Issues Paper 5

Civil litigation

Limitation periods

Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse

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1 Scope of this submission

The Royal Commission into Institutional Responses to Child Sexual Abuse is required to inquire into, amongst other things, ‘what institutions and governments should do to address, or alleviate the impact of, past and future child sexual abuse in institutional contexts, including in ensuring justice for victims through the provision of redress by institutions’. ¹

1.1 Limitation of Actions statutes – limitation periods

To assist the Royal Commission in addressing the terms of the Letters Patent, this submission responds to specific matters of interest to the Royal Commission, namely:

(1) Are there elements of the civil litigation systems, as they currently operate, which raise issues for the conduct of litigation brought by people who suffer child sexual abuse in institutional contexts? For example:

(e) limitation periods which restrict the time within which a victim may sue and the circumstances in which limitation periods may be extended;

(4) What changes should be made to address the elements of the civil litigation systems that raise issues for the conduct of litigation brought by people who suffer child sexual abuse in institutional contexts?

1.2 The central recommendation of this submission: abolition of time limits for civil claims regarding child sexual abuse

This submission makes one simple yet powerful recommendation. It is informed by extensive analyses of: the phenomenon of child sexual abuse and its psychological sequelae; of legislative time limits and case law across Australia and internationally; of the policy reasons underpinning statutory time limits generally; and of the need for fairness, certainty and practicability in the legal system.

The recommendation is:

In line with jurisdictions in Canada, legislative reform is required in all Australian States and Territories to remove time limitations for civil claims for injuries caused by child sexual abuse.

¹ Letters Patent for the Royal Commission into Institutional Responses to Child Sexual Abuse, S No 12 of 2013, 11 January 2013, Term of Reference (d).
1.3 Submission based on scholarly articles

As an Associate Professor in the School of Law at Queensland University of Technology, and having conducted extensive research in this field, the recommendation and points made in this submission are informed by scholarly work I have published in five articles, other work completed in the course of consulting with institutions in this context, and recent developments in Australia and overseas.

The articles and key consultation pieces are:


These articles are enclosed with the submission and are also available at [http://eprints.qut.edu.au/view/person/Mathews,_Ben.html](http://eprints.qut.edu.au/view/person/Mathews,_Ben.html)
2 Executive Summary

2.1 Growing recognition of the need for reform of limitation of actions legislation for child sexual abuse cases

Limitation of actions statutes set time periods within which a plaintiff must bring their legal claim. In Australia, there is a growing recognition of the need to reform these statutory time limits to remove unjustifiable obstacles to access to justice for survivors of child sexual abuse. It is recognized that current time limits not only differ unjustifiably between States and Territories, but that they produce unjust results in denying plaintiffs access to courts in the special context of child sexual abuse cases.

A broad consensus from government inquiries, legal organisations, religious institutions and academics

In essence, a broad consensus has emerged that current statutory time limits do not allow a reasonable amount of time for victims of child sexual abuse to commence civil claims and have access to the justice system to have their claim decided. The result is that many victims are denied access to courts to seek damages for their injuries.

The acknowledgment of this, and the growing recognition of the need for reform, is exemplified by the conclusions and recommendations made by government inquiries, representative legal organisations, representatives of major religious institutions, and scholarly work. A selection of these conclusions demonstrates this:

‘There is no public policy justification for applying limitation periods to civil cases relating to criminal child abuse’… ‘Because reporting in cases of criminal child abuse is typically delayed for several decades, it is necessary to amend the Limitation of Actions Act 1958 (Vic) to allow victims of criminal child abuse sufficient time to initiate legal action’


‘The Archbishop of Melbourne, Denis Hart…said all states and territories should abolish time limits on victims seeking compensation in civil proceedings…“There shouldn’t be any artificial restriction on our society’s ability to redress such matters” ’

Archbishop of Melbourne, Denis Hart, quoted by P Munro, ‘Scrap time limits on child sex abuse cases, urges head of bishops’, Sydney Morning Herald, 27 November 2012.

