



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Injury:JElw:942619

25 March 2015

Mr Andrew Cappie-Wood
Secretary
Department of Justice
GPO Box 6
SYDNEY NSW 2001

By email: justice.policy@agd.nsw.gov.au

Dear Mr Cappie-Wood,

Discussion Paper - Limitation periods in civil claims for child sexual abuse

I am writing on behalf of the Injury Compensation Committee of the Law Society of New South Wales ("the Committee") in response to the Department's Discussion Paper on Limitation periods in civil claims for child sexual abuse ("Discussion Paper").

The Committee commends the proactive response of the NSW Government with respect to both the formulation of the 18 Guiding Principles for government agencies responding to civil claims for child sexual abuse, announced in November 2014, and this Discussion Paper.

The Committee supports the implementation of Option A, outlined in the Discussion Paper, which would completely remove the application of the *Limitations Act 1969* for a defined class of claims. The Committee considers this the best option to remedy one of the current obstacles faced by victims of child sexual abuse in pursuing civil claims.

Existing statutory exceptions to limitation periods

The Committee submits that victims of child sexual abuse already face significant hurdles in order to bring a successful civil claim without the additional burden of a time limit obstacle. The Committee considers that existing statutory exceptions to limitation periods do not provide sufficient access to justice for victims of child sexual abuse and reform is necessary.

As noted in the Discussion Paper, the Royal Commission's Interim Report Volume 1 recorded a finding that the average time for a victim to disclose the sexual abuse was 22 years. Some of the reasons for delay included gross embarrassment, fear of not being believed, fear of retribution and lack of access to someone to disclose to.

Although the extensions of the limitation periods available in certain exceptional circumstances were developed in response to victims with particular circumstances,



it is submitted that these exceptions remain inadequate for the victims of child sexual abuse.

The Committee agrees with the Discussion Paper comments that the existing exceptions covering mental incapacity may not effectively cover the range of reasons why a child sexual abuse victim may be unable to commence proceedings within a limitation period.

The Committee submits that the current exception with respect to minors, applicable to abuse after 2002, which provides that a person is “under a disability” while a minor but not while the minor has a capable parent or guardian, is unjust. In child sexual abuse matters it is often the case that the parent or guardian themselves may not have been aware of the abuse. Time should not run against minors until they cease to be a minor.

Currently, children abused by a parent, guardian or ‘close associate’ have a longer period to initiate proceedings than children abused by a perpetrator falling outside this category. The Committee submits that the operation of the limitation periods should not be determined by the characterisation of the perpetrator.

The Committee agrees that the application for an extension of time, or to prove disability itself, can prove a traumatic experience. The ordeal experienced by John Ellis during his case against the Catholic Church provides a compelling example of what these applications can entail for victims (*John Ellis v Pell and the Trustees for the Roman Catholic Church for the Archdiocese of Sydney [2006] NSW SC 109*). The process is typically difficult and hard fought, and the likelihood of having a potential claim dismissed at the outset provides a significant impediment to more claims being pursued.

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

The Committee considers that Option A is the most appropriate option to remedy the existing barriers to accessing justice presented by current limitation periods for victims of childhood sexual abuse.

The removal of limitation periods pursuant to Option A would place the emphasis on the fundamental and central issues of the abuse itself.

The Committee endorses the removal of limitation periods in claims of child sexual abuse with respect to claims both at common law against institutions, and intentional tort claims against individuals.

The Limitation of Actions Amendment (Criminal Child Abuse) Bill 2015 (“Victorian Bill”) was introduced to Parliament in Victoria recently. The Victorian Bill completely removes limitation periods, including the longstop limitation period, retrospectively for a defined class of claims. The Victorian Bill is similar to legislation in British Columbia, as outlined in the Discussion Paper.

The significant advantage of this approach is that the expense and trauma associated with the application for an extension of time or establishing a disability in an interlocutory application is removed. From a forensic perspective, the victim will not be required to experience the traumatic aspects of the claim twice.



In addition to the advantages outlined in the Discussion Paper, it is submitted that the optimal position would be the adoption of a national approach to the removal of limitation periods which would bring consistency across Australia. While Victoria and New South Wales are the only States to have taken action on possible amendments to limitation periods to date, it is hoped that other States would consider similar legislative reforms so that there is a nationally uniform and just approach adopted in respect of these victims.

It is the Committee's position that the advantages of Option A outweigh any disadvantages and it is the option which should be adopted in NSW.

The Committee submits that were Option A adopted the existing civil procedures such as applications to strike out, dismiss or stay proceedings and abuse of process principles recognised by the High Court in *Batistatos v Roads and Traffic Authority of New South Wales* [2006] HCA 27 are sufficient to protect the proper administration of justice.

Further, the Committee refers the Department to clause 27R of the Victorian Bill which specifically refers to these principles. The clause provides:

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.

The example provided states that "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."

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

At present, once a defendant pleads the limitation period the onus shifts to the plaintiff to prove that the claim was commenced within time or that one of the statutory exceptions applies.

Option B seeks to reverse the presumption that limitation periods apply to certain causes of action based on child sexual abuse. The defendant would bear the onus to prove that the plaintiff was capable of commencing court proceedings earlier.

