KELSO LAWYERS

Submissions in Response to the NSW Department of Justice Discussion Paper on Limitation Periods in Civil Claims for Child Sexual Abuse

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Introduction

Kelso Lawyers are pleased to present these submissions in response to the NSW Department of Justice ('the Department') Discussion Paper on Limitation Periods in Civil Claims for Child Sexual Abuse ('the Discussion Paper'). We congratulate the Department on the excellent quality of the Discussion Paper which demonstrates a thorough understanding of the issues.

In preparing our submissions we have sought to address the potential for amendments to have their objects undermined, or to have unintended consequences, by neglecting to consider them in the context of the related legal landscape.

In view of this concern, we start by specifically identifying the outcomes that these amendments seek to achieve. We then look at the common rationales for limitation periods and propose the common thread that runs through these rationales.

On this foundation we identify which concerns are already sufficiently addressed by other features of the written and unwritten law. We then set out how the *Limitations Act 1969* (NSW) should be amended, how the proposals best achieve the desired outcomes, and how they do so in a manner that is consistent with the purposes of the *Limitations Act*.

After addressing the proposed amendments to the *Limitations Act* we proceed to identify a number of other obstacles in the legal landscape that could significantly undermine the desired outcomes of these changes. We then discuss how the Government might overcome these obstacles in a manner that is fair to stakeholders, promotes continual improvement in child protection, and ensures justice for survivors of historical child abuse.

Regarding terminology, we have used the term 'survivor' to refer to persons who have been caused harm by acts of child abuse.

Executive Summary

The Director and founder of this firm, Peter Kelso, spent his childhood as a ward of the State of NSW – where he regularly endured domestic violence from his foster parents. This has given Peter a heart for survivors of abuse, and an empathy born from firsthand experience. As a result this firm has evolved to specialise in acting for survivors of child abuse and domestic violence.

We have helped over 10,000 clients obtain victims compensation through statutory schemes; As members of the Panel of External Legal Practitioners for the NSW Department of Family and Community Services, we are heavily involved in providing legal advice and representation to children in State care; We also have a significant practice in obtaining meaningful settlements for survivors of historical child abuse; and we act for witnesses appearing at the Royal Commission into Institutional Responses to Child Sexual Abuse ('the Child Abuse Royal Commission').

The focus of our work, as a firm, places us at the coalface of the issues raised in the Discussion Paper – in particular the injustices caused by the limitation period, and the imprecise state of the law on vicarious liability of institutions for child abuse. We have therefore drawn on our experiences to extend the discussion to both identify the non-litigation implications of the *Limitations Act 1969* (NSW), and to propose solutions to other obstacles which threaten to significantly undermine the overriding purposes for amending the *Limitations Act*.

Our submissions start by expressly identifying the overriding objectives or outcomes that are driving the calls for changes to the *Limitations Act*. We submit that these objectives include:

1. Incentivising the continual improvement of child safety measures in institutions;
2. Avoiding unnecessary trauma in the civil litigation process for survivors;
3. Promoting fair private settlements for survivors; and,
4. Promoting public confidence in the legal system.

We then look at the usual rationales for the *Limitations Act* to identify the most consistent purposive view of the Act from which to amend it in a consistent manner. We propose that the common thread running through these rationales suggests that the *Limitations Act* can be seen as a 'rough justice' manifestation of the principles of estoppel. This is in the sense that a potential defendant should generally be able to take the failure of a potential plaintiff to bring proceedings, several years after an incident, as a representation that proceedings won't be brought.

On that footing we argue that it is consistent with the rationales of the *Limitations Act* to remove the limitation period for actions arising from child abuse. This is because delay in these cases is well known to be caused by the impact of the offender's conduct – the defendant should not be able to take the delay as a representation that the plaintiff does not intend to bring proceedings.

We then use the identified objectives and the proposed underlying intentions of the *Limitations Act* to address the Discussion Questions through a series of recommendations.

Summary of Recommendations

Our recommendations are as follows:

Limitations Act Recommendations

1. The limitation period for actions arising from child abuse should be removed.
2. Actions arising from child abuse should be exempt from the ultimate bar.
3. There should be no requirement to establish that the delay in bringing the action was caused by the child abuse. This would be unnecessarily traumatising for survivors.
4. The existing applications for strike out, dismissal and staying of proceedings provide sufficient protections where delay has prejudiced the possibility of a fair trial.
5. The scope of actions that will have the benefit of the 'child abuse' exception should be drafted and interpreted broadly – to avoid replacing one technical obstacle with another. It should at least include physical and sexual abuse, and not require the physical abuse to be connected to the sexual abuse.

