



10 March 2015

Justice Policy
Department of Justice
GPO Box 6
Sydney 2001

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

Dear Madam / Sir,

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

1. Women's Legal Services NSW (WLS NSW) thanks the Department of Justice for the opportunity to comment on the Discussion Paper: Limitation periods in civil claims for child sexual abuse.
2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.
3. In particular, we acted on behalf of 13 survivors of child sexual assault, in civil litigation against the State of New South Wales that was the subject of the Royal Commission Case Study 19 into Bethcar Children's Home (Bethcar public hearing).

Child sexual abuse claims and limitation periods

4. We do not believe that the current exceptions to limitation periods under the *Limitation Act 1969* (NSW) (*Limitation Act*) provide sufficient access to justice for victims of child sexual abuse.
5. We acknowledge and agree with the evidence gathered by the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) that suggests that many victims have faced a number of barriers to pursuing civil claims and that of those who have, many have found the process of civil litigation to be



traumatic and difficult.

6. It is our experience that one of the greatest hurdles to pursuing a civil claim for child sexual abuse is the application of the *Limitation Act*.
7. We agree with the significant difficulties experienced by victims of child sexual abuse in attempting to rely on the exceptions in the *Limitation Act* outlined at page 6 of the Discussion Paper.
8. The Royal Commission's Interim Report states that on average it takes a victim 22 years to disclose sexual abuse.¹
9. In our experience, and well documented in the literature, there are many reasons why victims of child sexual abuse do not report or disclose abuse for many years, if at all. Reasons include shame, an inability to recognise the abuse was a crime and a lack of access to therapeutic services to help them emotionally prepare themselves to seek redress.
10. A delay in disclosure and the limited exceptions in the *Limitation Act* mean that many victims will be statute barred from pursuing a civil claim.

Changes to NSW Government practice

11. We wish to acknowledge the speed with which the NSW Government responded to the issues raised in the Royal Commission's public hearing into Case Study 19: the Bethcar Children's Home, by its release of the 18 guiding principles for government agencies responding to civil claims for child sexual abuse (the Principles).
12. It is hopeful that the policy changes brought by the new Principles in conjunction with the Model Litigant Policy will bring about meaningful change for victims of child sexual abuse bringing civil claims against the State.
13. We do not however support the exception to the Principles that declares that agencies should not generally rely on a statutory limitation period defence **except** where there are multiple defendants. There are other defences open to a defendant and such an exception only acts to create a further barrier to the filing of a civil claim by a victim of child sexual abuse.
14. We note that both the Model Litigant Policy and the Principles are not enforceable. This is problematic because, as evidenced at the Bethcar public hearing, plaintiffs have little recourse if the State or its agencies breach the Model Litigant Policy. It was the experience of the plaintiffs in the Bethcar civil litigation that where it was raised with the State that the Model Litigant Policy was not being adhered to, no adequate response was forthcoming.
15. It is submitted that model litigant obligations and the Principles must be enforceable and therefore the abandonment of the limitation defence would best be expressed in legislation rather than as policy.

¹ Royal Commission into Institutional responses to Child Sexual Abuse, Interim Report: Volume 1, pp 158 & 197

Reform Options

Option A: Remove the limitation period in claims for child sexual abuse

16. WLS NSW strongly supports the removal of limitation periods from causes of action based on child sexual abuse (Option A).
17. We also strongly support the removal of the limitation period to cover all instances of sexual assault.
18. We submit that the removal of limitation periods from such causes of action must be retrospective. We further submit that retrospectivity should apply not only to conduct that occurred prior to the amendment of the legislation but also to any claim previously defeated by reason of a successful *Limitations Act* plea and to extant claims.
19. We support the introduction of provisions similar to those in British Columbia's Limitation Act² which set out exemptions to the limitation period for the following circumstances:
 - (a) claims of misconduct of a sexual nature (including without limitation, sexual assault) that occurred while the claimant was a minor;
 - (b) claims of assault or battery that occurred while the claimant was a minor;
 - (c) claims relating to sexual assault (regardless of the age of the victim at the time as the assault).
 - (d) claims of assault or battery where at the time of the acts, the victim 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 perpetrated, contributed to, consented or otherwise enabled the acts of assault or battery.
20. We note and support that the provisions in British Columbia are expressly retrospective in that they apply 'whether or not the claimant's right to bring court proceedings was at any time governed by a limitation period.'
21. We acknowledge and agree with the advantages of removing the limitation period outlined at page 10 of the Discussion Paper. The advantages significantly outweigh any disadvantages that may be brought about by such a change.
22. We argue that there should be no exceptions to pleading the limitation defence in child sexual abuse cases. The removal of limitation periods would not act to exclude other defences open to defendants including stay or strike out applications. This would balance the interests of both parties.
23. Removal of limitation periods in child sexual abuse matters would improve access to justice by focusing on the child sexual abuse itself rather than allowing alleged perpetrators to benefit from delays in reporting. Having to face the barrier of proving disability or latent injury under the *Limitation Act* if a matter is out of time may mean

