SUBMISSION

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LIMITATION PERIODS IN CIVIL CLAIMS FOR CHILD SEXUAL ABUSE

A submission by the New South Wales Bar Association in response to the NSW Department of Justice Discussion Paper *Limitation Periods in Civil Claims for Child Sexual Abuse*.

NEW SOUTH WALES
BAR ASSOCIATION

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Introduction

The New South Wales Bar Association welcomes the opportunity to respond to the Discussion Paper on limitation periods in NSW and their effect on victims of child sexual abuse.

The Bar Association particularly commends the proactive response of the NSW Government, which, along with that the Victorian Government, anticipates the recommendations of the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse. The Commission is likely to issue a further interim report on the subject in mid-2015.

The need for action

In the Commonwealth Royal Commission Interim Report Volume 1 (at 5.1 on page 158) appears a finding based upon 1,677 private interviews that 'survivors took an average of 22 years to disclose their abuse after it began'. This is remarkably close to the period of 23 years from last abuse to first complaint found by an Anglican Queensland survey of victims.[1]

The reasons for delay include infancy and lack of access to independent legal and other advice, psychological injury consequent upon sexual and/or physical abuse, ignorance of the nature of the abuse or indeed, in some cases that it is abuse at all, lack of insight into the sequelae of such abuse, fear or threats by abusers or those associated with them, directed both at the victim and on occasions, at the victim's

family, gross embarrassment, unwillingness to disclose details of abuse to family or others who may disbelieve them and unwillingness to undergo the trauma of complaint in respect of criminal, let alone civil, remedies.

The Discussion Paper refers to the incongruity of circumstances in which the perpetrator can be tried and convicted of sexual abuse many years later but the institution under whose aegis the abuse occurred can argue that on the lower civil onus, a fair trial is no longer possible. Such an argument was advanced (albeit unsuccessfully) in *Salvation Army (South Australia Property Trust) v Graham Rundle* [2008] NSWCA 347.

It is worthy of note that limitation regimes vary enormously throughout Australia, ranging from regimes under which extensions of time over lengthy periods are well nigh impossible (Western Australia and Queensland) to more liberal regimes such as South Australia. In the *Salvation Army v Rundle* case referred to above, the extension of time application was in respect of prolonged sexual and physical abuse in a Salvation Army institution in South Australia in the early 1960s, brought in NSW, where the victim now lives. His abuser was convicted of offences against a substantial number of victims, including the plaintiff, in quite recent times.

There is in the Discussion Paper a helpful summary of the various issues under NSW law in relation to potential rights to extension of time. Those rights, however, are markedly less liberal than the South Australian law applied by the NSW court and it is most unlikely that time would have been extended if the abuse had occurred in NSW and NSW law had been applied rather than the law of South Australia on limitation periods.

Moreover, all applications for extension of time (as distinct from proving incapacity under the *Limitation Act 1969* (NSW)) must meet the *Brisbane South*[2] test, where the plaintiff must establish that a fair trial is still possible after a prolonged lapse of time and given a presumed reduction in capacity of witnesses to recall evidence, even where records have not been destroyed.

The existing rights for minors, save where the abuse is by a parent/guardian, in NSW, bind a child by the conduct of the parent/guardian and if that person fails to bring an action in time, then notwithstanding the infancy of the victim, the child loses the right to an extension of time and to sue. It is not apparent why that exception is just or fair but it illustrates the difficulties created by the present law.

Moreover, the need to apply for an extension of time or to prove disability can itself be a source of significant trauma. Applicants are frequently subjected to protracted cross examination. They are often required to recount events which are disturbing to them, only to be called upon to do so again when the matter ultimately goes to trial, assuming success at the interlocutory stage.

Reform options

Option A - removing limitation periods from causes of action based on child sexual abuse

In the Victorian *Limitation of Actions Amendment (Child Abuse) Bill 2015* ('the Victorian Bill'), which is currently before the Victorian Parliament, it is proposed to completely remove limitation periods applying to civil actions, including the longstop limitation period, to do so retrospectively and to do so in respect of acts or omissions 'in relation to the person when the person is a minor that is physical abuse or sexual abuse and … psychological abuse (if any) that arises out of that act or omission'.

This approach, similar to that of British Columbia, has very considerable advantages. The trauma and expense of litigation to obtain an extension of time or establish a disability is removed.

The overwhelming advantages of Option A, in our respectful submission, strongly commend this option as the one that NSW should adopt.

In addition to the advantages referred to above, there would be the further advantage of consistency with the State of Victoria. It is to be anticipated from the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse Consultation Paper issued in January 2015 that a single approach will be recommended throughout Australia. The present piecemeal approach to limitation periods generally is bad enough but its application to child sexual abuse victims is particularly arbitrary and unjust, depending upon where the offence is deemed to have occurred. A common approach with Victoria is likely to go a long way towards bringing about national consistency in providing justice to victims.

The alternative approaches

The second alternative discussed is to reverse the presumption against an extension of time. The mere reversing of the presumption avoids few of the difficulties standing in the way of the victim. To start with, the victim must bring him or herself within one of the range of remedies outlined in the discussion paper and meet the *Brisbane South* criteria. The reversal of onus does not avoid the need to bring a long and expensive application, which, in many cases, defendants will exercise their right to oppose. Such applications can be very traumatic for plaintiffs and may deter many victims of sexual abuse from bringing their case at all due to fear of process and uncertainty of outcome. Even where there is a presumption that the plaintiff could not have commenced earlier, that does not preclude the possibility of lengthy, detailed, vigorous and traumatic cross-examination at the interlocutory stage, designed to overcome the presumption.