6. The removal of the limitation period should be retrospective to promote fairer settlements for survivors of historical child abuse.

7. NSW should engage the other States and endeavour to arrive at uniform limitations legislation.

Additional Recommendations

1. There should be a statutory ground to set aside deeds of release that were executed while the current limitation period was in place. Otherwise pleading these deeds will become a means of circumventing the changes to the *Limitations Act*.

2. Institutions should be held liable for actions arising from child abuse that occurred in connection with their activities, unless they can show that they took all reasonable measures to prevent the abuse.

3. The associated property trust of an institution should be statutorily deemed to be a proper defendant able to stand in the place of the institution.

4. A nominal defendant should be established as a defendant of last resort. This nominal defendant could be funded by an annual levy paid by medium to large sized institutions whose activities bring them into contact with children.

5. The *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW) should be amended to prevent 'child abuse' proceedings, properly commenced in NSW (whether by use of that Act or otherwise), from being removed to a jurisdiction with a limitation statute which is less favourable to the plaintiff.

Desired Outcomes

It is apparent from the Discussion Paper[1] introduction that the Government has two overriding concerns:

1. That victims of child abuse have access to the courts, and

2. That the process of civil litigation not be unnecessarily traumatising

[1] Department of Justice, 'Limitation periods in civil claims for child abuse - Discussion Paper', January 2015.

In view of the Discussion Paper's reference to the work of the Royal Commission into Institutional Responses to Child Sexual Abuse ('the Royal Commission'), we submit that the first concern should be seen to include:

1. Access to justice
2. Public confidence in the legal system
3. Promoting fair private settlements for survivors
4. Incentivising the continual improvement of child safety measures by institutions

Consistency with the Underlying Purposes of the Limitations Act

To avoid confusion and unintended outcomes, the amendments should endeavour to operate consistently with the underlying purposes of the *Limitation Act*. In this section we discuss the most commonly raised rationales for the Limitation Act in the context of the wider legal landscape. From there we suggest a single purposive foundation from which to arrive at amendments that operate consistently with the Act.

The main rationales proffered for limitation statutes are summarised in Part 2 of the Discussion Paper.

1. The public interest requires that disputes be settled as quickly as possible.
2. Delays are likely to lead to relevant evidence being lost.
3. 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'.
4. 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.

The summary draws from McHugh J's judgment in *Brisbane South Regional Health Authority v Taylor*. In that case McHugh J argued that the primary rationale was the capacity for the passage of time to cause the loss and decay of evidence – the result being that the

defendant's ability to disprove or test the plaintiff's case was irretrievably prejudiced; and therefore a fair trial could not be had.[2]

This suggests that the limitation statues should be understood as inspired by the courts' inherent jurisdiction to strike out or stay applications on grounds of evidentiary prejudice through delay in bringing proceedings. This view sets a hard task for any out-of-time plaintiff, as it effectively requires them to overcome a presumption that a fair trial cannot be had – and to do so by showing that the defendant is not prejudiced by evidence lost, faded or forgotten.

This view is however at odds with the absence of a limitation period on the prosecution crimes such as child sexual abuse, which provides a corresponding cause of action in tort. The consequences of any prejudice in a criminal trial are greater than those in a civil matter. This suggest that the Parliament either does not take the view that delay in itself should be presumed to have prejudiced a fair trial, or that certain conduct should not have the benefit of such a presumption.

> *R v Lane* (Unreported, Federal Court, 19 June 1995, 2) (Wilcox J)
>
> It is commonplace for there to be a substantial delay in the reporting of alleged sexual assaults, especially where the complainant is a child…it seems that many sexual assault victims are unable to voice their experience for a very long time. To adopt a rule that delay simpliciter justifies a stay of criminal proceedings would be to exclude many offences, particularly offences against children, from the sanctions of the criminal law.

This juxtaposition of the civil and criminal consequences of the same conduct, and the effect of delay on the offender's continued liability to those consequences, suggest a problem with the view that delay, in itself, should be presumed to have prejudiced a fair civil trial for child abuse litigation.

