that it has only limited application where minors were injured by a person *other than* a parent, guardian or close associate. These provisions may need to be re-examined in light of evidence about delayed reporting of child sexual abuse (including where the abuse is not perpetrated by relatives) to ensure they are not having a disproportionate impact on male victims, who are more likely than girls to be abused by persons outside the family.

Further, the process of proving that an exception applies can, in itself, be traumatic for victims of child sexual abuse. Once a limitation defence is raised by a respondent the onus of proof shifts to the plaintiff to establish that an exception applies. This requires extensive

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the basis that the 38 year delay between the abuse and the commencement of civil proceedings was significantly prejudicial to the defendant: *Applications 861 and 864* (unreported, Botting DCJ, District Court of Queensland, 21 June 2002).

proof of the nature of the psychiatric injury and is likely to include examination and cross-examination of the plaintiff, which can be deeply traumatising.<sup>8</sup>

The requirement that plaintiffs prove that the exceptions apply can affect settlement negotiations. There is a risk that plaintiffs may be more likely to settle meritorious claims on less favourable terms because of the risks that they may not be successful in establishing the exceptions to the Act.

### Discussion questions

1. Do the existing statutory exceptions to limitation periods provide sufficient access to justice for victims of child sexual abuse?

### *Changes to NSW Government practice*

On 3 November 2014, the NSW Government announced 18 guiding principles for government agencies responding to civil claims for child sexual abuse (**the Principles**).<sup>9</sup> The Principles only impact the way that government agencies respond to civil claims against them for child sexual abuse. They do not apply to other defendants. The Principles were formulated with the intention of minimising any further trauma to victims caused by the experience of civil litigation, and ensuring that the State takes a compassionate and consistent approach in these types of claims.

Principle 10 of the NSW principles declares that agencies should not generally rely on a statutory limitation period defence. However, agencies can rely on a limitation defence in matters involving multiple defendants, but only where there is 'a risk that the State could bear a disproportionate share of the whole liability owed to the plaintiff'. Principle 10 does not prevent any other applications that a defendant may make at common law, such as applications to strike out or stay proceedings.<sup>10</sup> A similar approach has been adopted in Victoria.<sup>11</sup>

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<sup>8</sup> A study of victims who had contact with the legal system revealed that, as a result of that experience 87% felt bad about themselves, 71% were depressed, 89% felt violated, 53% felt distrustful of other people and 80% reported being reluctant to seek further help: quoted in Anthony Gray, 'Extending Time Limits in Sexual Abuse Cases in Australia, America and Canada' (2011) 10:2 *Whittier Journal of Child and Family Advocacy* 227 at p230.

<sup>9</sup> NSW Government guiding principles for government agencies responding to civil claims for child sexual abuse: <http://www.justice.nsw.gov.au/Documents/Media%20Releases/2014/NSW%20Gov%20GuidIng%20Principles.pdf>

<sup>10</sup> Principles 10: "State agencies should not generally rely on a statutory limitation period as a defence. State agencies can rely on a statutory limitation period as a defence in matters involving multiple defendants, where there is a risk that the State could bear a disproportionate share of the whole liability owed to the plaintiffs. Principle 10 applies to defences under the *Limitation Act 1969* (NSW), and does not affect any other applications that a defendant may make at common law (for example, an application that a court strike out or stay proceedings that are an abuse of process)."

<sup>11</sup> The Victorian Government has also released a policy that restricts the use of statutory limitations defences by Victorian government agencies. The Common Guiding Principles for responding to civil claims involving allegations of child sexual abuse relevantly provide that "Departments should ordinarily not rely on a defence that the limitation period has expired, either formally (for example in pleadings) or informally (for example in

As Principle 10 only applies to government agencies, there is currently nothing preventing other defendants from using a statutory limitation period defence. Amendments to the Limitation Act would be required should it be considered appropriate to prevent or restrict *all* defendants from relying on a statutory limitation period defence in civil claims for child sexual abuse.

### ***Other jurisdictions – legislative exceptions for child sexual abuse claims***

At this stage no Australian jurisdiction has created specific exceptions to limitation periods for victims of child sexual abuse. However, the Victorian Government recently released an exposure draft bill proposing to remove limitation periods for civil actions relating to ‘criminal child abuse’, which is defined as physical or sexual abuse of a minor that constituted a criminal offence at the time it occurred.<sup>12</sup>

Various overseas jurisdictions have made significant exceptions for civil claims relating to child sexual abuse and other sexual crimes. In particular, in Canada eleven of the thirteen provinces and territories have made legislative changes to limitation periods for these matters, with most provinces removing limitation periods entirely.

The key variations in the approaches taken in other jurisdictions are whether the legislation:

- a. removes the application of limitation periods to certain classes of plaintiff and/or injury altogether;<sup>13</sup> OR
- b. reverses the presumption that the limitation period should apply, so that the onus is on the defendant to prove that the plaintiff was capable of commencing proceedings sooner;<sup>14</sup> OR
- c. provides that a standard limitation period applies, but that a plaintiff can displace the limitation period if they fall within a statutory exception.<sup>15</sup>

There are also important variations in the scope of the claims to which the exceptions apply. These include:

- a. The nature of the conduct to which the exception applies – whether it includes sexual misconduct, or is limited to sexual assault; and whether non-sexual assaults are included;<sup>16</sup>

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the course of settlement negotiations). If a limitation defence is relied on, careful consideration should be given as to whether it is appropriate to oppose an application for extension of the relevant period.” See <http://assets.justice.vic.gov.au/justice/resources/929338ee-af8d-48c2-abc4-72dc21a35159/common-guiding-principles-child-sexual-abuse-civil-claims.pdf>

<sup>12</sup> The Limitation of Actions Amendment (Criminal Child Abuse) Bill 2014 (exposure draft) (Victoria’s exposure draft Bill) [see Attachment 3].

<sup>13</sup> For example, see Victoria’s exposure draft Bill, Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Saskatchewan and Yukon [Attachment 3 at pp1-4].

<sup>14</sup> For example, see Northwest Territories and Ontario [see Attachment 3 at pp4-5].

<sup>15</sup> This is the kind of exception currently generally available under the NSW Limitations Act. For examples in other jurisdictions see Nova Scotia, Quebec and Prince Edward Island [see Attachment 3 at pp5-6].

<sup>16</sup> New Brunswick, Newfoundland and Labrador remove the limitation period for claims based on sexual misconduct (which includes sexual assault) but not for physical assaults. Victoria’s exposure draft Bill, Alberta,

- b. The nature of the victim to whom the exception applies – whether including all victims,<sup>17</sup> or limited to minors;<sup>18</sup>
- c. The nature of the relationship between the victim and the defendant – under some statutes the relationship of dependence between the plaintiff and defendant is the basis of an exception. The relevant relationships have been defined to include, for example, where the plaintiff was under the care of, dependent upon, in a fiduciary relationship with a person or organisation, or was in an intimate relationship with the defendant.<sup>19</sup>

A number of these provisions were expressly made retrospective.<sup>20</sup>

Many of these jurisdictions have had these exceptions for significant periods. For example, British Columbia has exempted these classes of claims from limitation periods since 1992 and, in its recent review of limitation periods, retained the exceptions.

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British Columbia, Manitoba and Saskatchewan remove the limitation period for claims based on sexual and physical assault. However, this is not a blanket removal in all circumstances, for example, in British Columbia there is no limitation period for claims based on sexual assault for all claimants (regardless of age or dependency), but claims for sexual misconduct will have a limitation period unless the victim was a minor at the time. Further, there is no limitation period for claims based on physical assault if the victim was a minor or in an intimate relationship with the defendant [see Attachment 3].

<sup>17</sup> Some Canadian provinces remove limitation periods for all victims of sexual assault, regardless of their age, such as British Columbia and Yukon [see Attachment 3].

<sup>18</sup> Victoria's exposure draft Bill. Also, in British Columbia and Yukon limitation periods for claims for sexual misconduct are only removed if the victim was a minor [see Attachment 3].

<sup>19</sup> Manitoba (physical assault only), New Brunswick, Saskatchewan and the Northwest Territories do not specifically mention minors, but rather refer to relationships of dependence or intimacy etc. between the plaintiff and defendant [see Attachment 3].

<sup>20</sup> Victoria's exposure draft Bill, British Columbia, Newfoundland and Labrador, Saskatchewan and Yukon [see Attachment 3].

### 3. Reform options

The following options for amending the *Limitations Act 1969* (NSW) have been identified as possible ways to resolve the problems identified in this paper:

- a. removing limitation periods from causes of action based on child sexual abuse
- b. reversing the presumption, so that limitation periods only apply to causes of action based on child sexual abuse if the defendant is able to demonstrate that the proceedings could have been commenced earlier;
- c. clarifying that the statutory exception for 'disability' includes psychological distress caused by child sexual abuse;
- d. removing the operation of limitation periods to causes of action based on child sexual abuse in circumstances where there is a criminal conviction based on the same or substantially similar facts; or
- e. amending the post-2002 provisions relating to minors so that all minors are subject to the same exception, regardless of the characterisation of the perpetrator.

Regardless of the option chosen, it will be necessary to determine whether the amendment should be retrospective and the type of actions that will be included. These issues are considered further below.

#### ***Option A: Remove limitation periods in claims for child sexual abuse***

This option completely removes the application of the *Limitation Act* from a defined class of claims. This option is based on the British Columbia legislation, which:

- a. Applies to claims of misconduct of a sexual nature (including, without limitation, sexual assault) that occurred while the claimant was a minor;
- b. Applies to claims of assault or battery that occurred while the claimant was a minor; and
- c. Is expressly retrospective, in that it applies 'whether or not the claimant's right to bring the court proceeding was at any time governed by a limitation period'.

Advantages of this option include that:

- a. The amendment would be simple to apply;
- b. There would be no need for plaintiffs to provide proof of their psychological injury at an interlocutory stage, which has the potential to reduce the risk of re-traumatisation to plaintiffs;
- c. The amendment would avoid legal costs being incurred on contested limitation period defences, although the overall impact on the costs of litigation is difficult to predict with certainty;
- d. This option may increase the fairness of settlement negotiations and encourage defendants to focus on the merits of the case.

This option would be similar to the treatment of claims for dust related conditions to which the *Limitation Act 1969* does not apply.

The disadvantages of this option include that making it easier to bring historical claims may mean that more claims are brought in circumstances where important evidence has been lost. It may be significantly more difficult for defendants to properly defend, and for courts to properly decide, such cases.

