

**SUBMISSION BY THE STATE OF WESTERN AUSTRALIA TO THE ROYAL  
COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL  
ABUSE RE ISSUES PAPER 5 – CIVIL LITIGATION**

1. Western Australia's Submissions made in response to the Royal Commission's Issues Paper No.5 are limited to addressing the issues of limitation legislation, measures which may assist Plaintiffs in civil litigation involving allegations of child sexual abuse and, briefly, the benefits of government administered redress schemes over the civil litigation process.
2. Western Australia is of the view that the civil litigation process is a blunt instrument and that redress for these kinds of wrongs is often not best achieved through the legal process but rather through government administered redress programmes.

**LIMITATIONS LEGISLATION**

*The policy underpinning limitations law*

3. Undeniably, it is a most unfortunate situation where victims of child sexual abuse are denied an entitlement to compensation for their abuse in consequence of the passage of time. At the same time, our justice system demands that, so far as is practicable, judicial disputes between parties are determined according to evidence which can be objectively demonstrated to be credible and sufficient, and determined without pre-judgement and in a manner which minimises prejudice to all parties in the presentation of their cases. The two interests – on the one hand, achieving compensation for victims perhaps many years after their having been abused and, on the other hand, ensuring that justice is done and can be seen to have been done in the mode of determination of liability<sup>1</sup> and of consequent compensation where abuse is alleged, and enabling the identification of all entities (including insurers) who or which should to some degree bear that liability – are frequently not reconcilable.
4. No matter what the apparent strength of a plaintiff's claim, the defendant or defendants, and any entities from whom or which indemnity or contribution is sought, are entitled to a fair trial; i.e. a trial which, as far as it can be achieved, will determine the issues in dispute consistently with the determinations which would have been made according to the evidence available to be led had the claim been pursued promptly.

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<sup>1</sup> The issue of liability will frequently turn not only upon whether an assault or, in circumstances where a duty of care is established, a negligent breach of that duty, has occurred, but also upon other considerations such as whether the surrounding facts give rise to vicarious liability and whether causation has been proved. The causation issue will be especially difficult where the victim has suffered physical or mental abuse in multiple environments or where, in a claim in which a defendant's negligence must be proved, there is doubt as to whether the harm for which compensation is sought was a consequence of conduct occurring during a period when the defendant's supervision or oversight was negligent or whether it was a result of conduct falling outside that period.

5. It is a fundamental assumption of our justice system that "where there is delay the whole quality of justice deteriorates"<sup>2</sup>. With time, recollections fade or, worse, become inaccurate; witnesses die or cannot be traced; documents are destroyed or the context of preserved documents is lost; material which would assist in the assessment of a witness's credibility ceases to be available.

Frequently, the parties to a dispute will not even appreciate, with the passing of time, what was known or available at some earlier stage. This is a major difficulty where a Court is required to assess, in the context say of an application for an extension of time, the extent to which a party will be prejudiced by a trial many years after the incidents the subject of the proposed claim. As was observed by the High Court in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541<sup>3</sup>:

*Sometimes the deterioration in [the] quality [of justice] is palpable, as in the case where a crucial witness is dead or an important document has been destroyed. But sometimes, perhaps more often than we realise, the deterioration in quality is not recognisable even by the parties. Prejudice may exist without the parties or anybody else realising that it exists. ... So, it must often happen that important, perhaps decisive, evidence has disappeared without anybody now "knowing" that it ever existed. Similarly, it must often happen that time will diminish the significance of a known fact or circumstance because its relationship to the cause of action is no longer as apparent as it was when the cause of action arose. A verdict may appear well based on the evidence given in the proceedings, but, if the tribunal of fact had all the evidence concerning the matter, an opposite result may have ensued. The longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose.*