> *Applications 861 and 864* (Unreported, Botting DCJ, District Court of Queensland, 21 June 2002, 49)

[2] *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, [4] (McHugh J).

> It may perhaps trouble some that in a case where a criminal trial has taken place, and convictions ensued, that our legal system should deny the complainants the right to pursue their violator for compensation by civil action. It is not my function to seek to explain, let alone seek to resolve any such apparent incongruity.

These observations suggest the need to search for a more fundamental intention or rational behind the *Limitations Act*. That the more severe consequences of the criminal law can remain long after the civil consequences of the same conduct have been time-barred indicates that the avoidance of prejudice to the defendant is not the highest priority for parliament. It also suggest that there is strong public benefit to retaining indefinite liability to punishment for certain types of conduct.

A Purposive Foundation for Amending the Limitations Act

We submit that the *Limitations Act* can be viewed as a 'rough justice' manifestation of the principles of estoppel. And it is from this foundation that it is right and consistent to remove the limitation period for actions arising from child abuse.

What we mean by this 'estoppel' approach is as follows: In the majority of cases the parties will have at least constructive notice that a claim may exist between them; If after a reasonable time the plaintiff has not commenced the action, the defendant should be allowed to take this as a representation that no action will be brought; In reliance on this representation the defendant will go about arranging his affairs without factoring in that he may have need to defend the claim (and this of course has the benefits to society set out in the third limitation period rational listed above); The defendant would then suffer detriment if the plaintiff were allowed to depart from this representation as he will be caught unprepared (in his records and financial affairs) to defend the claim.

This estoppel approach seems more compatible with the various grounds available in the *Limitation Act* to extend time. It also avoids the statute serving a superfluous role in view of the existing powers to stay and strike out actions.

As to grounds to extend time under the Act, they variously relate to circumstances that affect what is a reasonable time for the plaintiff to take in bringing an action (e.g. latent injury), or where the defendant would have at least constructive notice of reasons not to take delay as a representation that no action will be brought (e.g. concealment, disability).

We will draw on this 'estoppel' view of the Limitation Act when discussing how the Act should be amended below. In particular it will be argued that the defendant's actions will usually be the case for the delay in cases of child abuse; and therefore, delay should not serve as a representation that the plaintiff does not intend to bring an action. We will also address the issue that time-barring child abuse litigation does not serve the interests of society.

Suitability of Existing Protections for Defendants

The courts already possess sufficient powers to prevent injustice to defendants. Chief amongst these protections is the power to summarily dismiss a claim as an abuse of process where the claim cannot be justly determined for any reason, including delay.[3] The effect of this protection is that the changes we propose to the *Limitations Act* would not prevent a court from disposing of proceedings in which delay genuinely has rendered it unjust to the defendant to proceed. Instead, these changes would merely operate to remove the statutory presumption that to proceed in such circumstances is unjust.

NSW courts may also issue a stay of proceedings where the proceedings constitute an abuse of process.[4] It has been held that abuse of process includes proceedings in which delay has rendered a fair trial impossible;[5] thus providing another avenue for defendants of child abuse claims to argue that the proceedings are unjust in the circumstances.

These safeguards are further complimented by the courts' power to order a legal practitioner to pay costs where the proceedings constitute an abuse of process.[6]

In addition to these safeguards, the fact remains that, regardless of any changes to the *Limitations Act*, a plaintiff will still has to prove each element of their claim on the balance of probabilities in substantive proceedings. And plaintiffs are less likely to be able to rely on the rule in *Jones v Dunkel* (whereby an adverse inference is drawn from the failure to lead evidence on a point) where it is reasonable to find that the defendant's failure to provide

[3] *Uniform Civil Procedure Rules 2005* (NSW) R.13.4(1); *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 25
[4] *Civil Procedure Act 2005* (NSW) s67.
[5] *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256
[6] *Civil Procedure Act 2005* (NSW) s99; *Cahill v Ekstein* (Unreported, 5 June 1998, NSWSC)

evidence is most likely due to the loss of witnesses, records, and memories with the passage of time.

Obstacles & Proposed Solutions: The Limitations Act

Having identified the overriding purposes and rationales to be considered, and the existing safeguards, we will now progress to identifying the various obstacles faced by survivors of child abuse, and to propose how they may be resolved.