‘Child sexual abuse cases form a special category of intentional tort, where policy considerations strongly favour allowing proceedings to continue where there is a possibility of a fair trial”

[A] more appropriate long-term solution for all Australian legislatures would be to abolish the limitation period altogether for sexual assault claims.


Eleven of Canada’s thirteen provinces and territories have amended their limitation of action statutes to effectively abolish limitation periods for victims of child sexual abuse.


The time is ripe for this enhancement of justice and social welfare.


2.2 Almost all Canadian provinces and territories have abolished time limits for child sexual abuse cases

Eleven out of thirteen Canadian jurisdictions have amended their legislation to allow child sexual victims a fair period of time in which to bring claims. In nearly all cases, this has been achieved by removing the limitation period entirely. This policy change has been driven by recognition of the special context of child sexual abuse and its qualitative characteristics, and of the traditional policy reasons behind limitation periods not applying to this class of cases. The changes have enabled claims to be commenced, and courts’ normal functions and capacities in determining proof and fair outcomes in all civil claims are naturally preserved to enable fair hearings for defendants. The reforms have not caused an intolerable ‘flood of claims’.  

Table 1: Canadian provincial and territorial legislation: limitation periods for civil claims based on sexual assault

<table>
<thead>
<tr>
<th>Province/territory</th>
<th>Legislative provision</th>
<th>Effect</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alberta</td>
<td>Limitations Act, RSA 2000, c L-12</td>
<td>Limitation period retained</td>
</tr>
<tr>
<td>British Columbia</td>
<td>Limitation Act, SBC 2012, c 13, s 3(1)(k)</td>
<td>No limitation period</td>
</tr>
<tr>
<td>Manitoba</td>
<td>The Limitation of Actions Act, CCSM c L 150, s 2.1(2)(a)</td>
<td>No limitation period</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>Limitation of Actions Act, SNB, 2009, c L-8.5, s 14.1</td>
<td>No limitation period</td>
</tr>
<tr>
<td>Newfoundland and Labrador</td>
<td>Limitations Act, SNL 1995, c L-16.1, s 8(2)</td>
<td>No limitation period</td>
</tr>
<tr>
<td>Northwest Territories</td>
<td>Limitation of Actions Act, RSNWT 1988, c L-8, s 2.1(2)</td>
<td>No limitation period</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>Limitation of Actions Act, RSNS 1989, c 258, s 2(5)</td>
<td>No limitation period while plaintiff unaware of injuries and causal connection</td>
</tr>
<tr>
<td>Ontario</td>
<td>Limitations Act, 2002, SO 2002, c 24, s 10</td>
<td>No limitation period</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>Statute of Limitations, RSPEI 1988, c 5-7</td>
<td>Limitation period retained</td>
</tr>
<tr>
<td>Quebec</td>
<td>Civil Code of Quebec, LRQ, c C-1991, s 2926.1</td>
<td>30 years</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>The Limitation Act, SS 2004, c L-16.1, s 16(1)(a)</td>
<td>No limitation period</td>
</tr>
<tr>
<td>Yukon</td>
<td>Limitation of Actions Act, RSY 2002, c 139, s 2(3)</td>
<td>No limitation period</td>
</tr>
</tbody>
</table>

2.3 Fundamental policy reasons and the qualitative features of child sexual abuse underpin the calls for reform

The policy reasons underpinning these calls for reform are supported by the distinctive qualitative features of child sexual abuse cases, which mark these cases as different from ordinary civil disputes.

These policy reasons for reform are also animated by the fundamental requirement that legal processes and institutions in a society governed by the rule of law should safeguard the right of access to justice for those who have experienced violent breaches of personal bodily and psychological integrity and who have suffered substantial personal injuries. In a liberal democratic society, people must not be impeded from exercising legal rights. Adjudicative procedures should be fair, means must be provided to resolve disputes, and the law must protect fundamental human rights.