6. It is not only matters of an evidentiary character which have the potential to result in a miscarriage of justice where there is delay. Years or decades after an incident giving rise to a claim, parties may be unaware of, or unable to establish, entitlements to insurance coverage or the extent to which, had they received timely notification of a claim, they may have been able to pursue contribution or indemnification against third parties in respect of the claim.
7. Changes in the common law, and modifications to statute law the operation of which is not tied to the date of the incident giving rise to a claim, can result in quite different determinations of disputes of the same character heard at significantly different times.
8. It is often pointed out, too, in discussions of the rationale for limitation periods, that the public interest is served by people (including insurers) at some stage being able to order their financial and personal affairs on the basis that claims can no longer be made against them and that records need no longer be retained. As was said in *Brisbane South Regional Health Authority v Taylor*<sup>4</sup>:

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<sup>2</sup> Per McHugh J in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 551, citing Lord Hailsham in *R v Lawrence* [1982] AC 510 at 517. McHugh J's judgment, at pp 551-553, contains what many regard as the seminal High Court discussion of the rationales for limitation periods.

<sup>3</sup> Per McHugh J, at 551.

<sup>4</sup> (1996) 186 CLR 541, per McHugh J, at 553.

*Even where the cause of action relates to personal injuries<sup>5</sup>, it will be often just as unfair to make the shareholders, ratepayers or taxpayers of today ultimately liable for a wrong of the distant past, as it is to refuse the plaintiff a right to [pursue an] action arising from that wrong.*

In short, it will ordinarily be in the public interest that notice be given of claims, and that the claims be brought and resolved, within reasonable timeframes. Allowing proceedings to be brought long after the alleged wrongful conduct occurred carries with it significant direct and indirect costs.

9. Statutory limitation provisions represent an endeavour to arrive at an appropriate balance between the interests of potential plaintiffs in achieving a remedy, the interests of defendants in having a fair trial and, having regard to the factors canvassed above, the interests of the community generally in the fair, certain and effective judicial resolution of claims.

To again quote observations of McHugh J in *Taylor*<sup>6</sup>:

*A limitation period should not be seen therefore as an arbitrary cut off point unrelated to the demands of justice or the general welfare of society. It represents the legislature's judgment that the welfare of society is best served by causes of action being litigated within the limitation period, notwithstanding that the enactment of that period may often result in a good cause of action being defeated.*

Where such a balance should be struck raises complex legal and policy considerations and difficult, largely subjective, judgements as to where the public interest lies and at what stage a fair trial is no longer attainable. Understandably, the debate can give rise to strong emotions, especially where the interests of vulnerable classes of person (sexually abused children being a prime example) are involved. Even in that context, an appropriate balance might well differ according to whether the defendant is alleged to have been the actual perpetrator of the abuse or whether the defendant is said to be vicariously liable for the perpetrator's conduct or, alternatively, liable say in negligence or for breach of a fiduciary duty<sup>7</sup> owed to the plaintiff.

10. It is sometimes suggested that a proper balance can be achieved by vesting in Courts a broad discretion as to whether a limitation period ought to be extended in a particular case. Plainly, a case can be made for discretions in defined circumstances, where the criteria to be applied are made clear. An obvious example is where the proposed defendant is alleged to have pressured the victim not to pursue proceedings.

However, the difficulty with a broad discretion is that it will generally necessitate a Court making what is in truth not a judicial decision but, rather, a policy decision. Such a decision is one which, as a matter of principle, should be made by Parliament

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<sup>5</sup> Such claims being specifically referred to by McHugh J by way of example as the defendants to personal injury claims which are ordinarily insured.

<sup>6</sup> *Brisbane South Regional Health Authority v Taylor*, at 553.

<sup>7</sup> On the basis of the principles in *Bennett v Minister of Community Welfare* (1992) 176 CLR 408.

rather than by the judiciary. Courts are not in the best position to consider and weigh policy and economic issues such as the increased cost of insurance premiums associated with potentially lengthened limitation periods, the cost of records retention, and the economic and financial implications of persons and companies being unable accurately to assess their potential liabilities at any particular time. More importantly perhaps, requiring courts to make decisions which will be governed substantially by subjective factors (such as what is "just") rather than objective considerations, puts at risk respect for the judicial system and its assumed objectivity. This is particularly so in controversial cases.