However, there are factors that would mitigate these risks, such as the capacity of defendants to apply to the court to stay or strike out the proceedings. Where a court hears a stay application the court's discretion as to whether a case can be heard is based on factors including whether there is irremediable prejudice to the defendant so that a fair trial is not possible. Given that long delays are typical in these cases, it may be preferable that a court's decision to hear or not hear a claim is based on these factors, rather than on a technical issue regarding whether the statutory period has expired and whether any exceptions may apply.

In any case, removing the limitation period would not change the fundamental requirement that plaintiffs prove all the elements of the relevant tort on the balance of probabilities in order to bring a successful substantive claim.

#### **Discussion questions**

2. Do the advantages of Option A outweigh any disadvantages?
3. If Option A were adopted, would it be sufficient to rely on existing civil procedures (such as applications to strike out, dismiss or stay proceedings) to protect the proper administration of justice, including in cases where a fair hearing of a matter may not be possible?

#### ***Option B: Reversing the presumption that limitation periods apply to causes of action based on child sexual abuse***

Currently, a defendant must specifically plead that an action is statute barred in order to rely on the limitation period as a defence to a claim. However, once the defendant pleads the limitation period, the onus shifts to the plaintiff to prove that the claim was commenced within time, or that the limitation period should be extended because one of the statutory exceptions applies.

Option B is to reverse the presumption that limitation periods apply to causes of action based on child sexual abuse.

The Ontario legislation provides that:

- a. The limitation period does not run in a claim based on sexual or physical assault if the plaintiff is incapable of commencing the proceedings because of his or her physical, mental or psychological condition;

- b. In a claim for physical assault, where prescribed circumstances apply,<sup>21</sup> there is a presumption that a plaintiff was incapable of commencing proceedings any earlier;
- c. In all claims for sexual assault there is a presumption that a plaintiff was incapable of commencing proceedings any earlier; and
- d. The onus is on to the defendant to prove that the plaintiff was capable of commencing proceedings earlier. If the defendant is successful, the claim will be statute barred unless it was commenced within 2 years.

An alternative approach would be to provide that the limitation period does not run in child sexual abuse cases unless the defendant can prove that the failure to run the case within the statutory period has caused them actual prejudice, for example, where the passage of time means that records have been destroyed or crucial witnesses have died.

Advantages of this option include that:

- a. It links the determination of whether the case can be heard to the plaintiff's capacity or actual prejudice to the defendant, rather than to an arbitrary statutory period;
- b. It may be broader than the current statutory exceptions (for example, the reference to 'mental or psychological condition' could be defined to cover the range of reasons known to prevent child sexual abuse victims from commencing proceedings);
- c. It limits the circumstances in which a defendant could raise a limitation period defence.

Disadvantages of this option include that:

- a. It is unlikely to significantly reduce legal costs, as it will still allow the parties to contest the limitation point, although reversing the presumption may mean that this occurs less often;
- b. Where the issues are considered as interlocutory matters, this will continue to increase the duration of litigation;
- c. Where the plaintiff is required to bring evidence to refute the defendant's case it may re-traumatise the plaintiff;
- d. If the reasons for the delay are only in the plaintiff's knowledge, it may be difficult for the defendant to demonstrate that the proceedings could have commenced earlier;

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<sup>21</sup> Where the plaintiff was in an intimate relationship with, or dependent (financially or otherwise) on, the perpetrator at the time of the assault

- e. The alternative approach (*i.e.* providing that the limitation period applies when there is prejudice to the defendant) is likely to only apply in limited cases. It may also be very similar to a stay application.
- f. It lacks the specificity of Option A.

#### **Discussion questions**

- 4. Do the advantages of Option B outweigh any disadvantages?
- 5. Are there other advantages or disadvantages of Option B?

#### ***Option C: Clarify the definition of 'disability'***

This option would retain the application of statutory limitation periods to causes of action based on child sexual abuse, but would clarify the definition of 'disability' to ensure that it applies to plaintiffs who are unable to commence proceedings because of the psychological difficulties they may have confronting or recounting their experiences of abuse.

Currently 'disability' is defined in the Limitation Act to include where a person is incapable of, or substantially impeded in, the management of his or her affairs in relation to the cause of action, for reasons including 'any disease or any impairment of his or her physical or mental condition', for a continuous period of 28 days or more. The courts have held that 'substantial impairment' requires that the impairment be more than 'trivial or minimal' but does not require total impairment.<sup>22</sup> In practice, what is sufficient to establish 'substantial impairment' has varied from case to case, but depression and PTSD have been sufficient in some cases.<sup>23</sup>

This option aims to clarify that the circumstances in which a child sexual abuse victim is entitled to claim the exception for 'disability' due to his or her mental condition:

- a. do not require that the plaintiff show that any mental incapacity was due to a diagnosable psychiatric condition;
- b. can include, for example, where a plaintiff does not commence proceedings due to:
  - i. intense feelings of shame connected to the abuse;
  - ii. an inability to confront or recount their experiences of abuse; or
  - iii. a belief that his or her allegations of abuse would not be believed.

This option has possible disadvantages, including that:

- a. It may not significantly reduce the legal costs of litigation regarding limitation periods;

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<sup>22</sup> *Kotulski v Attard* [1981] 1 NSWLR 115.

<sup>23</sup> *Kotulski v Attard* [1981] 1 NSWLR 115; and *Guthrie v Spence* [2009] NSWCA 369.

- b. Where limitation periods are considered as interlocutory matters, it will continue to increase the duration of litigation and may increase the trauma to the plaintiff;
- c. It tends to equate being a victim of child sexual abuse *per se* with being under a disability, which is at odds with the general approach, where specific types of injury, disease or impairment constitute a disability;
- d. The expanded definition may not cover those victims who are not constantly impeded in the management of their affairs, for example, those victims who experience PTSD later in life.

Under the Limitation Act the 'ultimate bar' operates to prevent claims being brought from 30 years after the cause of action accrued, regardless of whether the 'disability' exception might otherwise apply. If option C is adopted, consideration should be given to whether the ultimate bar should continue to apply to the 'disability' exception in child sexual abuse cases. The ultimate bar is premised on an assumption that all cases brought more than 30 years from the date of the cause of action are likely to involve significant prejudice to the defendant. However, the ultimate bar is arbitrary and may not reflect the existence of actual prejudice to the defendant in every case. It may be more appropriate for courts to determine prejudice arguments on a case-by-case basis.

Consideration has also been given to whether there is any scope for extending the application of the 'latent injury' exception in child sexual abuse matters.

Currently, a court cannot grant an extension for 'latent injury' unless the plaintiff was unaware they had suffered an injury, the extent of the injury and the connection between the injury and the act or omission of the defendant. Unlike the disability exception, the 'latent injury' exception requires a causal connection between the abuse and the injury. A 'latent injury' can include psychiatric injuries.

Child sexual abuse victims may have difficulty in establishing the latent injury exception. In particular, it may be difficult to establish that the injury was caused by the abuse, as there may be multiple possible causes for the range of problems experienced by child sexual abuse survivors in later life. However, an amendment deeming that an injury (or a particular kind of injury) was caused by the abuse would appear to be inappropriate, given that the question of the cause of the injury is central to the issue of the defendant's liability. As such, there appears to be little scope for amending the definition of 'latent injury' in child sexual abuse cases.

#### **Discussion questions**

- 6. Do the advantages of Option C outweigh any disadvantages?
- 7. Is there any appropriate way to amend the latent injury exception to better accommodate child sexual abuse claims?

***Option D: Remove limitation periods where there has been a conviction for child sexual assault***

A possible limited amendment would be to remove the application of the *Limitation Act* in circumstances where the defendant has already been convicted of a criminal offence relating to the sexual or indecent assault of a child based on the same factual circumstances.

The rationale for the amendment is that there is little apparent reason why a perpetrator of abuse should not be capable of being held civilly liable, in circumstances where he or she has been found guilty of the relevant conduct on the criminal standard of proof.

However, this option is narrow. Given that the criminal standard of proof (beyond reasonable doubt) is stricter than the civil standard (balance of probabilities) it would be likely to apply only to a small number of potential civil cases. Further, there may be reasons why police and/or prosecutors may not proceed to charge and prosecute an offender that are not related to the guilt of the offender.

While a criminal conviction may be an appropriate basis to waive the limitation period for civil actions against perpetrators, it is not clear that option D could apply to third party institutions that may have been responsible for allowing the abuse to occur. This is because establishing the liability of a third-party institution is likely to require significant additional evidence to the evidence required to prove the direct perpetrator's guilt.<sup>24</sup>

In light of these limitations, it is likely that this option would only apply to a limited group of child sexual abuse claims.

**Discussion questions**

8. Is there value in adopting Option D, either alone, or in combination with any of the other options?
9. If Option D were adopted, should it apply only to civil claims against the direct perpetrator of the sexual abuse, or is there scope for it to also apply to claims against third party institutions responsible for allowing the abuse to occur?

***Option E: Amend the post 2002 provisions affecting minors sexually abused by a person who is not a 'close associate'***

Section 50E of the *Limitation Act* provides a special limitation period for minors injured by a close relative. Different limitation periods may apply depending on the characterisation of the perpetrator, and not the type of injury suffered as a result of the sexual abuse.

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<sup>24</sup> Although, different additional evidence will be needed depending on the basis of the institution's liability, whether due to vicarious liability (for example, because the perpetrator was an employee or agent of the institution) or negligence (where the institution had a duty of care to the plaintiff and breached the duty).

In summary,<sup>25</sup> children in NSW who are abused after 2002 whilst in the care of a capable parent or guardian are not considered to be under a disability. The operation of the limitation periods is determined by the characterisation of the perpetrator:

- a. If the abuser was a parent, guardian or 'close associate' of the child, then the limitation period will permit the child to bring proceedings between the ages of 25 and 37 years, depending on when the cause of action is actually discoverable;
- b. If the abuser was not a family member or 'close associate' of the child, then the limitation period (3-12 years) will commence when the injury was discoverable by the parent or guardian (which could be as early as when the abuse occurred).

These provisions may create the following issues:

- a. Children in NSW (and Victoria) who are abused by a person who is not a 'close associate' may be at a disadvantage compared with children in other jurisdictions, who will generally have at least until they are 21 years of age to commence proceedings for abuse that happened when they were a minor;
- b. Children in NSW who are abused by a parent, guardian or 'close associate' have considerably longer to institute proceedings than children who are abused by a stranger or person who does not fit the statutory definition of 'close associate'. The 'close associate' provisions may operate to indirectly discriminate against male children because they are statistically less likely to be abused by a person who would fit the statutory definitions of a parent, guardian or 'close associate'.