In relation to the *Limitations Act*, we advocate for:

1. The removal of the limitation period for actions involving child abuse;
2. No requirement to justify the delay in bringing the action; and
3. The retrospective application of these measures.

Removing the Limitation Period

The very nature and typical circumstances of child abuse provide a solid foundation for removing the limitation period for actions arising from child abuse.

First, the impact of child abuse makes it entirely reasonable for the plaintiff to be delayed for several decades in bring their action. It is now well accepted that the impact of child abuse causes long term psychological harm.[7] It deprives survivors of the psychological fortitude to endure the process of civil litigation, or to even face the subject-matter of the action – especially in the vivid manner required; and the possibility of hostile treatment by defence counsel would not make this task any easier.[8]

Second, the offender cannot deny knowledge of the reasons why an action has not been brought within the usual limitation period, and in many cases the offender has sought to ensure this by threats and manipulation.

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[7] Chrousos, G., and Gold, P. (1992). 'The concepts of stress and stress system disorders: Overview of physical and behavioural homeostasis'. *The Journal of the American Medical Association*, 267(9), 1244–1252; Delima, J., and Vimpani, G. (2011). 'The neurobiological effects of childhood maltreatment : an often overlooked narrative related to the long-term effects of early childhood trauma?' *Family Matters*, (89) 2011: 42-52. http://search.informit.com.au.ezproxy.newcastle.edu.au/fullText;dn=20120485;res=AGISPT

[8] Braun, Kerstin, 'Legal Presentation for Sexual Assault Victims - Possibilities for Law Reform' (2014) 25(3) *Current Issues in Criminal Justice* 819, 819-820.

> *Hawkins v Clayton* (1988) 164 CLR 539, [42] (Deane J)
>
> If a wrongful action or breach of duty by one person not only causes unlawful injury to another but, while its effect remains, effectively precludes that other from bringing proceedings to recover the damage to which he is entitled, that other person is doubly injured. There can be no acceptable or even sensible justification of a law which provides that to sustain the second injury will preclude recovery of damages for the first. It would, for example, be a travesty of justice and common sense if the law provided that a cause of action lay for damages for false imprisonment but then went on to provide that that cause of action would be lost if the false imprisonment continued for six years after the cause of action first accrued.

Third, it is a rare thing for the institutions involved to be without at least constructive notice of the abuse. There should be no sympathy for those who close their eyes to, or actively cover up, such matters – preferring their assets and reputation to the welfare of the children entrusted to them. Neither the offenders nor the institutions should be afforded a statutorily entrenched presumption (via the *Limitations Act*) that delay in these cases serves as an assurance by the plaintiff that litigation won't be commenced.

Fourth, where conduct makes a person indefinitely liable to the heavy sanctions of the criminal law, retaining the lesser civil consequences for the same period does not cause injustice.

Fifth, if the removal of the limitation period does not apply to institutions as well then the incentive to cover up abuse and ride out the limitation period will remain. The work of the Royal Commission has shown that institutions behave as rational economic actors – they have consistently chosen the course that mitigates the damage to their bottom line. If the limitation period is removed, and accepting that defendants are in a better position to defend an action while the evidence is fresh (and they are in the better position to ensure the creation and preservation of evidence), then the incentive should work in the opposite direction – promoting the early resolution of wrongs arising from child abuse.

Sixth, public policy strongly favours making institutions liable for child abuse that occurs in connection with their activities. It has been a regular theme of the Royal Commission case

studies that it was the institutional environment that allowed the abuse to go on. It is the institutions that are in the best position to learn from the occurrence of child abuse and to continually improve their practices to reduce the risk of it. Furthermore, the veil of legitimacy and trust that institutions lend to their agents has frequently provided offenders with the means to gain and abuse the trust of those with parental responsibility for children. Having held themselves out as providing a safe environment for children, these institutions should not be exempted from continual liability for breaching that trust.

Seventh, as discussed above (see 'Suitability of Existing Protections for Defendants'), the law already provides sufficient protections for defendants from prejudice arising from delay. If the criminal law does not consider mere delay a sufficient reason not to prosecute for child abuse then neither should it be in civil actions.