² Limitation Act, SBC 2012, Chapter 13, subsections 3(1)(i) – (k)

that a victim chooses not to or is unable to pursue a civil claim and thus is denied justice.

24. We submit the potential for a greater number of historical cases of abuse to be brought before the Courts by plaintiffs should not be a relevant factor in deciding whether the limitation period is removed in such cases. Rather, the focus should be on issues such as access to justice and fairness. We argue it is in the public interest that perpetrators of child sexual abuse and any organisations that owe a duty of care to children where abuse took place are held accountable for their actions and are not able to escape such liability due to limitation periods.
25. Abolishing limitation periods in child sexual abuse claims would be consistent with the decision by the NSW Parliament to exclude time limits for recognition payments for victims of child sexual abuse under the *Victims Rights and Support Act 2013*. This decision was made in recognition of the significant delays by victims in reporting child sexual abuse and the consequent denial of access to compensation should a limitation period be applied in such cases.

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

26. We do not support Option B over Option A.

27. We are not convinced that reversing the presumption that limitation periods apply in cases of child sexual abuse will ensure more victims of abuse are not statute barred from filing a civil claim. Even with a definition of psychological condition that covers the range of reasons known to prevent child sexual abuse victims from commencing litigation, such a presumption will still act to disadvantage victims because it will leave a victim open to examination of their physical and / or psychological state in an attempt by the Defence to prove that the victim was in fact capable of commencing proceedings within time. It is our experience that a provision such as this would invite defendants to use private investigators, issue subpoenas for counselling and other records and require examination of victims by psychologists or psychiatrists engaged by defendants, causing re-traumatisation and distress to victims.

28. The Bethcar public hearing provides a good illustration of the lengthy delays that result from interlocutory proceedings and we envisage that the reversal of presumption under Option B will still give rise to such delays.

29. We do not support the alternative approach outlined in Option B.

Option C: Clarify the definition of disability

30. We do not support Option C over Option A.

31. As with Option B, this Option will still require at the least, that a plaintiff provide evidence of injury / disability and this evidence and the plaintiff victim will be open to cross-examination. Such an approach will likely cause further trauma to a victim and increase delays and costs in litigation.

32. Should Option C be adopted, we do not support an 'ultimate bar' in matters of sexual abuse and sexual assault and agree that it applies an arbitrary timeframe which may

not be reflective of an actual prejudice to the defendant.

33. The disadvantages that attach to Option C, as outlined in the discussion paper, are the very problems that reform is needed to address ie the continuation of limitation issues as interlocutory matters increasing the duration and cost of litigation and increasing the trauma to plaintiffs.

34. We do not support the alternative approach outlined in Option C, since it will not deliver the necessary reform that is required.

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

35. We do not support Option D, either alone or in combination with one of the other options, over Option A.

36. While we agree with the rationale that a perpetrator should be capable of being held civilly liable where there has been a conviction for the conduct to the criminal standard, there are many instances where cases of child abuse have not been prosecuted, where matters are 'no billed' or where findings of guilt have not been made. A removal of the limitation period in circumstances outlined under Option A will better capture all victims wishing to pursue civil litigation, rather than favouring only those plaintiffs where the perpetrator has been convicted for the offence.

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

37. We do not support limitation provisions which operate by virtue of the characterisation of the perpetrator. Victims of abuse by a family member or 'close associate' should not have more liberal limitation periods applied to them for the filing of proceedings than those victims of abuse perpetrated by those who fall outside of this category of perpetrators.

38. Amendments in accordance with Option A would mean that the 2002 amendments would cease to have effect and as such we prefer this option. If however, an option other than A is chosen, we strongly support the amendment of the 2002 provisions.

The type of actions covered

39. As discussed above under **Options for Reform - Option A**, we strongly support provisions which reflect those in place in British Columbia.

Child sexual abuse

40. We support amendments which cover child sexual abuse and support a broad definition of the range of conduct to which it applies. We support the adoption of the expressions 'sexual assault' and 'sexual misconduct' since both terms are broadly understood at common law.