#### **Discussion questions**

10. Should the 2002 amendments relating to minors be retained as is or amended in light of the issues raised above?

#### ***The type of actions covered***

If amendment is supported it would be necessary to consider the type of actions to which any amendments should apply; that is, whether any amendments should be limited to causes of action based on child sexual abuse, or should also cover serious physical abuse of a child (either where it is related to sexual abuse or otherwise). (Considering whether any amendments should include a wider range of vulnerable plaintiffs other than children, like some of the Canadian provisions, is beyond the scope of this paper).

It may be appropriate for any amendments to apply to a broad range of sexual misconduct, given that sexual abuse in all its forms can have long term consequences for child victims. Notably, all the Canadian examples include sexual misconduct as well as sexual assault, where the victim was a child. In NSW it may be most appropriate to adopt the expressions

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<sup>25</sup> See Attachment 1.

‘sexual assault’ and ‘sexual misconduct’, which are broadly understood at common law,<sup>26</sup> to describe the breadth of claims covered.

Serious physical abuse could also be included in any legislative amendments, as children often experience a combination of physical and sexual abuse, and, like sexual abuse, serious physical abuse during the key developmental stage of childhood can lead to serious psychological harm. If serious physical abuse were excluded, and victims of historical physical abuse continued to be statute barred, this would raise questions about how courts could approach matters where sexual and physical abuse have been claimed, but where different limitation periods apply to the different causes of action.

However, if serious physical abuse were included, the common law definitions of ‘assault’ and ‘battery’ are so broad as to include physical contact that is considered to be minor or accidental, and threats of assault. If this were the case, there would be no time limit restricting when a person could institute a claim for any physical assault they suffered as a child, including a wide range of claims based on, for example, school bullying, minor accidental injuries and some false imprisonment claims. To some extent, this could be mitigated by definitions of serious physical abuse, and/or requiring that the serious physical abuse be related to sexual abuse.

If physical conduct is to be included, there is also a question as to how it should be defined. One option is to rely on the existing common law definitions of ‘assault’ and ‘battery’.<sup>27</sup> However, this would encompass all assaults, or threats of assault, including those that are inconsequential or accidental.

A variation would be to rely on the common law definitions of ‘assault’ and ‘battery’ but to limit the actions to those where a minor was in a relationship of dependence with the alleged defendant.

If both sexual and physical abuse are to be included, another approach could be to adopt the terminology of ‘criminal child abuse’ used in the Victorian exposure draft Bill. This would cover both sexual and physical misconduct that constituted a criminal offence under NSW or Commonwealth law at the time it was committed. In the Victorian Bill this terminology is defined to expressly cover both acts and omissions. Restricting the application of the amendments to ‘criminal’ acts would ensure that minor or accidental physical assaults (that may be less likely to have long-lasting psychological consequences) are excluded.

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<sup>26</sup> The terms ‘sexual assault’ and ‘sexual misconduct’ are not defined in the *Civil Liability Act 2002* (NSW), however, it is generally accepted that ‘sexual assault’ refers to any offence of a sexual nature committed upon another person, including sexual intercourse without consent, acts of indecency and indecent assault. ‘Sexual misconduct’ has included sexually inappropriate behaviour such as touching or displaying intimate parts of the body, or non-physical behaviour such as suggestive remarks: see Dominic Villa, *Annotated Civil Liability Act 2002* (NSW), (Lawbook Co., 2013) pp58-59.

<sup>27</sup> ‘Battery’ is a direct act of the defendant that causes contact with the body of the plaintiff without the latter’s consent. ‘Assault’ is any direct threat by the defendant that causes the plaintiff to reasonably apprehend imminent contact with the defendant, or a person or thing within the defendant’s control: see Trindade, Cane and Lunney (eds), *The Law of Torts in Australia* (Oxford University Press, 4<sup>th</sup> ed. 2007) pp36 & 48.

## Discussion Questions

11. How should the type(s) of actions to which any amendments apply be defined?

### ***Retrospectivity***

It is also necessary to consider whether any amendments should operate retrospectively (*i.e.* to all claims for child sexual abuse, whether the alleged abuse occurred before or after the amendments were passed) or prospectively (*i.e.* to claims for child sexual abuse where the alleged abuse occurred after the amendment came into effect).

The general position is that the law looks forward, not backward.<sup>28</sup> However, there are strong policy reasons to consider applying any amendments retrospectively, as these will only assist historical child abuse victims to pursue their claims if they are retrospective. The fact that there is often a substantial delay between the abuse and disclosure means that there are likely to be many potential plaintiffs whose cases would be statute barred unless any amendments have retrospective application.

If any legislative amendments are made retrospective they must clarify what, if any, application they would have where a plaintiff has previously brought a claim. The general principle is that a cause of action that has been determined cannot be re-litigated.<sup>29</sup> However, there may be some scope to allow cases to be heard where defeated solely on the basis of the expiration of the limitation period. The following circumstances would need to be considered:

- a. **Claims where the limitations issue was judicially determined at an interlocutory stage** (*i.e.* where the issue of limitation periods was determined as a separate question prior to a hearing on the merits of the case). If the court determined that none of the statutory limitation exceptions applied to the plaintiff, and the substantive merits of the case have not been heard by the court, there may be scope for the case to be determined on its merits in light of any subsequent legislative amendments.
- b. **Claims that are currently on foot.** This would include where the defendant has pleaded a limitation defence, and the defendant has either not applied for the issue to be determined as a separate question, or the court has refused that application. As the substantive merits have not yet been considered, there may be scope for the case to be determined in light of any subsequent legislative amendments.

## Discussion Questions

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<sup>28</sup> *Lex prospicit, non respicit.*

<sup>29</sup> The doctrine of *res judicata* precludes re-litigation of claim where there has been a final judgment on the merits of the case. The doctrine of collateral estoppel prevents identical parties from re-litigating issues that have been determined in prior litigation. See *Stokes (by a tutor) v McCourt* [2013] NSWSC 1014.

12. Should any legislative amendments be retrospective?

13. If they are to be retrospective, what transitional provisions may be required?

#### 4. Potential impacts

The rationale for adopting any of the options discussed above would be to facilitate victims of child sexual abuse bringing civil claims regarding the abuse, including many years after the event. As such, some increase in the number of such claims commenced would be expected, indeed, intended. This part of the paper considers what other impacts any changes could have.

##### *Direct Impacts*

Any legislative amendment is likely to have the following direct impacts:

- a. Some increase in the number of claims commenced/litigated;
- b. Some increase in successful claims; and
- c. Some increase in legal costs and/or damages incurred due to an increase in claims heard and in successful claims.

It is difficult to predict with any certainty the extent of any increase in claims that might be prompted by removing or altering the application of limitation periods in civil child sexual abuse claims.

It is widely accepted that child sexual abuse is a significantly underreported phenomenon in Australia.<sup>30</sup> The results of the Royal Commission's prevalence study indicated that 15.3% - 29.3% of girls and 3.8% - 14.2% of boys experience some form of sexual abuse.<sup>31</sup> While these statistics demonstrate that any reforms in this area have the potential to affect significant numbers of people, data shows that currently only a small minority of victims of abuse will seek compensation, with an even smaller percentage opting to do so through civil litigation.<sup>32</sup>

Nevertheless, given that courts have sometimes found claims for child sexual abuse to be statute barred, removing or reducing the application of statutory limitation periods is likely to result in at least some increase in the number of claims commenced. If the changes are retrospective, this could be expected to result in an initial period in which a backlog of historical claims are commenced and work their way through the system.

However, the extent of additional claims (including historical claims) that are commenced may be affected by other disincentives to litigation. These can include difficulties identifying

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<sup>30</sup> *Interim Report: Volume 1*, p9.

<sup>31</sup> *Interim Report: Volume 1*, p98.

<sup>32</sup> About 2 in 5 people who attended private sessions at the Royal Commission had sought compensation for their sexual abuse (630 people out of 1,476). Of the 630 people who did seek compensation, only 144 did so through civil proceedings (22.9%) as opposed to approaching the institution directly (41%), or applying to a redress scheme (21%) or victims of crime scheme (15.2%): *Interim Report: Volume 1*, p295-296.

the correct defendant, difficulties establishing vicarious liability, difficulties finding sufficient evidence (particularly in historical cases), an impecunious defendant, and the potentially re-traumatising impact of adversarial litigation of plaintiffs.

It is also not clear whether an increase in claims will correlate with an equivalent increase in *successful* claims. Any legislative amendment would not alter the defendant's level of responsibility. It would only ensure that the case can be heard. There are many factors that will impact on whether any additional claims are successful, and some claims will still fail on substantive grounds (*e.g.* because the plaintiff is unable to prove his or her case, or the defendant is successfully able to argue prejudice as a result of the passage of time).

Any increase in claims is likely to impact on legal costs in two important ways:

- a. There may be some savings in legal costs within matters because parties will not incur the costs of arguing the limitation point;
- b. Organisations against whom additional claims are made would incur additional legal costs. The impact is likely to be greatest on organisations that are likely to have to defend multiple claims. While an increase in the number of overall claims is likely to result in an increase in the total legal expenses for affected organisations, this will be partially offset by the savings from not taking limitation points in these cases.

The extent of any impact on costs will be partly determined by the option chosen to amend the legislation. For example, if the amendment provides that the limitation period still applies, but makes it substantially easier to establish the exceptions, this is likely to mean there will be additional cases, but that the legal costs associated with running a limitations defence will still be incurred by the parties.

The changes to the application of limitation periods may also impact on the quantum of damages payable in claims. It is likely that the possibility of relying on a limitations defence has given defendants greater bargaining power in settlement negotiations, and may have resulted in matters where the limitation point was raised settling for lower damages than matters where it was not in issue. At this stage it is difficult to determine the impact on settlement amounts, and it is likely that this is an impact that will manifest over time.

### ***Indirect impacts***

The potential increase in claims could also potentially have flow-on impacts, for example, on the provision of insurance.