In all of this the primary consideration must go to promoting the protection of children, and addressing the impacts of child abuse as early as possible. The economic cost of unresolved child abuse in Australia is estimated to be over $9 billion annually[9] – institutions are in the best position to address this, they have long refused – without significant public pressure – to do so, so the law must provide the incentive.

No Requirement to Justify the Delay in Bringing the Action

Due to the complex psychological impact of child abuse, it would be unduly complicated, invasive, and expensive, to require proof that the plaintiff had brought the action within a reasonable time after recovering the fortitude to do so.

The limitation period for actions arising from child abuse should be removed without condition. And, furthermore, the scope of matters considered to have arisen from child abuse should be given a broad and beneficial interpretation.

To do otherwise would be to exchange one technical hurdle for another, and expose survivors of abuse to unnecessary trauma.

[9] Kezelman et al., 'The cost of unresolved childhood trauma and abuse in adults in Australia' (2015), page 10: http://tinyurl.com/l5l3thm.

No Ultimate Bar

Any amendment to the *Limitation Act* should expressly state that the ultimate bar does not apply to actions arising from child abuse.

To allow the ultimate bar to continue to apply would be incompatible with every object set out under 'desired outcomes' above. It would also be inconsistent with the presumption that survivors have brought their action within a reasonable time.

Relevantly, s294(2) of the *Criminal Procedure Act 1986* (NSW) states:

> (2) In circumstances to which this section applies, the Judge:
>
> (a) must warn the jury that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false, and
>
> (b) must inform the jury that there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making, a complaint about the assault, and
>
> (c) must not warn the jury that delay in complaining is relevant to the victim's credibility unless there is sufficient evidence to justify such a warning.

If delay in itself is not grounds to distrust a survivor's evidence in a criminal matter, then it should not be grounds to distrust it in a civil matter; and therefore the State should also not suffer the ultimate bar to operate on these claims. The seriousness of child abuse, the impact on the survivor, and the cost to society all favour exempting child abuse actions from the ultimate bar.

Removal of Limitation Period Should Be Retrospective

If the amendments do not operate retrospectively then survivors will also continue to be deprived of any significant leverage when seeking settlements from offenders and institutions. Without the threat of litigation the institutions (as the offenders often lack

sufficient assets) will continue to be able to dictate the outcome of any settlement for historical child abuse.

It is important that the benefit of any changes to the limitation period are not undermined by only the offender being exposed to liability. The gravity of the conduct, the burden it places on society, the trust reposed in these institutions, the measures available to them to mitigate the risk, and the moral standards which it is appropriate to hold them to (either because they purport to abide by those standards, or because of the marked power imbalance between them and the victim) make it appropriate to set the cost of their licence to operate at the price of constant vigilance and willingness to act.

By ensuring that any changes to the limitation period apply to institutions as well, and apply retrospectively, the healing of harms past and future is encouraged. In doing so the State can mark this time as a moment in our history where we turned a corner for the benefit of children and an improved confidence in the legal system to serve the welfare of society.[10]

The Scope: Actions Arising from Child Abuse

From the above discussion, three of the core arguments in favour of removing the limitation period for actions arising from child abuse are:

1. The psychological impact of child abuse means that the breach of duty itself often restrains the plaintiff from bringing the action for until many years later;
2. The absence of a limitation period in the criminal law for acts of child abuse shows that there is not a presumption from the legislature that delay itself prevents a just trial of the issues;
3. A limitation period for civil actions arising from child abuse is at odds with community standards and undermines the promotion of child safety and welfare.

On this footing, it would be inconsistent to remove the limitation period for child sexual abuse, but not for other forms of abuse – such as neglect and assault.

[10] Mathews, Ben 'Limitation periods and child sexual abuse cases: Law, psychology, time and justice' (2003) 11(3) *Torts Law Journal* 218,245.

Other forms of child abuse are also apt to similarly impede a plaintiff's ability to bring an action for many years. Assault and neglect, like sexual abuse, are known to similarly cause prolonged psychological harm to the victim;[11] and the severity of such harm typically increases with the duration of the abuse.[12] Furthermore, child abuse as a class of conduct often occurs in circumstances that hinder reporting (aside from the psychological impact of the abuse) – abuse of power, threats, authority figures (spiritual, family, social, government) as offenders, and concealment from independent witness.