This applies generally to cases of child sexual abuse regardless of the identity of the perpetrator. It applies even more strongly when the perpetrator occupies a position of psychological, emotional, economic power over the victim, such as in the case of abuse by a parent or family member. Arguably, it applies more strongly still where such a perpetrator’s acts have been fostered, protected or shielded within a context of institutional power and where not only the perpetrator’s position of psychological or emotional superiority but that of the institution has acted as a psychosocial impediment to the victim being able to seek legal redress.

2.4 Limitation of actions statutes: some key principles

Limitation of actions statutes set time periods within which a plaintiff must bring their legal claim. In Australia, each State and Territory has constitutional power to make laws regarding the conduct of civil litigation for personal injuries, and so each State and Territory has enacted its own statute of limitation.

No uniform approach – extreme complexity

There is no uniform approach across Australia and the laws differ substantially. The laws are extremely complex, often being described by superior courts as the worst drafted Acts on the statute book. 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. The desirability of simplicity and certainty noted by Rehnquist J is of particular cogency in this context.

In Queensland v Stephenson (2006) 227 ALR 17 at 27, Kirby J observed:

In Ditchburn v Seltsam Ltd (1989) 17 NSWLR 697 at 698, I suggested that an encounter with statutory provisions similar to those under consideration in this appeal was liable to confuse

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judges and lawyers causing them to emerge “on the other side dazed, bruised and not entirely certain of their whereabouts”. The passage of 17 years, and many more cases struggling with the meaning of the statutory language, has not removed the sense of disorientation. In a competition involving many worthy candidates, Lord Reid’s prize [of it being the worst drafted Act on the statute book: Central Asbestos Co Ltd v Dodd [1973] AC 518 at 529] remains in place. This is so although, as Rehnquist J noted in Chardon v Fumoro Solo [1983] USSC 131 “[f]ew laws stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitation”. This desirable goal has not been attained in Australia...This appeal affords the latest illustration of that fact.

Key principles. A full treatment of salient principles is provided in several scholarly articles. Several key principles can be noted for the purposes of this submission.

1. Basic limitation period is usually three years after attaining legal majority, with time being suspended while a child. In most States and Territories, civil claims for damages arising from situations of child sexual abuse must be brought within three years of attaining legal majority; hence, normally this means an action must be brought by age 21. In these circumstances, the time limitation period is suspended while the child is a minor. It is not possible for many survivors of child sexual abuse to bring the claim within this time period. A major reason for this is that the nature and extent of the injuries may not have fully manifested. In addition, often, the plaintiff may not have connected the injuries with the acts of abuse.

2. In some jurisdictions the time period is not suspended during minority and the child’s parent is expected to commence proceedings. In contrast, in New South Wales, Victoria and Tasmania, the time limitation period is not suspended while the child is a minor; a child’s parent is expected to bring the action on the child’s behalf. This is simply inadequate as many survivors will not have the good fortune to have parents who are able and willing to act on their behalf.

3. Some jurisdictions have more generous limitation period where the wrongdoer is a parent or ‘close associate’ of a parent. In several jurisdictions (NSW, Victoria), a different, more generous time period is allowed where the defendant is the child’s parent, or a ‘close associate of the child’s parent’. A major limits is that this only applies for injuries suffered after the commencement of these legislative amendments. This does provide a more justifiable time period for plaintiffs in these cases. It recognizes that the parent will be unlikely to proceed on the child’s behalf, that the child will be less able to disclose the abuse. However, even for these situations it has a limited scope and is inadequate to accommodate the features of institutional child sexual abuse. Tasmania and Western Australia have provisions based on the ‘parent/close associate of a parent’ concept but the time periods are not as generous as those in NSW and Victoria.

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(4) **Extensions of time may be sought but are costly and frequently defeated.** Where a plaintiff is ‘out of time’, in most but not all jurisdictions a plaintiff may seek an *extension of time* from the court. This is done on the basis that the plaintiff had not ‘discovered’ the cause of action for legitimate reasons, by not knowing key ‘discoverability’ facts required to bring the claim (such as the fact of negligence occurring; the nature and extent of the injury; the fact the injury was caused by the defendant’s act; and of the injury being sufficiently serious to justify bringing an action). However, these applications are costly, time-consuming, stressful, and often are denied.