An insurance company can be involved in litigation for child sexual assault either by defending a claim on behalf of the defendant, or by indemnifying the defendant for any damages that it pays to the plaintiff. In most cases, insurers are involved on behalf of institutional defendants with insurance policies. There are two types of insurance relevant to organisations working with children:

- a. Self-insurance by large organisations (such as the State of NSW and the Catholic Church), which will likely cover claims arising from sexual assault and negligence.
- b. Private, commercial insurance obtained by non-government organisations (**NGOs**) may exclude coverage for intentional injuries and criminal conduct. Many

such policies explicitly exclude coverage for injuries arising from sexual abuse. This means that insurance policies may not cover a civil claim for sexual assault. However, some insurance policies may cover claims based on other forms of liability (such as negligence, breach of non-delegable duty, vicarious liability and breach of fiduciary duty<sup>33</sup>).

It is possible that an increase in claims relating to child sexual abuse could have an impact on insurance premiums. However, the small percentage of personal injury claims that arise from child sexual abuse suggests that the impact on premiums may be relatively small, as even a significant proportional increase in claims may not justify a significant impact on premiums. To the extent that insurance providers do not cover claims based on child sexual abuse, the impact on insurance premiums would be minimal.

If there were an increase in premiums, this could have the potential to impact on the ability of smaller NGOs to obtain insurance or maintain premium payments on existing policies, which in turn could affect the ability of these NGOs to continue to provide services.

#### **Discussion Questions**

14. Is it likely that changes to the application of limitation periods to child sexual abuse cases would lead to a significant increase in the number of cases commenced?
15. Is it likely that any increase in civil child sexual abuse cases would have a substantial impact on insurance premiums?
16. If there were an impact on insurance premiums, is it likely that this would have any impact on the viability of any NGOs offering services to children, and how could this be managed?

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<sup>33</sup> British Columbia Law Institute Project Committee on Civil Remedies for Child Sexual Assault, Civil Remedies for Sexual Assault Report (BCLI Report No. 14, June 2001) p94.

## Attachment 1: Background Paper - Limitation periods in NSW

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### The legal context

In NSW, the *Limitation Act 1969* (**the Act**) sets out the statutory time limits within which civil claims must be commenced. After the expiry of the specified time period, court proceedings cannot be commenced unless one of the statutory exceptions applies.<sup>34</sup>

The Act applies to a wide range of civil claims. However, this paper is concerned only with the Act's application to claims for personal injury, which includes claims relating to physical and/or sexual abuse of a child. The following are the types of civil proceedings for personal injury that may be available to victims of child abuse (either on their own or in combination):<sup>35</sup>

- a. **Trespass to the person** (commonly known as **battery** or **assault**) may be found in circumstances where an injury (such as sexual assault) is intentionally inflicted (*i.e.* a wilful, deliberate act of the defendant). This type of tort is 'actionable per se', which means that the plaintiff only has to prove that the defendant intended to perform the act (not that the defendant intended to cause harm). This type of claim is usually brought against a direct perpetrator of abuse.
- b. **Negligence** can be established where the conduct of the defendant is negligent but not intentional or direct. Negligence is found where (i) the defendant owed the plaintiff (either personally or as a member of a specified class of persons) a duty to take reasonable care; (ii) the defendant negligently breached that duty of care (by act or omission); and (iii) the plaintiff suffers harm as a result of the breach. This type of claim is usually brought against organisations operating as service providers or regulatory agencies.
- c. **Vicarious liability** arises when a person is held liable for the wrongful act or omission of another person because of the relationship between them (*i.e.* employer and employee). In Australia, the leading case is inconclusive as to whether an employer can be vicariously liable for the criminal conduct of an employee.<sup>36</sup>

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<sup>34</sup> In NSW the plaintiff's cause of action is extinguished on expiration of the limitation period. In other Australian jurisdictions, the end of the limitation period merely bars the remedy, so that the plaintiff's right to bring the action remains in existence but it can no longer be enforced. See Peter Handford, *Limitation of Actions: the laws of Australia* (Thomson Lawbook Co, 2<sup>nd</sup> ed., 2009) p81.

<sup>35</sup> For example, in *CH v Birmingham* [2013] NSWSC 1218 the plaintiff alleged she was sexually assaulted by her teacher between 1977 and 1980. The plaintiff sued the teacher for trespass to the person, and sued the school (including the trustees and former headmasters) for negligence and vicarious liability for trespass to the person.

<sup>36</sup> In *New South Wales v Lepore* (2003) 212 CLR 511 the High Court delivered a number of conflicting judgments. Three of the seven judges held that a school authority cannot be vicariously liable for the sexual assault of a pupil committed by a teacher. Another three judges held that such a finding might be possible. The

The law of limitations is technically complex as the Act has been subject to a number of significant amendments over time. As a result, the length of the limitation periods that apply depend on when the cause of action accrued. There are also a number of statutory exceptions to the limitation periods that may apply. This background paper considers the current application of statutory time limits to commencing civil claims for personal injury, with a particular focus on claims relating to child abuse.

## Calculating the limitation period

In order to determine the latest date on which an action may be commenced, it is necessary to know:

- a. the length of the limitation period
- b. the date on which the limitation period begins to run (*i.e.* when the cause of action accrues or when the cause of action is discoverable)
- c. whether any of the statutory exceptions apply

Each of these matters is considered below. A table summarising the statutory limitation periods and the exceptions relevant to claims for physical and sexual abuse of a child is attached at **Attachment 2**.

### *The length of the limitation period*

The length of the limitation period applying to a personal injury claim<sup>37</sup> depends on whether the cause of action arose:

- a. Before 1990 the statutory period is 6 years from when the cause of action accrued.<sup>38</sup>
- b. Between 1990 and December 2002 the statutory period is 3 years from when the cause of action accrued.
- c. After December 2002 the statutory period is 3 years from when the cause of action was *discoverable*, or 12 years from the date of the act causing injury (sometimes referred to as the 'long-stop' provision).

### *The date on which the limitation period begins to run*

The phrase 'when the cause of action accrued' is used for claims arising before December 2002.<sup>39</sup> The general rule is that for torts of assault, the cause of action accrues when the wrongful act is done, even if the damage does not occur or is not discovered until later.<sup>40</sup> For

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seventh judge found that there could be a non-delegable duty of care.

<sup>37</sup> The same limitation periods apply to actions arising under the *Compensation to Relatives Act 1897*, however, the time period runs from the date of death of the deceased. For pre-December 2002 matters see s. 19 and for post December 2002 matters see ss. 50C and 50D of the *Limitation Act 1969*.

<sup>38</sup> It is now settled that the *Limitation Act 1969* is the applicable law for causes of action where the events occurred prior to 1 January 1971 (when the Act commenced) and proceedings have been commenced after that date: *Batistatos v RTA & Anor* [2006] HCA 27.

<sup>39</sup> Sections 14 & 18A.

<sup>40</sup> Handford, *Limitation of Actions*, p97.

negligence, the cause of action accrues only when damage is suffered (even where there is a substantial gap between when the breach of duty occurred and when the damage was suffered).<sup>41</sup>

The phrase ‘when the cause of action was discoverable’ is used for claims arising after December 2002.<sup>42</sup> This refers to the first date that a person knows (or ought to know) that an injury has occurred, that the injury was the fault of the defendant and was sufficiently serious to bring a legal action.

Courts have interpreted the ‘discoverability’ criterion for post-2002 claims beneficially for plaintiffs, holding that an action is not discoverable until the plaintiff receives professional advice that they have an action capable of being the subject of court proceedings.<sup>43</sup> While this has not been judicially considered in the context of child abuse actions, this is likely to mean that, for victims of child abuse, the action will be discoverable when they obtain a legal or medical opinion to the effect that they have a cause of action against a potential defendant.

While the discoverability criterion can significantly extend the limitation period in some cases, the long-stop provision (which commences when the event causing the injury occurs, rather than being based on the plaintiff’s knowledge) is intended to ensure that the cause of action cannot continue indefinitely.

## **Statutory exceptions to limitation periods in child abuse matters**

There are a number of exceptions to the limitation periods imposed by the Act. These include some limited powers of the court to extend the limitation period where just and reasonable to do so as well as specific exceptions where the plaintiff is under a disability or has a latent injury. The nature of the exceptions that may apply varies according to when the cause of action arose.

There are some important limitations on the application of the exceptions, including that:

- a. Other than the exception for latent injuries, none of the exceptions apply to claims where more than 30 years has passed since the cause of action arose (the ultimate bar).
- b. Even where exceptions may apply, an application for extension of time can still be defeated if a court considers that there is unreasonable prejudice to the defendant.<sup>44</sup>

### ***Extension by the discretion of the court***

Courts have general discretion to extend the limitation period in the following circumstances:

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<sup>41</sup> Handford, *Limitation of Actions*, p97.

<sup>42</sup> *Limitation Act 1969*, s. 50D.

<sup>43</sup> See for example *Baker-Morrison v State of NSW* [2009] NSWCA 35 at [44] and *State of NSW v Gillett* [2012] NSWCA 83.

<sup>44</sup> See for example *Batistatos v RTA & Anor* [2006] HCA 27.

- a. If the claim accrued before 1990, for a maximum of 1 year if the material facts were not known by the applicant until after the expiration of the limitation period.
- b. If the claim accrued between 1990 and December 2002, for a maximum of 5 years if it is just and reasonable to do so in the circumstances.
- c. If the claim arose after December 2002, the long-stop period of 12 years can be extended for as long as the court determines but not more than 3 years after the date on which the cause of action is discoverable.

For all claims after 1990, the Act requires that when exercising its discretion, courts have regard to factors such as the length of the delay, the reasons for the delay, the extent of prejudice to the defendant as a result of the delay, any conduct of the defendant that contributed to the delay and the extent of the injury or loss.

### ***Disability***

If a person is under a disability, the limitation period is suspended for the duration of the disability (but is still subject to the 30 year ultimate bar).<sup>45</sup>

The definition of ‘disability’ that applies to causes of action before 2002 includes:

- a. where a person is under 18 years of age or
- b. where a person is incapable of, or substantially impeded in, the management of his or her affairs in relation to the cause of action, for reasons including ‘any disease or any impairment of his or her physical or mental condition’, for a continuous period of 28 days or more.<sup>46</sup>

The courts have held that psychiatric injuries can constitute a disability. For example, in the case of *SB*, the court held that the plaintiff was under a disability due to the psychiatric injuries she suffered from being raped by her father for a period of 10 years.<sup>47</sup>

The courts have held that ‘substantial impairment’ requires that the impairment be more than ‘trivial or minimal’ but does not require total impairment.<sup>48</sup> In determining whether a plaintiff was under a disability, courts will examine the plaintiff’s activities in other spheres

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<sup>45</sup> *Limitation Act 1969*, ss. 52, 50F and 51.