The Committee submits that reversing the onus of proof does little to avoid the current difficulties preventing victims from accessing justice. Victims would still remain vulnerable to interlocutory applications by defendants seeking to prove that the victim was capable of commencing court proceedings earlier through accessing primary material from various treating practitioners and other witnesses. The victim would still face lengthy, detailed and vigorous cross examination on behalf of the defendant seeking to overcome this presumption and all the trauma that entails.

The introduction of such a presumption would still leave limitation periods remaining as a barrier for victims in accessing their legal rights and would not avoid the expense and time involved in interlocutory applications.

Another disadvantage of Option B relates to the inconsistency that would remain between NSW and other States and Territories as jurisdictions such as Victoria move to have limitation periods removed entirely for victims of childhood sexual abuse.

The Committee does not support Option B.

Option C: Clarify the definition of 'disability'

Option C seeks to redefine "disability" as defined in the *Limitation Act 1969* to ensure it applies to victims who are unable to commence proceedings because of the psychological difficulties they may have confronting their experiences of abuse. The Committee agrees with the disadvantages of this option that are identified in the Discussion Paper. In particular, where limitation periods are treated as interlocutory matters this approach will continue to increase the duration, cost and emotional ordeal of the victim. The Committee also agrees that such an approach tends to equate being a victim of child sexual abuse per se with being under a disability, which may not be appropriate.

While the Committee accepts that Option C is an improvement on the current position, it has more disadvantages than the preferred Option A.

Again, the Committee points out that such amendments would be inconsistent with the proposed changes in Victoria.

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

Option D provides for the limitation periods to be removed where there is a criminal conviction against the defendant for child sexual assault based on the same factual circumstances.

The Committee agrees that this option is narrow. While the Committee agrees with the rationale that a perpetrator should be capable of being held liable in a civil action where there has been a criminal conviction for the same conduct, there are a number of reasons why criminal prosecutions may not have been pursued. These include the death or flight of the perpetrator or a decision by police or prosecutors not to proceed with the prosecution of an offender. The Committee does not endorse this option.

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

Under Option E there would be amendment to the post-2002 provisions in respect of minors sexually abused by a person who is not a 'close associate'.

The Committee submits that it is not just to bind a minor to the conduct of a parent who fails to bring an action against a perpetrator.

The Committee reiterates that it is inappropriate that different limitation periods may apply depending on the characterisation of the perpetrator.



It is noted that amendments in accordance with Option A would result in the 2002 amendments ceasing to have effect in any event, and that option is preferred.

Type of actions covered

The Committee endorses the approach adopted in the Victorian Bill. Under clause 27O of this Bill, the new 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 -
 - (i) an act or omission in relation to the person when the person is a minor that is physical abuse or sexual abuse; and
 - (ii) psychological abuse (if any) that arises out of that act or omission.

The Committee submits that there is no justification for not including physical abuse which can also involve long lasting trauma and damage to victims. The Committee is also supportive of a provision as in clause 27O(1)(b)(ii) above which removes a limitation for psychological abuse where it is related to sexual abuse or physical abuse. It is noted that the Victorian Bill refers to "an act or omission" and the Committee supports the inclusion of omissions.

The Committee strongly supports the position adopted in the Victorian Bill.

Retrospectivity

The Committee considers that reforms must provide avenues for justice for so-called "historical" abuse and therefore must be retrospective in their application.

With respect to transitional provisions, the Committee considers that cases should be allowed to be heard where they were previously defeated solely on the basis of the expiration of the limitation period. This would cover cases where the issue of the limitation period was judicially determined as a separate question prior to a hearing on the merits. Likewise in cases currently on foot where there are interlocutory proceedings in relation to the *Limitation Act 1969*, the amendment should be applicable and allow the Court to proceed to hear and determine the substantive merits of the case.

Potential impacts

It is difficult to forecast whether changes to the application of limitation periods to child sexual abuse claims would lead to a significant increase in the number of civil cases commenced.

The Committee notes that the Royal Commission will be making recommendations in relation to the formation of a redress scheme and some victims may be content with compensation available under such a scheme.

It is also noted that removal of limitation periods will merely remove one procedural barrier that currently hampers victims' ability to achieve justice. Other barriers will remain including costs risks, difficulties identifying the correct defendant, difficulties



establishing duty and liability and the trauma involved in bringing such a case before the court. These barriers will continue to limit the number of civil cases brought.

The Discussion Paper raises issues with respect to insurance coverage and premiums which might result from increased claims. The Committee does not consider that the potential flow on effect for organisations in terms of possible increases to insurance premiums as a result of increased claims should be a relevant factor in deciding on the appropriate amendments to the *Limitation Act 1969*.

Conclusion

The Committee commends the NSW Government for its consideration of this important issue addressed in the report by the Royal Commission into Institutional Child Sexual Abuse.

The Committee supports the approach taken by the Victorian Government and submits that Option A is the preferred solution to the current barrier to justice that the *Limitation Act 1969* presents to victims of child sexual abuse.

Please do not hesitate to contact the Committee's Policy Lawyer, Leonora Wilson on (02) 9926 0323 or via email leonora.wilson@lawsociety.com.au, should you have any queries arising out of this submission.

Yours sincerely,



John F Eades
President