(5) **The limitation period does not operate automatically; defendant must choose to plead it.** Importantly, it must be noted that the time limitation period does not operate automatically to bar a plaintiff from access to a court. A defendant must choose to plead the expiry of time as a defence. This choice has been used as a technical matter in many case of deserving claims in child sexual abuse cases. It is a principle which is open to abuse by a more powerful defendant - such as a religious institution, or a government - over a less powerful plaintiff.

(6) **Absolute ‘longstop’ period.** Some jurisdictions have an *absolute ‘longstop’ period*, after which an action cannot be brought.

(7) **Legal disability provisions.** In some rare cases, a plaintiff may plead suspension of time because of the presence of an ongoing legal disability, most likely based on post-traumatic stress disorder, which suspends time from running. However, this is a highly technical argument and would require very strong medical evidence of continual disability to instruct solicitors and otherwise do the acts necessary to bring a claim.
3 Fundamental principles and problems: statutes of limitation and child sexual abuse cases

Legislation in each Australian State and Territory sets time limits within which civil claims for damages must be commenced. These limits were created decades ago to apply in ordinary personal injury contexts, before child sexual abuse and claims for injuries caused by it were recognized by scholarly, community and legal discourse.

In general, as acknowledged below, there are sound public policy reasons for having time limits for civil claims. However, due to qualitative differences in the nature, context and psychological sequelae of child sexual abuse, clear problems arise in the application of these time limits to civil claims for damages arising from child sexual abuse, and particularly from institutional child sexual abuse.

Here, four distinctive features of child sexual abuse are analysed to demonstrate why traditional approaches to statutory time limits are unjustifiable in these cases. Then, overarching problems with Australia’s time limitation statutes are noted. Together these analyses indicate that it is time for legislative reform to enable plaintiffs in child sexual abuse claims to have fair access to the justice system.

3.1 Delayed disclosure

This frequent feature of the child sexual abuse context is arguably the main reason justifying a different approach to statutory time limits for this class of case. Due to the nature and typical psychological sequelae of child sexual abuse, most significantly including post-traumatic stress disorder, victims frequently cannot disclose the abuse at all, or can only do so a significant period of time after the time limit has expired. This means that no matter what jurisdiction they are in, many victims cannot discuss their experience or engage in the required dealings with legal advisors in order to bring their claim within time.

Reasons for non-disclosure. A child who has been sexually abused child will often not disclose it at all, or will only disclose it many years later. Child sexual abuse is usually inflicted by an adult who is known to the child, as exemplified by institutional cases. Nondisclosure may be influenced by many factors, including: the child being preverbal or very young, being persuaded the acts are normal, or feelings of guilt, shame,

6 Limitation Act 1985 (ACT); Limitation Act 1969 (NSW); Limitation Act 1981 (NT); Limitation of Actions Act 1974 (Qld); Limitation of Actions Act 1936 (SA); Limitation Act 1974 (Tas); Limitation of Actions Act 1958 (Vic); Limitation Act 2005 (WA).
embarrassment and responsibility;\textsuperscript{10} fear of reprisals to the child;\textsuperscript{11} the perpetrator being a parent, family member, or other trusted figure;\textsuperscript{12} including a clergy member;\textsuperscript{13} and fear of the perpetrator being punished.\textsuperscript{14}

**Time to disclose.** Evidence demonstrates the frequent requirement of time for a survivor to become able to even report the abuse. In Queensland, the Project Axis survey found that of 212 adult survivors, 25 took 5–9 years to disclose it, 33 took 10–19 years, and 51 took over 20 years. Where the perpetrator is a relative, it is even more likely that the delay will be long. A Criminal Justice Commission analysis of Queensland Police Service data from 1994–1998 found that of 3721 reported offences committed by relatives, 25.5% of survivors took 1–5 years to report the acts; 9.7% took 5–10 years; 18.2% took 10–20 years; and 14.2% took more than 20 years.\textsuperscript{15}

### 3.2 Power imbalance

Due to the nature and context of sexual abuse, the individual perpetrator is clothed with physical, cognitive, emotional and psychological power over the child. In many and probably most cases of institutional abuse, especially those involving perpetrators within a religious institution or a government institution, this power dynamic is further heightened.