<sup>46</sup> *Limitation Act 1969*, s. 11(3), however this excludes ‘protected persons’, being persons to whom a guardian has been appointed under the *Guardianship Act 1987* or for whom certain orders are in force under the *Guardianship Act 1987* or the *Trustee and Guardian Act 2009*.

<sup>47</sup> *SB v State of New South Wales* (2004) 13 VR 527. SB sued the State for negligently failing to prevent the assaults. The plaintiff and her siblings were made wards of the State and placed in foster care. The children were then removed after it was discovered the plaintiff was being sexually assaulted by her foster father. The children were returned to the care of their birth father, who proceeded to rape the plaintiff over the next 10 years and had two children with her. Even though it was not necessary in the circumstances (because the plaintiff was found to be under a disability), the court noted that it believed on the balance of probabilities that the plaintiff was unaware of the nature and extent of her personal injury and the fact it was connected to the rapes by her father (thus indicating that an extension would have been granted on the basis of latent injury provisions).

<sup>48</sup> *Kotulski v Attard* [1981] 1 NSWLR 115 was a claim by a widow after the death of her husband in a traffic accident. The court held that her “depressive state” constituted a disability.

of life. However, the capacity to successfully engage in some aspects of life (including other litigation) will not necessarily preclude a finding that the plaintiff was substantially impaired regarding their capacity to bring proceedings relating to the abuse. For example:

- a. In *Saunders*, the plaintiff was held to have been under a disability, even though she was able to engage in employment and raise a family during that period.<sup>49</sup>
- b. In *Guthrie v Spence*, the plaintiff was able to undertake a course of tertiary study, seek compensation for a physical injury, report the sexual assaults to police and apply for victim's compensation. The Court still accepted that the plaintiff was impeded from commencing the claim for a substantial period because of his PTSD, and therefore extended the limitation period for the duration of the disability.<sup>50</sup>
- c. In several cases plaintiffs were held to be under a disability in relation to commencing compensation proceedings for sexual abuse, even though they were able to engage in criminal and family law proceedings.<sup>51</sup>

However, different provisions may apply to persons with a 'disability' in causes of action arising after December 2002.

#### ***Exceptions for minors for injuries after 2002***

For causes of action arising after December 2002 minors (and 'protected persons') who have a capable parent or guardian are *not* generally considered to be under a disability.<sup>52</sup>

However, a specific exception does apply where a child is abused by a parent, guardian or a person in a close relationship with the parent/guardian (a '**close associate**'). In these cases the cause of action is not 'discoverable' until the victim turns 25 years old, or when the action actually becomes discoverable, whichever is the later. The 12 year long-stop period runs from when the victim turns 25, ending when they are 37 years old.<sup>53</sup>

The Act defines a 'close associate' as a person whose relationship with the parent/guardian is such that it:

- a. might influence the parent/guardian not to bring an action on behalf of the victim, or
- b. might cause the victim to be unwilling to disclose the act that caused the injury to the parent/guardian.<sup>54</sup>

This definition could conceivably include priests, teachers, scoutmasters, grandparents, sports coaches and de facto partners of the parent/guardian, although this would need to be determined by the courts on a case-by-case basis.

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<sup>49</sup> *Saunders & Anor v Jackson* [2009] NSWCA 192 (a claim for assault).

<sup>50</sup> *Guthrie v Spence* [2009] NSWCA 369 at [10] (a claim for sexual assault).

<sup>51</sup> See for example *State of NSW v Bennie* [2005] NSWCA 172 (claim by a Police officer for false imprisonment and assault) and *State of NSW v Higgins* [2005] NSWCA 244 (claim for sexual assault).

<sup>52</sup> *Limitation Act 1969*, s. 50F(2).

<sup>53</sup> *Limitation Act 1969*, s. 50E.

<sup>54</sup> *Limitation Act 1969*, s. 50E(2).

The definition assumes that a personal relationship with the abuser will impact the likelihood of the abuse being reported by the child and/or whether the parent/guardian commences proceedings. However, it has been argued that the provision does not go far enough because it fails to recognise that children often fail to disclose abuse, regardless of their relationship with the perpetrator, because of the nature of the acts and the feelings they have about those acts.<sup>55</sup>

The effect of this provision is to place a victim who is abused after 2002 by a parent, guardian or close associate in a better position to access civil litigation than a victim of abuse by a perpetrator who is not a 'close associate'. This is demonstrated by the following examples:

- a. A survivor of child abuse inflicted by a parent or close associate after 2002 will have three years from when he turns 25 years old, or from when the cause of action is actually discoverable, whichever is the later. This means that, at a minimum, he will have until he is 28 years old to institute proceedings (3 years after turning 25) and possibly until he is 37 years old to commence his claim (as the long-stop period of 12 years commences when he turns 25 years). If he has not 'discovered' the extent of his injuries within this period, courts have discretion to grant a further extension of the long-stop pursuant to s. 62A of the *Limitation Act 1969*.
- b. By contrast, if a child is sexually abused after 2002 by a person that is *not* a 'close associate', and is in the custody of a capable parent or guardian, the exemption for disability will not apply and any civil proceedings must be brought within the standard time period (*i.e.* within 3 to 12 years). The period would be determined by when the injury was *discoverable* by the parent or guardian. For example,
  - i. If a 10 year old girl ("Y") is sexually abused by someone who is not a close associate and she discloses the abuse to her mother immediately, then the action would have to be commenced by the time the girl turned 13.
  - ii. If her mother discovers the abuse when Y is 12 years old, the action would have to be commenced by the time Y is 15 years old.
  - iii. If Y's parents do not know of the abuse (and are not deemed to have constructive knowledge<sup>56</sup>), at best, the limitation period would expire 12 years after the event, when Y turns 22.

In the first two examples, the time period is considerably shorter than in other Australian jurisdictions (where the child would have until 21 years of age).<sup>57</sup>

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<sup>55</sup> Dr Ben Mathews, 'Post-lpp special limitation periods for cases of injury to a child by a parent or close associate: new jurisdictional gulfs' (2004) 12(3) *Torts Law Journal* 239 accessed from <http://eprints.qut.edu.au>, p9.

<sup>56</sup> In determining when cause of action is discoverable in these circumstances, facts that are known or ought to be known by a capable parent or guardian are taken to be facts that are known to the person: *Limitation Act 1969*, s. 50F(3).

<sup>57</sup> Mathews (2004) pp.11-14. NSW and Victoria are the only Australian jurisdictions to have enacted these

There is an exception to the application of these provisions. A victim of abuse after 2002 by a parent, guardian or close associate can get an extension of the limitation period if they can demonstrate that proceedings were not instituted because of an 'irrational' decision by a parent or guardian.<sup>58</sup>

However, it has been argued that the 'irrational decision' exception is too narrow, as a parent or guardian might elect not to commence proceedings on behalf of a child for reasons that are 'rational' (for example, where a parent or guardian has concerns about putting the child through the trauma of civil proceedings, or is not aware of the seriousness of the injury caused by the abuse).

A further concern with these provisions is that they may have the potential to discriminate indirectly against male victims, who are significantly less likely to be abused by a family member or person who meets the statutory definition of 'close associate'. The Royal Commission's Interim Report states:

*"Most victims are sexually abused by someone they know. But there is a significant gender difference as to whether that person is from within the family or not:*

- *Girls are more likely to be abused by a family member. More than 50 per cent of perpetrators were fathers, stepfathers and other male relatives (including siblings) compared to 21 per cent for boys.*
- *For boys, the largest category of perpetrators was 'another known person'.*
- *Twice as many boys (18 per cent) have been sexually abused by a stranger compared with girls (9 per cent)."*<sup>59</sup>

### **Latent Injury**

If a person is unaware of the fact, nature, extent or cause of the injury then the court has discretion to extend the limitation period for however long it deems just and reasonable in the circumstances, so long as the plaintiff commenced proceedings within 3 years of becoming aware of the nature of their injury.<sup>60</sup>

An awareness of the 'nature and extent' of the injuries requires that the plaintiff know the nature of his or her injury and its broad extent, rather than knowing of a diagnosed condition.<sup>61</sup> The High Court has confirmed that latent injuries can include psychiatric injuries where the 'knowledge of a disorder, and of its cause, occurs at or about the same time as

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provisions. In *Hopkins v State of Queensland* [2004] QDC 021 (unreported, McGill DCJ, 24 February 2004) the plaintiff instituted proceedings at age 28 alleging sexual abuse by her foster father. The plaintiff's application for an extension of time was refused, however, as Dr Mathews highlights, if the new provisions had applied in Queensland, the plaintiff would have been entitled as of right to bring the claim.

<sup>58</sup> *Limitations Act 1969*, s. 62D.

<sup>59</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report: Volume 1*, pp.158 & 197 downloaded 28.7.2014: [http://www.childabuseroyalcommission.gov.au/about-us/reports/interim-report-volume-1-final-020714\\_lr\\_web](http://www.childabuseroyalcommission.gov.au/about-us/reports/interim-report-volume-1-final-020714_lr_web) ("Interim Report: Volume 1"), p99.

<sup>60</sup> *Limitation Act 1969*, ss. 60F, 60G & 60I. The ultimate bar provisions do not apply to the latent injury exemption: s. 51(2).

<sup>61</sup> *Locklier v State of NSW* [2009] NSWSC 746.

the occurrence of the disorder'.<sup>62</sup> However, this can raise its own challenges, as one expert psychiatrist has testified:

*'Physical damages is always so much easier for the individual to identify and quantify. Psychological damage requires the damaged psyche to assess itself and quantify what is lacking, what is wrong.'*<sup>63</sup>

This exception is subject to the court's assessment of what extension of time is 'just and reasonable'. Consequently, there is a lack of certainty about the circumstances that will support an exception for 'latent injury'. In *SD* the court considered it just and reasonable to grant an extension for latent injury, as there was enough evidence to afford a fair trial, even though there was prejudice to the defendant due to the time that had lapsed.<sup>64</sup> By contrast, in *Locklier* the court considered that it was not just and reasonable to grant the extension in light of the time that had passed and the significant prejudice to the defendant.<sup>65</sup>

Overall, the courts have decided both for and against plaintiffs regarding whether the injuries arising from child abuse constitute a 'latent injury'. There are potential difficulties for a plaintiff trying to obtain an extension of the period on that basis.