The cost, trauma and difficulty of this option must outweigh the modest advantages of a shift in the onus - a shift displaceable by evidence which defendants will inevitably seek to call, as would be their right under that model.

This alternative should be rejected.

The next option (Option C) is to redefine disability. It would still require claims to be brought and established. It would make it easier to establish that the person was a person under a disability within the meaning of the *Limitation Act 1969* so that the limitation period was not running against them. However, there would still be issues of causation and the trauma and expense of the necessary application would remain, together with embarrassment and re-traumatisation, to deter many victims from seeking to extend time and, thereby, preventing them from obtaining justice. Again, we say that such a remedy is a poor substitute for Option A.

Option D suggests removing limitation periods where there has been a conviction for child sexual assault. It rightly notes that this applies only to a limited category of situations. There might, for example, be ample evidence of offences having been committed but the person committing the offences may have fled (or been removed) from the jurisdiction or have died so that no conviction occurs. Legal rights ought not rest on the health, or continued existence, of the perpetrator. Nor should they depend upon the vigour or resources of prosecuting authorities. It is no real solution in the great majority of cases.

The other option (E) is to amend the provisions in respect of minors sexually abused by a person who is not a 'close associate'. New South Wales law makes the child bound by the conduct of their parent or guardian and if that parent or guardian fails to bring proceedings they are out of time and, effectively, without a remedy. This is undoubtedly a provision which should be amended but does not resolve the overall problem. It is not clear how justice is served by binding an infant by the conduct or misconduct of a parent who fails to bring an action.

The width of the cases to which the reformed law should apply

We have already indicated in an earlier comment that, in our view, the Victorian Bill would seem appropriate. Physical abuse (without a sexual element) can of course lead to devastating trauma. There is ample evidence of that. Separating out sexual and physical injury would be inappropriate in these circumstances, as would any attempt to exclude the psychological consequences of either sexual or physical abuse. There does seem to be a case, however, for excluding pure psychological injury (without sexual or physical abuse), since the difficulties of proof, uncertainties of diagnosis and risk of injustice to defendants seem to us to outweigh the advantages of that further change.

Accordingly, we strongly support the approach taken in the Victorian Bill with the modification referred to earlier.

Retrospectivity

The Bar Association is of the view that this is one of the rare instances in which the Parliament should give consideration to enacting legislation which will operate retrospectively. There is a precedent for the retrospective removal of limitation periods, for broadly similar reasons, in the area of dust-related diseases. Like those who manifest the symptoms and signs of diseases caused by asbestos exposure many years after the event, victims of physical and sexual abuse frequently fail to recognise the long-

term effects of the abuse, or the relationship between that abuse and its consequent psychological harm, until many years later. Sexual abuse, of course, also has the element of embarrassment or shame felt by some victims, often deterring them from seeking redress until many years after the abuse has occurred.

On the other hand, it is important to consider the insurance implications of a retrospective abolition of limitation periods. One important reason why the Parliament should be very careful before proceeding to enact retrospective legislation in the civil sphere is the potential for its retrospective operation to skew insurance arrangements. That industry works by predicting risk, fixing premiums according to risk, assessing claims, setting reserves for individual claims and distributing profits after a period of time; often after the expiry of a limitation period. The retrospective removal of the protection of a limitation period after the distribution of profits can cause a significant economic distortion.

However, despite those considerations, we think this is a rare exception to the general rule against retrospectivity and requires very serious consideration. The injustice visited upon (past) child victims of physical (particularly sexual) abuse is so significant, the need so great and the number of victims so substantial that, in the Association's view, notwithstanding the economic distortions associated with such a change, the justice of the situation under consideration favours retrospectivity.

It is to be noted that there are examples of retrospective legislation in respect of rights in NSW, such as the amendments to s 3B of the *Civil Liability Act 2002*, which deprived some claimants of their right to common law damages even whilst their cases were part-heard. The Bar Association would not wish to see such an injustice revisited, but, of course, providing rights to those wrongly denied them in the past (rather than removing them) falls into a very different category.

Insurance

The insurance implications are presently the subject of close consideration by the Commonwealth Royal Commission. There are significant difficulties, including a present lack of cover where criminality is involved, small institutions which might not be able to afford insurance cover anyway and a lack of insurance cover by abusive individuals. We would respectfully suggest that insurance should be regarded as a work in progress, which will be subject to an interim report by the Commonwealth Royal Commission later this year and should be deferred until then. That may mean it is necessary to delay taking action in relation to any retrospective legislation concerning limitation periods until the insurance implications are better known.

Conclusion

The New South Wales Bar Association commends the NSW Government for bringing forward this issue and not awaiting the Royal Commission interim report. The Association suggests that a single national approach (which we suspect the Royal Commission will recommend) is highly desirable and that the approach taken in the Victorian Bill offers the best way forward.

The Bar Association would welcome the opportunity to have further input into the detailed drafting of the legislation and in respect of any further issues which might arise.

Endnotes

1. Patrick Parkinson, Kim Oates, Amanda Jayakody, 'Study of Reported Child Sexual Abuse in the Anglican Church', (May 2009), at 5.
2. *Brisbane South Regional Health Authority v Taylor* [1996] HCA 25; 186 CLR 541.