Sexual assault will also often be accompanied by other forms of abuse, and indeed it may be facilitated or exacerbated by such conduct – the victim may be kept against their will and sexually assaulted, they may be beaten into not resisting any other abuse from the offender, and the sexual assault may also involve the use of a weapon or restraints. In such situations it would undermine community standards of justice and fairness to attempt to separate out what harm was caused by the sexual assaults, and what harm was caused by the other forms of child abuse.

However, it is important that the scope of the child abuse definition used in the amendments to the *Limitation Act* not become a hurdle itself. The amendment must be drafted so as to avoid removing the limitation period only for those who would be held criminally liable. Institutions are in the best position to learn from and prevent instances of child abuse, unless they are similarly exposed to liability they will continue to be without any additional incentive to improve their practices.

We propose that the scope of conduct for which the limitation period should be removed could be defined as follows:

1. 'Child abuse' means conduct, or a course of conduct, that occurs or commences while the victim is under the age of 18 years;

[11] Chrousos, G., and Gold, P. (1992). 'The concepts of stress and stress system disorders: Overview of physical and behavioural homeostasis'. *The Journal of the American Medical Association*, 267(9), 1244–1252; Delima, J., and Vimpani, G. (2011). 'The neurobiological effects of childhood maltreatment : an often overlooked narrative related to the long-term effects of early childhood trauma?' *Family Matters*, (89) 2011: 42-52. http://search.informit.com.au.ezproxy.newcastle.edu.au/fullText;dn=20120485;res=AGISPT

[12] De Bellis, M., and Kuchibhatla, M. (2006). 'Cerebellar volumes in pediatric maltreatment: Related posttraumatic stress disorder'. *Biological Psychiatry*, 60, 697–703.

2. ‘Child abuse’ means conduct, or a course of conduct, that occurs while the defendant has custody of, or is in communication with, the child. And that conduct is likely to cause more than a temporary impact upon the victim’s psychological health;

3. For the avoidance of doubt, it is not necessary that a defendant to an action arising from child abuse be the party who personally committed the acts of child abuse.

In any case, a broad and beneficial removal of the limitation period for those directly and vicariously liable is best way to promote the safety of children and the redressing of past wrongs.

Obstacles & Proposed Solutions: Other Recommendations

Having discussed the proposed amendments to the Limitations Act, we now proceed to discuss a number of other recommendations that will assist in ensuring the objectives of these changes are achieved.

Inconsistency of Laws

Ideally, the States and Territories should strive for consistency in their limitation statutes. Unfortunately this has not been the case. As Dr Ben Mathews observes:

> [t]here is no uniform approach across Australia and the laws differ substantially. … This complexity complicates matters for plaintiffs generally, and even more so for those in child sexual abuse claims. It also makes it difficult to synthesise even basic propositions.[13]

When combined with the cross-vesting scheme these inconsistencies yield further problems for survivors.

The Royal Commission’s ‘Consultation Paper on Redress and Civil Litigation’, at pages 200-201, summarises the experience of an attempted class action against the Congregation of Christian Brothers in Western Australia. Due to the inflexibility of the Western Australian *Statute of Limitations*, actions were commenced in NSW and Victoria for plaintiffs now

[13] Dr Ben Mathews, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper No 5: Civil Litigation*, released 6 December 2013, p 8.

resident in those States. However, the defendant successfully applied to have the proceedings removed to the Western Australian Supreme Court.

We propose that NSW engage with our fellow States and Territories to implement uniform provisions and exemptions for actions arising from child abuse. Mindful of the complexities that this may involve, we also propose that the *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW) be amended to prevent proceedings properly commenced in NSW (whether or not by the use of that Act) being transferred to another jurisdiction where it is prima facie more likely that the plaintiff's claim will be statute-barred.

Deeds of Release

It is important, for the purposes of removing the limitation period to be fully realised, that provision be made for the voiding of unjust deeds of release. Otherwise, defendants who have executed these deeds with survivors can effectively continue to plead the limitation period by pleading a deed that was executed in reliance on the limitation period. These deeds will serve as 'circuitous devices'[14] by which offenders and institutions will circumvent the changes in the law, and shirk their social responsibilities.

Frequently, survivors who have attempted to sue the perpetrator or the institution have been met with the limitation period. With no other options available to them, and 'something being better than nothing', they reluctantly execute a deed of release for a sum that falls significantly short of the gravity of the abuse they suffered. These situations are plainly unjust and apt to cause people to lose faith in the legal system's ability to deliver justice and facilitate accountability.