### ***Ultimate Bar***

The Act provides for an 'ultimate bar' to proceedings if they are not commenced by 30 years after the cause of action accrues. This applies to all exceptions under the Act, except the exception for 'latent injuries'.<sup>66</sup>

### ***Prejudice to the defendant***

In some cases where there has been a long delay in commencing proceedings, this can impact on the evidence that is available and cause prejudice to the defendant. Even where an exception to the limitation period may exist because of a 'latent injury', the court can, on the basis of prejudice to the defendant, determine that it is not 'just and reasonable' to grant the exception. A defendant may also ask the court to strike out or stay the proceedings on the basis that the passage of time has created significant prejudice and a fair trial is not possible in the circumstances.

Courts have not always accepted that prejudice to a defendant caused by long delay is sufficient to stay the proceedings. In *Lampard-Trevorrow*, the South Australian Court of Appeal accepted that there was prejudice to the State because of missing records and difficulties locating witnesses from the 1950s and 1960s, but accepted that the State's delay in informing the plaintiff of the reasons for his removal as an infant, and the public interest

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<sup>62</sup> *Stingel v Clark* [2006] HCA 37 at [28] (a claim for rape 37 years after the event where the plaintiff had PTSD as a consequence).

<sup>63</sup> Mathews (2003) p1.

<sup>64</sup> *SD and 2 Ors v Director General of Community Welfare Services (Vic) and 3 others* [2001] NSWSC 441. The plaintiffs were Aboriginal siblings sexually abused by their father between 1979 and 1985 who sued the State for breaches of statutory duty, breaches of fiduciary duty and negligence.

<sup>65</sup> *Locklier v State of New South Wales* [2009] NSWSC 746. The plaintiff initially sought an extension for a disability, however, she did not press this because the 30 year bar would have prevented the claim.

<sup>66</sup> *Limitation Act 196*, s. 51.

issues required the case should proceed.<sup>67</sup> Similarly, in the Stolen Generation case of *Cubillo*<sup>68</sup>, O’Loughlin J stated that the case was of such importance to the Aboriginal people, and the nation as a whole, that nothing short of a determination of the issue on the merits was warranted.

In contrast, in *Batistatos* the High Court affirmed the decision to strike out the proceedings commenced in 1994 for a man who was severely mentally and physically disabled as a result of a car accident in 1965. The High Court held that the passage of time meant that a fair trial was not possible, so that to allow the plaintiff’s case to continue would ‘inflict unnecessary injustice’ on the defendants.<sup>69</sup>

Proving that prejudice exists can also be a costly exercise, as the defendant will have to demonstrate that relevant records and witnesses are no longer available, or that it is impossible to commission expert reports to rebut the plaintiff’s case.<sup>70</sup>

### Examples of the application of limitation periods

Based on the above information, the following are three examples of how statutory limitation periods could apply to claims arising in the three relevant periods for the purposes of the Act.

For a claim arising before 1 September 1990:

The plaintiff (“A”) is a 76 year old man claiming for abuse suffered whilst in a residential institution in 1950 when he was 12 years old.

- a. The initial limitation period was 6 years (to 1956).
- b. A could have commenced a claim for a further 2 years because he was under a ‘disability’ while he remained a minor (to 1958).
- c. A may also have been able to commence a claim for a further period on the basis that he was under a disability due to a substantial impairment of his mental condition. However, the ultimate bar would prevent any extension of the limitation period on the basis of disability after 30 years from the date the abuse (1980).
- d. If A wishes to commence proceedings in 2014, his only option would be to argue that he had a latent injury (as he was unaware of the nature, extent and cause of his injury), but the exception would only be available if A had not been aware of his injuries (or the extent of his injuries) until 2011.

For a claim arising after 1 September 1990 but before 6 December 2002:

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<sup>67</sup> *State of South Australia v Lampard-Trevorrow* [2010] SASC 56 at [455-456].

<sup>68</sup> *Cubillo & Anor v Commonwealth of Australia* [2000] FCA 1084.

<sup>69</sup> *Batistatos v RTA & Anor* [2006] HCA 27.

<sup>70</sup> See *Fletcher v Hamilton-Gibbs & Anor* [2013] NSWSC 77 for a discussion on the issue of prejudice in a medical negligence claim connected to events in the 1980s and which affected the quality of the expert evidence that could now be obtained.

The plaintiff (“B”) is a 36 year old woman claiming for abuse by her father in 1993 when she was 12 years old.

- a. The initial limitation period was 3 years (to 1996).
- b. B would be able to claim for a further 3 years because she was under a disability while she remained a minor (to 1999).
- c. A court would have a general discretion to extend the limitation for as much as 5 years from the original period if ‘just and reasonable’ to do so (to 2001).
- d. B could be eligible for a further extension if she can prove she is under a (continuous) disability (due to impairment of her mental condition), until the ultimate bar applies (at most until 2023).
- e. B could be eligible for a further extension if she can establish she is suffering from a latent injury up (to a maximum of 3 years from when the latent injury becomes apparent).

For a claim arising after 6 December 2002:

The plaintiff (“C”) is a 22 year old man claiming for abuse suffered in a state school in 2004 when he was 12 years old.

- a. Assuming C had a competent parent (and the abuser did not meet the ‘close associate’ definition):
  - i. The initial limitation period was 3 years (to 2007).
  - ii. If C’s parents (while he remained a minor – until 2010) or C (after he turned 18 – after 2010) were not aware of the injury or the extent of the injury, C could have *up to* 12 years to commence a claim (to 2016), depending on when his parents or he ‘discovered’ the injury.
  - iii. C could also potentially argue that he had a latent injury.
- b. Assuming C did *not* have a competent parent or guardian (and the abuser did not meet the ‘close associate’ definition):
  - i. C is under a disability until he turns 18 years (2010).
  - ii. C will have 3 years from the date on which the cause of action was discoverable to bring the action. The 12 year long stop period would end in 2022.
  - iii. C could potentially argue that he was under a continuing disability or had a latent injury.

The plaintiff (“D”) is a 25 year old woman claiming for abuse by her mother’s long term de facto partner in 2003 when she was 14

- a. Assuming the mother’s de facto partner meets the ‘close associate’ definition
  - iv. The cause of action only becomes discoverable when D turns 25 (2014) and D has a further 3 years to claim (2017).

- v. If the cause of action was not discoverable by D by the age of 25, the long stop period would allow *up to* 12 years from the age of 25 to commence the action, that is, until 2026.
- vi. The ultimate bar would prevent D bringing a claim after 2034, unless she can show she is suffering from a latent injury.

## The procedures for determining limitation issues

### *Pleading limitations periods*

A defendant must specifically plead that an action is statute barred in order to rely on the limitation period as a defence to a claim.<sup>71</sup> This is because the onus is on a defendant to prove that the limitation period has expired. However, once the expiration of the limitation period is raised by a defendant, the onus shifts to the plaintiff to prove that the limitation period should be extended because one of the statutory exemptions applies.<sup>72</sup>

### *Hearing limitation period issues as a separate question*

In civil proceedings, the default position is that all issues should be determined in one hearing. A party seeking to have an issue determined separately must demonstrate to the court why this should occur.<sup>73</sup> This position was clarified by the High Court when it stated that limitation questions should not be decided in interlocutory proceedings ‘except in the clearest of cases’.<sup>74</sup>

Any decision about separate determination of issues requires the court to balance the competing rights of the plaintiff and defendant in light of the facts of each case. In practice, where there are special, sensitive circumstances (such as stolen generation cases)<sup>75</sup>, or in complex cases (where there are multiple plaintiffs or allegations of historical abuse) there is a tendency for the courts to consider limitation issues at the same time as substantive issues. For example, in the recent NSW case of *Giles v Commonwealth*, a representative action concerning multiple allegations of child sexual abuse in a children’s home over a long period, the Court rejected an application to hear the limitations argument as a separate question. The Court’s reasoning included:

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1. <sup>71</sup> *Limitation Act 1969*, s. 68A. In *Guthrie v Spence* [2009] NSWCA 369 at [10], the Court of Appeal noted, without endorsing a particular approach, that once the issue of limitation periods has been joined on the pleadings, it was open to the court to determine the issue along with the other issues at hearing, or separately as an interlocutory hearing.

<sup>72</sup> Handford, *Limitation of Actions*, p295.

<sup>73</sup> In *CH v Bermingham* [2013] NSWSC 1218 at [25] Button J refers to s. 56 of the *Civil Procedure Act 2005*, which requires that the overriding purpose of proceedings be ‘the just, quick and cheap resolution of the real issues’ and rule 28.2 of the *Uniform Civil Procedure Rules 2005*, which permits a court to determine any question separately.

<sup>74</sup> *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 533.

<sup>75</sup> *Cubillo & Anor v Commonwealth of Australia* [2000] FCA 1084; *Trevorrow v State of South Australia* [2007] SASC 285 upheld on appeal: *State of South Australia v Lampard-Trevorrow* [2010] SASC 56.

- a. Delay: The need to consider the limitation issue separately for each individual plaintiff would cause significant delay and exacerbate the prejudice caused by the delay in commencing proceedings.
- b. Duplication: Hearing the limitation issue separately would lead to each plaintiff being cross examined on the same facts on two separate occasions. This was considered undesirable in the context of claims concerning psychiatric and psychological harm. It would also require expert medical evidence to be provided twice.
- c. Efficiency: Hearing the limitations issue at the same time as the principal claims would be the most efficient use of the Court's resources, and promote the timely disposal of the representative proceedings as a whole.<sup>76</sup>

Similar reasons for hearing limitations issues with the substantive proceedings were identified in *CH v Bermingham*.<sup>77</sup>

Nevertheless, courts have also decided to determine limitation issues in interlocutory hearings, including in several recent cases of child sexual assault in NSW.<sup>78</sup>

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<sup>76</sup> *Giles v Commonwealth of Australia* [2014] NSWSC 83 is a representative action (or class action) brought by former residents of Fairbridge Farm, a residential and educational facility in Molong NSW, for alleged physical and sexual abuse suffered between 1937 and 1974.

<sup>77</sup> *CH v Bermingham* [2013] NSWSC 1218 at [29-36]

<sup>78</sup> In *Guthrie v Spence* [2009] NSWCA 369 the limitation issue was dealt with separately at an interlocutory hearing. The Court of Appeal said that if the limitation issue is to be determined at a separate hearing, then the questions to be answered must be precisely formulated, and the facts underlying the questions should be identified with precision (at [18]). In *SW v State of New South Wales* [2010] NSWSC 966 the court determined the limitation issue as a separate question pursuant to rule 28.2 of the UCPR. The court declined to extend the limitation period as the plaintiff's medical condition and period of incarceration taken together did not constitute a 'disability' (pre 1990).