Physical abuse of a child

41. We support amendments which extend to claims alleging physical assault of a minor. This inclusion would acknowledge the great damage, physical and psychological,

that can be caused to victims of physical abuse in childhood.

42. Inclusion of physical abuse of a child would also avoid the problem identified at page 7 of the Discussion Paper where otherwise courts would be challenged with how to approach cases where the allegations of sexual abuse are not statute barred while the allegations of physical abuse are barred.
43. We do not support the threshold of 'serious' physical abuse. Rather the term 'physical abuse' should be used. There is precedent for this in the British Columbia legislation in Canada which includes 'assault or battery' where the assault or battery happened while the claimant was (i) a minor or (ii) in an intimate and personal relationship or relationship of dependency.³ It is also consistent with proposed section 27O(1)(b) of the Limitation of Actions Amendment (Child Abuse) Bill 2015 (Vic).
44. We also do not support a requirement that in order to obtain the benefit of a limitation period exception, physical abuse must be connected to sexual abuse. There is no such requirement proposed in the Limitation of Actions Amendment (Child Abuse) Bill 2015 (Vic).
45. We further recommend the removal of a limitation period for psychological abuse, where it is related to sexual abuse or physical abuse as evident in proposed section 27O(1)(b) of the Limitation of Actions Amendment (Child Abuse) Bill 2015 (Vic).
46. We do not support limiting actions of assault and battery to those where a child was in a relationship of dependence with the alleged defendant. This would have the effect of creating tiers of victims under the *Limitation Act* exceptions.
47. We do not support a definition of sexual abuse or physical abuse that includes a reference to 'criminal child abuse' as proposed in the Victorian exposure draft bill (which was later amended after consultation, see below). A reference to 'criminal' would create an unnecessarily high threshold and may deny some victims of child sexual abuse access to justice.
48. Instead the terms 'sexual abuse', 'physical abuse' and 'psychological abuse' should be defined by their ordinary meaning as now occurs in proposed section 27O(1)(b) of the Limitation of Actions Amendment (Child Abuse) Bill 2015 (Vic) and articulated in the explanatory memorandum.⁴

Sexual assault of an adult

49. We support amendments to the *Limitation Act* which provide an exemption for all matters involving claims of sexual assault, regardless of the age of the victim at the time of the assault. An amendment to this effect would recognise the shame and distress caused to victims of sexual assault and the consequent delays in reporting to police and taking civil action.

³ Limitation Act, SBC 2012, s3(k)

⁴ Limitation of Actions Amendment (Child Abuse) Bill 2015, Explanatory Memorandum, 24 February 2015, Clause 4.

Domestic Violence – physical abuse

50. We support amendments to the *Limitation Act* which provide an exemption to victims of domestic violence in terms that reflect the provisions contained in the Limitation Act of British Columbia. Such an amendment would recognise the shame and trauma experienced by victims of domestic violence which often leads to delays in reporting and filing of legal proceedings.

Retrospectivity

51. Any amendments should apply retrospectively and apply regardless of whether there are or were any limitation periods in effect at the time of the offence.

52. The amendments should also apply without exception in the following circumstances:

- (a) where a case has previously failed on the limitation issue alone. That is, that the merits of the case were not determined because the claim was dismissed because the plaintiff could not prove any exception under the *Limitation Act*. In these cases, a plaintiff should be at liberty to re-file their case, relying on amendments to the *Limitation Act*.
- (b) where a case is currently on foot and where there are interlocutory proceedings in relation to the *Limitation Act*. In this case, the amendments should be deemed to apply enabling the Court to proceed to hear and determine the substantive issues of the case.

Potential Impacts

Direct Impacts

53. Changes to the *Limitation Act* may lead to an increase in claims filed because, quite simply, amendments would now more likely allow a case to be heard on its merits where previously it would have been dismissed for failing to prove an exception under the Act.

54. However, amendments will not alter or lift the other barriers faced by plaintiffs in bringing claims. These barriers include costs risks, a lack of legal aid to fund proceedings, difficulties identifying the correct defendant, difficulties establishing duty and liability, finding sufficient evidence, an impecunious defendant and the trauma involved in bringing such a case before the Court. These barriers will continue to limit the number of cases filed.

55. We believe that a decision about whether amendments should be made to the *Limitation Act* should be based on access to justice and fairness, rather than the potential increase in numbers of cases being filed in courts and the costs that may flow from that to Courts and court lists.