Other considerations militating against broad discretions include, firstly, the considerable uncertainty which will face potential litigants in predicting whether a Court is likely to grant, or not to grant, leave in respect of a particular claim and, secondly, the legal costs which will be associated with applications for such leave, an expense compounded where, as is sometime necessary, the matter proceeds to trial on the basis that the Court will determine only at the conclusion of the evidence whether an extension of time should be granted<sup>8</sup>. In addition, there is an undesirable lottery in the potential, through the exercises of judicial discretion, for one plaintiff to be permitted to pursue an otherwise barred claim against a defendant, but for another plaintiff with a claim of substantially the same character to be precluded from suing another, or even the same, defendant. This potential for real or perceived inconsistency can operate to bring the judicial system into disrepute.

### *The position in Western Australia*

11. In so far as actions against the State or public authorities in respect of child sexual abuse are concerned, causes of action accruing before 15 November 2005 are, subject to certain exceptions<sup>9</sup>, governed by the *Crown Suits Act 1947* (WA) and the *Limitation Act 1935* (WA), including in particular section 47A of the latter Act. Causes of action accruing on or after that date are, subject of course to those same exceptions, governed by the *Limitation Act 2005* (WA).
12. The limitations regime set out in the *Limitation Act 2005* was introduced with the benefit, in particular, of the 1982 Law Reform Commission report *Limitation and Notice of Actions: Latent Disease and Injury*, the Commission's further extensive review in its 1997 *Report on Limitation and Notice of Actions*, and the community consultation which followed government's release of a *Limitations Law Reform* discussion paper in May 2002.
13. The essential scheme of the *Limitation Act 2005* is fixed time periods running from the date of accrual of identified causes of action. The general limitation period for actions for damages for personal injury is three years from accrual<sup>10</sup>. Actions for

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<sup>8</sup> As in the 'Stolen Generation' case of *Cubillo v Commonwealth (No 2)* (2000) 103 FCR 1, the appeal from which was dismissed in *Cubillo v Commonwealth* [2001]112 FCR 455. The trial judge, having heard all the evidence as to liability, found that the Commonwealth had been materially prejudiced by the plaintiff's delay in instituting proceedings and so, a fair trial not being possible, refused to grant an extension of time to commence the action. The Full Court of the Federal Court agreed that this conclusion was open.

<sup>9</sup> See sections 6 and 7 *Limitation Act 2005*.

<sup>10</sup> Section 13 *Limitation Act 2005*.

contribution under the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA) must be brought within two years of the cause of action accruing<sup>11</sup>. In personal injury actions, the common law which determines the date of accrual of latent injury claims is modified by section 55. Moreover (and of particular relevance to civil claims relating to child sexual abuse), sections 30 to 32 extend limitation periods for persons who are under 18 years of age, and section 33 extends time where the proposed defendant had responsibility for the child's welfare or where, because of the particular relationship of the proposed defendant to the child or to the child's parent or guardian it was reasonable for proceedings not to have been issued within the statutory period. Sections 35 and 36 address the circumstance of persons with mental disability.

Applications for extensions of time may be made in defined circumstances. Section 38 permits extension where the failure to bring proceedings within time was attributable to fraud or improper conduct by the defendant. Section 39 allows extension where the plaintiff in a contemplated personal injuries action was unaware of the injury or its cause or of the identity of the perpetrator. Sections 41 and 42 address the situation where a guardian acted unreasonably in failing to commence within time proceedings on behalf of a child or person with a disability. Pursuant to section 44, a Court is obliged, when considering an application for extension, to have regard to whether delay would unacceptably diminish the prospects of a fair trial and to whether the defendant would be significantly prejudiced by a time extension.

14. The *Limitation Act 2005* applies to equitable actions, which will include certain causes of action arising out of breach of fiduciary duty<sup>12</sup>. The equitable jurisdiction to decline the granting of relief on the grounds of laches, acquiescence and the like, is preserved<sup>13</sup>.

The application of the Act's principles in particular cases will of course turn upon whether a claim is brought in trespass, negligence, breach of statutory duty, contract, or breach of fiduciary duty; the elements of each potential cause of action; whether the claim alleges physical harm or mental harm<sup>14</sup> or both; when damage can be said to have occurred; and on the factual circumstances governing whether a cause of action has been statutorily extended or might be extended by Court order.