## Attachment 2: Table of statutory limitation periods and the possible exceptions available in claims for child abuse

	Before 1 September 1990	Between 1 September 1990 and 5 December 2002	After 6 December 2002
<b>Limitation period</b>	<p><b>6 years</b> from when the cause of action accrued<sup>79</sup> [s. 14]</p> <p><i>(for personal injury claims based on tort)</i></p>	<p><b>3 years</b> from when the cause of action accrued [s. 18A(2)]</p> <p><i>(for personal injury claims based on negligence, nuisance or 'breach of duty' which includes trespass to the person [s. 11])</i></p>	<p>Whichever of the following periods is the first to expire:</p> <p><b>3 years</b> from the date on which the cause of action was <i>discoverable</i><sup>80</sup> or</p> <p><b>12 years</b> from the when the act or omission causing the injury occurred ("the long stop period") [s. 50C]</p> <p>An action is <i>discoverable</i> when the person first knows or ought to know each of the following facts:</p> <ul style="list-style-type: none"> <li>- an injury has occurred</li> <li>- the injury was caused by the defendant</li> <li>- the injury was serious enough to justify bringing proceedings [s. 50D]</li> </ul> <p>The long stop period can be extended if the court</p>

<sup>79</sup> The general rule is that for torts of assault, the cause of action accrues when the wrongful act is done, even if the damage does not occur or is not discovered until later. For negligence, the cause of action accrues only when damage is suffered (even where there is a substantial gap between when the breach of duty occurred and when the damage was suffered). See Handford p97.

<sup>80</sup> This refers to the first date that a person knows (or ought to know) that an injury has occurred, that the injury was the fault of the defendant and was sufficiently serious to bring a legal action.

			<p>considers that it is just and reasonable to do so, provided that it is not extended beyond 3 years from the date of discoverability.</p> <p><i>(for personal injury claims based on contract or tort)</i></p>
<p><b>Extension by discretion of the court</b></p>	<p>The courts have the discretion to extend if:</p> <ul style="list-style-type: none"> <li>- material facts were not 'within the means of knowledge of the applicant' until after the expiration of the limitation period</li> </ul> <p>and</p> <ul style="list-style-type: none"> <li>- there is evidence to establish the cause of action.</li> </ul> <p>The extension is for a maximum of <b>1 year</b> from when the material facts were known to the applicant. [s. 58]</p> <p>'Material facts' is defined [s.57B(1)]</p>	<p>The courts have the discretion to extend if it is just and reasonable to do so in the circumstances [s. 60C]</p> <p>The extension is for a maximum of <b>5 years</b> [s. 60A]</p> <p>The court must have regard to:</p> <ul style="list-style-type: none"> <li>- length &amp; reasons for the delay</li> <li>- extent of prejudice to the defendant as a result of the delay</li> <li>- time when the person became aware of the injury / the nature and extent of the injury / connection between the act of the defendant and the injury</li> <li>- any conduct of the defendant that contributed to the delay</li> <li>- any expert evidence obtained by the person</li> <li>- the extent of the injury or loss</li> </ul> <p>[s. 60E]</p>	<p>The courts have discretion to extend the 12 year "long stop period" if just and reasonable to do so in the circumstances</p> <p>The extension is for such period as the court determines but not more than 3 years after the date on which the cause of action is discoverable [s. 62A]</p> <p>The court must have regard to:</p> <ul style="list-style-type: none"> <li>- length &amp; reasons for the delay</li> <li>- extent of prejudice to the defendant as a result of the delay</li> <li>- the extent &amp; nature of the injury or loss</li> <li>- any conduct of the defendant that contributed to the delay</li> <li>- any expert evidence obtained by the person</li> <li>- time when action was discoverable</li> </ul> <p>[s. 62B]</p> <p>Applications for an extension can be sought after the limitation period has expired [s. 62F]</p>

<p><b>Disability<sup>81</sup></b> (under 18 years or lacking capacity to manage own affairs)</p>	<p>If a person is under a disability, the limitation period is extended for the <b>duration of the disability</b> [s. 52(d)]</p> <p>If a person ceases to be under a disability the limitation period is extended to <b>3 years</b> after that date [s. 52(e)]</p> <p>Disability includes [s. 11(3)]:</p> <ul style="list-style-type: none"> <li>• under 18 years or</li> <li>• lacking capacity to manage own affairs</li> </ul>	<p>[Section 52 does not apply to post-2002 claims. However, an alternative exemption for disability applies [s. 50F].</p> <p>If a person is under a disability, the limitation period is extended for the <b>duration of the disability</b> [s. 50F(1)]</p> <p>The definition of disability is very similar to s11, except that it <i>excludes</i> a minor with a capable parent or guardian, or a protected person (with a guardian) [s. 50F(2)]</p> <p>In determining when cause of action is discoverable (by a minor with a capable parent or guardian or a protected person), facts that are known or ought to be known by a capable parent or guardian are taken to be facts that are known to the person [s. 50F(3)]</p> <p>However, a person who was a minor at the time of the injury can apply for an extension of the limitation period on the basis that proceedings were not instituted because of an irrational decision by a parent or guardian (after the cause of action was discoverable) [s. 62D]</p>
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<sup>81</sup> The Act defines a person as being under a disability if they are: under 18 years of age [s. 11(3)(a)] or incapable of, or substantially impeded in, the management of his or her affairs in relation to the cause of action by reason of disease or impairment of physical or mental condition, the fact they are in custody or detention, or involved in warlike operations [s. 11(3)(b)].

<p><b>Special provisions for minors</b></p>	<p>N/A</p>	<p>N/A</p>	<p>If the person is injured whilst a minor (under 18 years) by a parent, guardian or 'close associate' of a parent or guardian, then:</p> <p>the cause of action is <i>discoverable</i> when the person turns 25 years of age, or the cause of action is actually discoverable, whichever is the later.</p> <p>The 12 year long stop period runs from when the victim turns 25 years of age [s. 50E]</p> <p>A person who was a minor at the time of the injury can apply for an extension of the limitation period on the basis that proceedings were not instituted because of an irrational decision by a parent or guardian (after the cause of action was discoverable) [s. 62D]</p>
<p><b>Latent Injury</b></p>	<p>The court has further discretion to extend the limitation period if the person was unaware of the fact, nature, extent or cause of the injury, disease or impairment at the relevant time [s. 60F] [Sch. 5 cl.4]</p> <p>The extension is granted for however long the court determines is just and reasonable in the circumstances [s. 60G]</p> <p>The court must not grant the extension unless at the time the limitation period expired the person:</p> <ul style="list-style-type: none"> <li>- did not know the injury had been suffered, or</li> <li>- was unaware of the nature or extent of the injury, or</li> <li>- was unaware of the connection between the injury and the act of the defendant</li> </ul> <p>The person must seek the extension within <b>3 years</b> of becoming aware of the above matters [s. 60I]</p>	<p>The court has further discretion to extend the limitation period if the person was unaware of the fact, nature, extent or cause of the injury, disease or impairment at the relevant time [s. 60F] [Sch. 5 cl.4]</p> <p>The extension is granted for however long the court determines is just and reasonable in the circumstances [s. 60G]</p> <p>The court must not grant the extension unless at the time the limitation period expired the person:</p> <ul style="list-style-type: none"> <li>- did not know the injury had been suffered, or</li> <li>- was unaware of the nature or extent of the injury, or</li> <li>- was unaware of the connection between the injury and the act of the defendant</li> </ul> <p>The person must seek the extension within <b>3 years</b> of becoming aware of the above matters [s. 60I]</p>	<p>The court has further discretion to extend the limitation period if the person was unaware of the fact, nature, extent or cause of the injury, disease or impairment at the relevant time [s. 60F] [Sch. 5 cl.4]</p> <p>The extension is granted for however long the court determines is just and reasonable in the circumstances [s. 60G]</p> <p>The court must not grant the extension unless at the time the limitation period expired the person:</p> <ul style="list-style-type: none"> <li>- did not know the injury had been suffered, or</li> <li>- was unaware of the nature or extent of the injury, or</li> <li>- was unaware of the connection between the injury and the act of the defendant</li> </ul> <p>The person must seek the extension within <b>3 years</b> of becoming aware of the above matters [s. 60I]</p>
<p><b>Ultimate Bar</b></p>	<p>A claim cannot be brought after 30 years from the date on which the cause of action accrued [s.51(1)]</p> <p>This does not apply if the court has granted an extension for a latent injury [s.51(2)]</p>	<p>A claim cannot be brought after 30 years from the date on which the cause of action accrued [s.51(1)]</p> <p>This does not apply if the court has granted an extension for a latent injury [s.51(2)]</p>	<p>A claim cannot be brought after 30 years from the date on which the cause of action accrued [s.51(1)]</p> <p>This does not apply if the court has granted an extension for a latent injury [s.51(2)]</p>

## Attachment 3: Examples of limitation provisions from other jurisdictions that modify limitation periods in cases of child sexual abuse

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### Option 1 – Remove the application of limitation periods to certain classes of plaintiff and/or injury

#### VICTORIA, AUSTRALIA<sup>82</sup>

##### 27A Interpretation

(1) In this Part —

*criminal child abuse* means an act or omission in relation to a person when the person is a minor —

(a) that is physical or sexual abuse; and

(b) that could, at the time the act or omission is alleged to have occurred, constitute a criminal offence under the law of Victoria or the Commonwealth.

##### 27O Application of Division

(1) This Division applies to an action if the action —

(a) is in respect of a cause of action to which this Part applies or extends; and

(b) is founded on the death or personal injury of a person resulting from criminal child abuse.

(2) Divisions 2 and 3 do not apply to an action of a kind referred to in section 27P.

(3) Division 2 (other than section 27F) does not apply to an action of a kind referred to in section 27Q.

(4) Division 3 applies to an action of a kind referred to in section 27Q as if a reference in section 27K(1) to a cause of action under Division 2 were a reference to a cause of action of a kind referred to in section 27Q.

**Note:** see also section 27N(6)

##### 27P No limitation period for certain actions

(1) An action to which this Division applies that is not an action that arises under Part III of the *Wrongs Act 1958* may be brought at any time after the date on which the act or omission alleged to have resulted in the death or personal injury has occurred.

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<sup>82</sup> *Limitations of Actions Act 1958* incorporating draft amendments from the Limitation of Actions Amendment (Criminal Child Abuse) Bill 2014, sections 27A, 27O-27R.