56. We agree that amendments to the *Limitation Act* may bring cost savings to plaintiffs and defendants since it would negate the need for interlocutory proceedings where the limitation point is argued. While this may be a positive side effect, we do not believe it is a relevant factor in deciding amendments under the *Limitation Act*.

57. We do not agree that the potential increase in legal costs for organisations is a

relevant factor in determining the extent of any amendments to the *Limitation Act*. As stated above, decisions should be based solely on access to justice and fairness.

Indirect impacts

58. We do not agree that the potential flow on effect for organisations in terms of increases to their insurance premiums should be a relevant factor in deciding the extent of amendments to the *Limitation Act*.

Conclusion

59. In summary we support Option A over all other options. Further, we support its extension to cover the circumstances set out in British Columbia's *Limitation Act*. For too long the law and its application has swung too far in the direction of protecting perpetrators of abuse and institutional defendants against litigation brought by those who have experienced child sexual abuse, sexual assault and domestic violence. There are sound public policy reasons to support a solution that is simple to apply; that would reduce the risk of re-traumatisation; avoid legal costs; and encourage focus on merits hence increasing fairness in settlement negotiations.

60. We support the proposition outlined at page 27 of the Royal Commission Consultation Paper on Redress and Civil Litigation 'that although the primary responsibility for the sexual abuse of an individual lies with the abuser and the institution of which they were part, we cannot avoid the conclusions that the problems faced by many people who have been abused are the responsibility of our entire society.'

61. Under international human rights, States are required to act with due diligence to protect, promote and fulfill their human rights obligations.⁵

62. Significantly, as noted in General Recommendation 19 made by the Committee on the Elimination of Discrimination against Women, States may 'be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation'.⁶

63. In her 2013 annual thematic report to the United Nations Human Rights Committee Special Rapporteur on Violence Against Women, its causes and consequences, Ms Rashida Manjoo, advocates that the due diligence standard be divided into two categories: individual due diligence and systemic due diligence.⁷

64. Individual due diligence should be flexible and respond to the specific needs of the individual – housing, health and counselling, legal needs, assistance in finding employment as well as compensation. It requires that perpetrators of violence

⁵ The *Universal Declaration of Human Rights* (art. 8), the *International Covenant on Civil and Political Rights* (art. 2, para. 3), the *International Convention on the Elimination of All Forms of Racial Discrimination* (art. 6), the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (art. 14), the *Convention on the Rights of the Child* (art. 39), *CEDAW General Recommendation 19: Violence against Women*, as contained in UN Doc A/47/38 (1992) [9, 24(i), 24(t)(i)], Human Rights Committee, *General Comment No. 31*, CCPR/C/74/CRP.4/Rev.6 [8]; Committee on the Rights of the Child, *General Comment No. 5*, CRC/GC/2003/5, 27 November 2003 [1]; Committee on Economic, Social and Cultural Rights, *General Comment No. 14*, E/C.12/2000/4 (2000), [33].

⁶ *CEDAW General Comment 19: Violence against Women*, as contained in UN Doc A/47/38 (1992) [9, 24(i), 24(t)(i)].

⁷ *Report of the Special Rapporteur on violence against women, its causes and consequences*, Rashida Manjoo, Human Rights Council, 14 May 2013 A/HRC/23/49, [70]

against women and those who failed in their duty be held accountable and be punished.⁸

65. Systemic due diligence refers to States obligations to ensure 'a holistic and sustained model of prevention, protection, punishment and reparations for acts of violence against women'.⁹ Significantly, it requires States 'to be involved more concretely in overall societal transformation to address structural and systemic gender inequality and discrimination'.¹⁰
66. The United Nations *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, supports the 'strengthening and expansion' of compensation funds.¹¹
67. It is incumbent upon States to take all steps it reasonably can to strengthen its due diligence to prevent future violations. Although a redress scheme is needed, so is an accessible civil litigation process.
68. Taking a progressive approach to amendments to the Limitation Act is a crucial and important step available to NSW to develop a fairer justice system for survivors.
69. If you would like to discuss any aspect of this submission, please contact Janet Loughman, Principal Solicitor on 02 8745 6900.

Yours faithfully,
Women's Legal Services NSW

Janet Loughman
Principal Solicitor

⁸ Ibid.

⁹ Note 4 at [71]

¹⁰ Ibid. See also *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo*, Human Rights Council, 23 April 2010 A/HRC/14/22, [24].

¹¹ U.N General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985, U.N Doc. A/RES/40/34 [13].