Along with the already invidious effects of sexual abuse which are inherent to the factual context, these dual dimensions of power related to the identity and nature of the perpetrator and his or her protective institution places the plaintiff in a massively imbalanced power relationship. This means it can be even more difficult for the victim to disclose the abuse, and bringing civil proceedings against a defendant holding a significant economic and sometimes psychological and emotional power imbalance further deeply compromises a plaintiff’s capacity to seek access to justice.


3.3 Different context of child sexual abuse from ordinary civil disputes

Statutes of limitation are common in numerous legal systems, and in general, they are underpinned by sound policy reasons. The core policy value motivating limitation periods is that where there is undue delay, ‘the whole quality of justice deteriorates’.\(^\text{16}\) In particular, the quality of available evidence will be lessened by the passage of time, whether by faded memory, death, or the absence of witnesses and documentation.

The concern is that the defendant should be able to mount a defence with sufficiently fresh evidence to secure a fair trial. As well, it is said that defendants should be able to proceed with their lives unencumbered by the threat of late claims; that plaintiffs should not sleep on their rights; and that the public interest requires that disputes be settled as quickly as possible.

**Why the policy reasons are inapplicable to child sexual abuse cases.** However, these time limits were designed generations ago to accommodate the archetypical legal conflict (such as a motor vehicle accident). They were made at a time and in a context where the critical features of typical legal disputes were substantially different from those characteristic of claims based on child sexual abuse. It is also highly significant that the statutory time limits were designed at a time when child sexual abuse and its consequences were virtually unknown. Thus, statutory time limits were not designed to cater for child sexual abuse claims, with their far different characteristics.

**Table 2: Qualitative differences between typical legal conflicts and child sexual abuse cases**

<table>
<thead>
<tr>
<th>Critical feature</th>
<th>Model legal conflict</th>
<th>Child sexual abuse case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Status/capacity of injured person</td>
<td>Adult</td>
<td>Child</td>
</tr>
<tr>
<td>Features of wrongdoer who has caused injury</td>
<td>Injury inflicted by a stranger having no cognitive, psychological or emotional influence or power over the plaintiff</td>
<td>Injury often inflicted by an adult holding considerable cognitive, psychological or emotional influence or power over child, and who may continue to do so</td>
</tr>
<tr>
<td>Are parties on an equal footing</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Capacity to disclose events causing injury</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Whether injuries tend to be obvious or latent</td>
<td>Obvious</td>
<td>Latent</td>
</tr>
<tr>
<td>Whether injuries obviously related to defendant’s acts</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Whether injuries involve reluctance or inability to commence legal proceedings</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Whether plaintiff generally able to institute legal proceedings within a relatively short period of time of the event and injury</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Presence of witnesses</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Does failure to commence proceedings suggest plaintiff has slept on their rights</td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>

\(^{\text{16}}\) *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, McHugh J at 551; citing *R v Lawrence* [1982] AC 510 at 517.
3.4 Post-traumatic stress disorder and other psychological injuries compromising capacity to commence proceedings within time

A substantial body of research has identified the effects of child sexual abuse. Apart from physical injury, psychological injury is frequent and often continues through adulthood, with consequent effects on behaviour and socialization, and capacity to navigate legal processes. Most relevant to the issue of limitation of actions statute is that the psychological consequences commonly include post-traumatic stress disorder. Post-traumatic stress disorder is a trauma-related disorder recognized in the Diagnostic and Statistical Manual of Mental Disorders V. PTSD is particularly relevant to the issue of whether limitation periods are justifiable in child sexual abuse cases because one of its key symptoms inherently compromises a person’s capacity to bring a civil claim. This is the avoidance symptom: the person with PTSD persistently


voids trauma-related stimuli, and has numbed general responsiveness, as shown by factors including: avoiding thoughts, feelings or conversations concerned with the event; avoiding activities, people or places that recall the event; and an inability to remember an important feature of the event.