- (2) Subsection (1) applies whether the act or omission alleged to have resulted in the death or personal injury occurs before, on or after the commencement of section 5 of the *Limitation of Actions Amendment (Criminal Child Abuse) Act 2014*.

### **27Q No long-stop limitation period for certain actions arising under Part III of the Wrongs Act 1958**

- (1) An action to which this Division applies that is an action that arises under Part III of the **Wrongs Act 1958** shall not be brought after the expiration of the period of 3 years from the date on which the cause of action is discoverable by the plaintiff.

**Note:** see section 27F for when a cause of action is discoverable by a plaintiff.

- (2) Subsection (1) applies whether the date of death of the deceased is before, on or after the commencement of section 5 of the *Limitation of Actions Amendment (Criminal Child Abuse) Act 2014*.

### **27R Interaction with other powers of court**

Nothing in this Division limits —

- (a) in the case of the Supreme Court, the court's inherent jurisdiction, implied jurisdiction or statutory jurisdiction; or
- (b) in the case of a court other than the Supreme Court, the court's implied jurisdiction or statutory jurisdiction; or
- (c) any other powers of a court arising or derived from the common law or under any other Act (including any Commonwealth Act), rule of court, practice note or practice direction.

**Example:** this Division does not limit a court's power to summarily dismiss or permanently stay proceedings where the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible.

## **ALBERTA, CANADA**<sup>83</sup>

### **5.1 Minors**

- (1) In this section,
- (a) “guardian” means a parent or guardian having actual custody of a minor;
  - (b) “potential defendant” means a person against whom a minor may have a claim.
- (2) Except as otherwise provided in this section, the operation of limitation periods provided by this Act is suspended during the period of time that the claimant is a minor.
- ...
- (13) Subsections (3) to (12) do not apply
- (a) where the potential defendant is a guardian of the minor, or

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<sup>83</sup> *Limitations Act*, RSA 2000, Chapter L-12, subsection 5.1(1), (2) and (13).

- (b) where the claim is based on conduct of a sexual nature including, without limitation, sexual assault.

## **BRITISH COLUMBIA, CANADA<sup>84</sup>**

### **Exempted claims**

3 (1) This Act does not apply to the following:

- (i) a claim relating to misconduct of a sexual nature, including, without limitation, sexual assault,
  - (i) if the misconduct occurred while the claimant was a minor, and
  - (ii) whether or not the claimant's right to bring the court proceeding was at any time governed by a limitation period;
- (j) a claim relating to sexual assault, whether or not the claimant's right to bring the court proceeding was at any time governed by a limitation period;
- (k) a claim relating to assault or battery, whether or not the claimant's right to bring the court proceeding was at any time governed by a limitation period, if the assault or battery occurred while the claimant
  - (i) was a minor, or
  - (ii) was living in an intimate and personal relationship with, or was in a relationship of financial, emotional, physical or other dependency with, a person who performed, contributed to, consented to, or acquiesced in the assault or battery.

## **MANITOBA, CANADA<sup>85</sup>**

### **Definition of "assault"**

2.1(1) In this section, "assault" includes trespass to the person and battery.

### **No limitation period re certain assaults**

2.1(2) An action for assault is not governed by a limitation period and may be commenced at any time if

- (a) the assault was of a sexual nature; or
- (b) at the time of the assault, the person commencing the action
  - (i) had an intimate relationship with the person or one of the persons alleged to have committed the assault, or

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<sup>84</sup> *Limitation Act*, SBC 2012, Chapter 13, subsections 3(1)(i) - (k).

<sup>85</sup> *The Limitation of Actions Act*, CCSM, Chapter L150, subsections 2.1(1) & 2.1(2).

(ii) was financially, emotionally, physically or otherwise dependent on the person or one of the persons alleged to have committed the assault.

## **NEW BRUNSWICK, CANADA<sup>86</sup>**

### **Trespass to the person, assault or battery**

14.1 There is no limitation period in respect of a claim for damages for trespass to the person, assault or battery if the act complained of is of a sexual nature.

## **NEWFOUNDLAND AND LABRADOR, CANADA<sup>87</sup>**

### **No limitation period**

8.(2) Notwithstanding sections 5, 6, 7, 9 and 22, where misconduct of a sexual nature has been committed against a person and that person was

- (a) under the care or authority of;
- (b) financially, emotionally, physically or otherwise dependant upon; or
- (c) a beneficiary of a fiduciary relationship with

another person, organization or agency, there shall be no limitation period and an action arising from that sexual misconduct may be brought at any time.

8.(3) Notwithstanding section 24, subsection (2) shall apply regardless of when the cause of action arose.

## **SASKATCHEWAN, CANADA<sup>88</sup>**

### **Assaults and sexual assaults**

16(1) There is no limitation period with respect to a claim in the nature of trespass to the person, assault or battery if:

- (a) the claim is based on misconduct of a sexual nature; or
- (b) at the time of the injury on which the claim is based:
  - (i) one of the parties who caused the injury was living with the claimant in an intimate and personal relationship; or
  - (ii) the claimant was in a relationship of financial, emotional, physical or other dependency with one of the parties who caused the injury.

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<sup>86</sup> *Limitation of Actions Act*, SNB 2009, Chapter L-8.5, section 14.1.

<sup>87</sup> *Limitations Act*, SNL 1995, Chapter L-16.1, subsections 8(2) & (3).

<sup>88</sup> *The Limitations Act*, SS 2004, Chapter L-16.1, section 16(1)(a).

- (2) Subsection (1) applies whether or not the claimant’s right to commence the proceeding was at any time governed by a limitation period pursuant to the former Act or any other Act.

## **YUKON, CANADA<sup>89</sup>**

2(3) The following actions are not governed by any limitation period and may be brought at any time

- (a) a cause of action based on misconduct of a sexual nature, including without limitation, sexual assault,
  - (i) when the misconduct occurred while the person was a minor, and
  - (ii) whether or not the person’s right to bring the action was at any time governed by a limitation period;
- (b) a cause of action based on sexual assault, whether or not the person’s right to bring the action was at any time governed by a limitation period.

**Option 2 – reverse the presumption, so that the onus is on the defendant to prove that the plaintiff was capable of commencing proceedings earlier**

## **ONTARIO, CANADA<sup>90</sup>**

### **Basic limitation period**

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

### **Assaults and sexual assaults**

- 10.(1) The limitation period established by section 4 does not run in respect of a claim based on assault or sexual assault during any time in which the person with the claim is incapable of commencing the proceeding because of his or her physical, mental or psychological condition.

### **Presumption**

- 10.(2) Unless the contrary is proved, a person with a claim based on an assault shall be presumed to have been incapable of commencing the proceeding earlier than it was commenced if at the time of the assault one of the parties to the assault had an intimate relationship with the person or was someone on whom the person was dependent, whether financially or otherwise.

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<sup>89</sup> *Limitation of Actions Act*, RSY 2002, Chapter 139, section 2(3).

<sup>90</sup> *Limitations Act, 2002*, SO 2002, Chapter 24, sections 4 & 10.

## Same

10.(3) Unless the contrary is proved, a person with a claim based on a sexual assault shall be presumed to have been incapable of commencing the proceeding earlier than it was commenced.

## **NORTHWEST TERRITORIES, CANADA<sup>91</sup>**

### **Definition of action**

2.1.(1) For the purposes of this section, "action" means an action for trespass to the person, assault, battery, wounding or other injury to the person where the cause of action is based on conduct of a sexual nature.

### **No limitation period for sexual assault in certain circumstances**

2.1.(2) The limitation period set out in paragraph 2(1)(d) does not apply in respect of an action where one of the parties had an intimate relationship with the aggrieved person, had a relationship of trust with the aggrieved person or was someone upon whom the aggrieved person was dependent.

### **Other limitation period does not start until person capable of commencing action**

2.1.(3) Where the relationship between the parties is not one of those described in subsection (2), the limitation period set out in paragraph 2(1)(d) does not commence so long as the aggrieved person is incapable of commencing the action because of his or her physical, mental or psychological condition.

### **Presumption**

2.1.(4) Unless the contrary is proved, an aggrieved person shall be presumed to have been incapable, because of his or her physical, mental or psychological condition, of commencing an action earlier than it was commenced.

### **Prior limitation periods do not apply**

2.1.(5) This section applies whether or not the right of an aggrieved person to bring the action was at any time governed by a limitation period.

**Option 3 – providing that a standard limitation period applies, but that a plaintiff can displace the limitation period if they fall within a statutory exception**

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<sup>91</sup> *Limitation of Actions Act*, RSNWT 1988, Chapter L-8, subsections 2.1(1) and 2.1(2).

## **QUEBEC, CANADA<sup>92</sup>**

2926.1. An action in damages for bodily injury resulting from an act which could constitute a criminal offence is prescribed by 10 years from the date the victim becomes aware that the injury suffered is attributable to that act. However, the prescriptive period is 30 years if the injury results from a sexual aggression, violent behaviour suffered during childhood, or the violent behaviour of a spouse or former spouse.

If the victim or the author of the act dies, the prescriptive period, if not already expired, is reduced to three years and runs from the date of death.

## **NOVA SCOTIA, CANADA<sup>93</sup>**

2(5) In any action for assault, menace, battery or wounding based on sexual abuse of a person,

- (a) for the purpose of subsection (1), the cause of action does not arise until the person becomes aware of the injury or harm resulting from the sexual abuse and discovers the causal relationship between the injury or harm and the sexual abuse; and
- (b) notwithstanding subsection (1), the limitation period referred to in clause (a) of subsection (1) does not begin to run while that person is not reasonably capable of commencing a proceeding because of that person's physical, mental or psychological condition resulting from the sexual abuse.

## **PRINCE EDWARD ISLAND, CANADA<sup>94</sup>**

1. In this Act

...

- (c) "disability" means disability arising from minority or unsoundness of mind;

...

2. (1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned:

...

- (d) actions for trespass to the person, assault, battery, wounding or other injury to the person, whether arising from an unlawful act or from negligence, or for false imprisonment, or for malicious prosecution within two years after the cause of action arose;

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<sup>92</sup> *Civil Code of Quebec*, LRQ c C-1991, section 2926.1

<sup>93</sup> *Limitation of Actions Act*, RSNS 1989, Chapter 258, section 2(5).

<sup>94</sup> *Statute of Limitations*, RSPEI 1988, Chapter S-7, sections 1, 2 & 5.

5. If a person entitled to bring an action is under disability at the time the cause of action arises, he may bring the action within the time hereinbefore limited with respect to the action or at any time within two years after he first ceased to be under disability.