The situation seems not that far from the doctrine of economic duress – where one party forces another to enter an unfair agreement in circumstances where the only lawful alternative is to suffer significant economic detriment. Similarly, survivors who are in possession of a time-barred cause of action are forced to accept grossly inadequate settlements or receive nothing.

[14] *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 349.

We submit that the injustice of this situation favours the adoption of a statutory ground of relief. Such a ground could – as with existing grounds like undue influence, unconscionable conduct, duress, and the *Contracts Review Act 1980* (NSW) – allow a person to apply to a court to have the deed declared void.

Such a ground should be available regardless of whether the applicant had legal representation at the time of executing the deed. The unfairness of an agreement made in the absence of leverage or options is not mitigated simply because the person was better informed of the impossible nature of their situation.

The court should be able to take into account all relevant factors – such as the sum of the award, provision for costs, whether the relevant cause of action was time-barred, and the gravity of the abuse that was alleged at the time of the agreement. After weighing the relevant factors the court could then make a finding on whether the deed was unjust in the circumstances, or substantially disproportionate to the likely impact of the abuse, and, if so, declare the deed to be void.

As the offenders and institutions have been able to dictate the outcome of negotiations regardless of the usual procedural safeguards – such as legal representation – there is a need to bring in a ground of relief that focuses on substantive unfairness.

A Proper & Pecunious Defendant

In many historical child abuse cases the direct perpetrator of the abuse will be either deceased or impecunious. Changes to the limitation period will have little effect on access to justice if they are not complimented by measures which ensure there is a suitable and pecunious defendant from which to seek redress.

Clarifying the Duty of Institutions

This has been a source of uncertainty in Australia since the High Court's decision in *Lepore,*[15] where the Court gave inconsistent judgments regarding when vicarious liability and non-delegable duties apply to institutions.

[15] *New South Wales v Lepore* (2003) 212 CLR 511

In the face of such uncertainty, plaintiffs may be faced with the frustration, delay, and prohibitive cost of multiple levels of appeal even after being permitted to commence their action. To avoid this war of attrition the legislature should clarify the circumstances in which an organisation will be held liable for abuse perpetrated by its employees, agents and volunteers.

One approach would be to reverse the onus of proof in child abuse claims: where abuse in institutions or by their agents is substantiated, the defendant institution must show that they took all reasonable steps to prevent the abuse, or else be held liable for it. This would also have the additional benefit of encouraging such organisations to both produce and maintain appropriate records regarding their interactions with children; the current state of affairs incentivises against this – allowing the record-keeping practices of institutions to directly undermine the strength of a plaintiff's claim against the institution.

Making the Defendants' Assets Available

Clarifying the organisation's duty and removing the limitation period will be of little benefit to most survivors of institutional abuse if the assets of an organisation's associated property trust are not available to pay a judgment debt. [16]

We submit that where organisations have engaged in activities which bring them into contact with children, it is fundamentally unjust that they avoid liability for any resulting child abuse simply by reason of their organisational structure. To rectify this situation, we propose that the property trusts associated with an institution be statutorily deemed to be a proper defendant and able to stand in the place of the institution.[17] This could be done by a stand-alone enactment, amendment to legislatively established property trusts, or both.

Nominal Defendant

Finally, there will be occasion where a survivor is left without redress because, despite the liability of the organisation, and the property trust being a proper defendant, neither the organisation nor its associated trust has sufficient assets.

[16] *Trustees of The Roman Catholic Church v Ellis and Anor* (2007) 63 ACSR 346
[17] For example, see: *JGE v Trustees of the Portsmouth Roman Catholic Diocesan; sub nom E v English Province of Our Lady of Charity* [2012] 4 All ER 1152

It is unjust that the value of a person's human rights should vary according to the pecuniosity of the tortfeasor. We therefore recommend that a nominal defendant be established. The nominal defendant could be funded by a levy placed on medium to large size organisations whose activities bring them into contact with children.

Having long introduced the risk of child abuse into the community, and substantially evaded any real accountability for it, it is right that institutions should bear the cost of these measures. Having failed on a significant scale to right these wrongs and mitigate the risks, the law should now in these ways be amended to advance the welfare of society and its children.

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