## **EX-GRATIA PAYMENTS AND REDRESS SCHEMES**

15. The Western Australian government acknowledges that there will be circumstances where, despite the limitation period precluding civil claims, or where a claimant is denied a remedy as a result of the application of a limitation period there nevertheless exists a strong policy case for the payment of compensation from the public purse. In those circumstances payments have been made on a one off ex-gratia basis or, where there is a particular class of persons to whom it is expected that

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<sup>11</sup> Section 17 *Limitation Act 2005*.

<sup>12</sup> Sections 13 and 27 *Limitation Act 2005*.

<sup>13</sup> Section 80 *Limitation Act 2005*.

<sup>14</sup> Bearing in mind section 5S *Civil Liability Act 2002* (WA).

payment will be made, Western Australia has established specifically tailored ex gratia redress schemes.

16. Redress schemes are also particularly useful in cases where, irrespective of whether an applicable limitation period has expired, there is a group of victims or persons of a particular class whose claims would be better addressed without the uncertainties, inconsistencies, expense and stress so often associated with the civil litigation system.
17. Redress schemes also allow much greater flexibility in the kinds of outcomes that can be offered to participants. For example, apologies, the provision of counselling services and other kinds of tailored support which cannot be outcomes of civil litigation can form part of the arrangements. Often these aspects of a redress scheme are as important to the participants as the payment of money.
18. Redress schemes also offer more consistent outcomes for participants. The making of an ex-gratia payment does not, of itself, preclude a victim from pursuing litigation in the courts.
19. Redress schemes operated in Western Australia have included Redress WA. The Redress WA scheme ran from 2008 to 31 December 2011. It WA was established as a finite scheme to acknowledge and apologise to adults who, as children, were abused and/or neglected while they were in the care of the state. Redress WA was based on four pillars of support: an opportunity to make a police referral; a personal apology from the Premier and Minister for Community Services; provision of support and counselling services; and ex gratia payments. Four broad levels of ex gratia payments were offered, ranging from a minimum of \$5000 to a maximum of \$45000.<sup>15</sup> The Western Australian Government has also implemented a limited Redress Scheme for people who were abused as children in State run country hostels.

#### **MEASURES WHICH MAY ASSIST PLAINTIFFS IN CIVIL LITIGATION REGARDING CHILD SEXUAL ABUSE**

20. The majority of civil litigation matters against the State or other State entities in respect of sexual abuse by former wards of the State have been resolved through informal settlement negotiations (unless liability is denied).
21. The State has identified a number of measures which are available as part of the civil litigation process which would assist plaintiffs in civil litigation regarding child sexual abuse, specifically:
  - (a) Modern case management in the relevant Court (usually the District Court of Western Australia) should be flexible enough to deal with a particular class of plaintiffs. The parties may agree to extend the time frames for case management, so that strict case management obligations do not apply. This would give plaintiffs in civil litigation regarding child sexual abuse a longer time

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<sup>15</sup> 2010-11 Annual Report, the Department for Communities.

to obtain medical evidence or to allow their symptoms to stabilise to a point at which settlement negotiations may commence.

- (b) The District Court has the capacity to adopt special measures for the giving of evidence to protect vulnerable witnesses, such as children. Following the Report of the Western Australia Law Reform Commission in 1989 on "Evidence of Children and Other Vulnerable Witnesses" (Project 87), the Western Australian *Evidence Act 1906* (WA) was amended to implement the Commission's recommendations. Those amendments make provision for children to give sworn or unsworn evidence (sections 106B-C), to have a person near to the child in Court who may provide the child with support (section 106E) and to have a suitable person appointed to act as a communicator for the child (section 106F). A person who is not a child but who has been ordered by a Judge to be a "special witness" may also have a support person near to him or her when giving evidence (section 106R). These measures have the capacity to assist plaintiffs giving evidence in civil litigation regarding child sexual abuse.
- (c) In appropriate cases where liability is not in dispute, parties should be encouraged to resolve civil claims at an early stage by informal negotiations or by court mediated settlement. This has the advantage of avoiding the delay and potential trauma which may occur from a matter going to trial and saves on legal costs.