Other relevant consequences

Also affecting victims’ capacity to engage with defendants, institutions, legal systems and actors, the effects also commonly include depression and low self-esteem. Consequences affecting general capacity to navigate complex social systems and legal processes include suicidal ideation, criminal offending, alcohol abuse, substance abuse and running away from home, and associated effects on intellectual, academic and personal achievement, and adult economic well-being. Sexual abuse of greater duration and severity (for example, involving penetration) and where the abuser is a family member or similarly influential figure, is understood as more likely to occasion significant adverse consequences.

3.5 Different Australian jurisdictions have different legislative time periods within which a civil action must be commenced

Across States and Territories, the statutes differ substantially in setting the time periods within which a claim must be brought. This situation is not justified as there are no jurisdiction-specific reasons for having different approaches. The result is that a plaintiff in one jurisdiction may be disadvantaged from a plaintiff in another jurisdiction purely because of their geographical location.

Acts of sexual abuse constitute negligence or breach of duty, as well as trespass

In Australian law, it is well established that the acts of sexual abuse which constitute an intentional tort not only constitute acts of trespass, but also constitute negligence or breach of duty. Because part of the cause of action in negligence requires the

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recognition and quantification of damage as a result of the wrongful acts, the plaintiff usually brings an action in negligence, rather than trespass.

This may have consequences for the activation of different time limitations. Usually it is more beneficial for a plaintiff to proceed in negligence or breach of duty, than in trespass. Yet, even if proceeding in negligence, many plaintiffs will face major challenges meeting the time limit.

**Statutes of limitation applied to child sexual abuse cases**
For child abuse cases, the time limits within which a civil claim for compensation must be commenced vary between States, and can depend on the identity of the perpetrator. Traditionally, these statutes have allowed 3 years after turning 18 to bring the action. In some jurisdictions, this is still the case.

**Table 3: State and Territory legislation: limitation periods for civil claims based on sexual assault**

<table>
<thead>
<tr>
<th>State/Territory</th>
<th>Legislation</th>
<th>Standard limitation period</th>
<th>If defendant is parent or close associate of a parent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australian Capital Territory</td>
<td>Limitation Act 1985</td>
<td>3 years from majority ie age 21 and 3 years post-knowledge of ‘disease or disorder’</td>
<td>No provision</td>
</tr>
<tr>
<td>New South Wales</td>
<td>Limitation Act 1969</td>
<td>Within 3 years of discoverability by parent, with a longstop of 12 years</td>
<td>For events post 6 December 2002: time runs from age 25 but other provisions mean plaintiff may have until age 37</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>Limitation Act 1981</td>
<td>3 years from majority ie age 21</td>
<td>No provision</td>
</tr>
<tr>
<td>Queensland</td>
<td>Limitation of Actions Act 1974</td>
<td>3 years from majority ie age 21</td>
<td>No provision</td>
</tr>
<tr>
<td>South Australia</td>
<td>Limitation of Actions Act 1936</td>
<td>3 years from majority ie age 21 and 3 years post-knowledge of injury</td>
<td>No provision</td>
</tr>
<tr>
<td>Tasmania</td>
<td>Limitation Act 1974</td>
<td>Standard: s 26(1) – 6 years from majority ie age 24</td>
<td>For events post 1 Jan 2005: 3 years from turning 25 ie age 28</td>
</tr>
<tr>
<td>Victoria</td>
<td>Limitation of Actions Act 1958</td>
<td>Within 6 years of discoverability by parent, with a longstop of 12 years</td>
<td>For events post 21 May 2003: time runs from age 25 but other provisions mean plaintiff may have until age 37</td>
</tr>
<tr>
<td>Western Australia</td>
<td>Limitation Act 2005</td>
<td>If injured under age 15: 6 years; If over 15, by age 21</td>
<td>For events post 15 Nov 2005: until age 25</td>
</tr>
</tbody>
</table>

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29 This is because actions in trespass are actionable per se, that is, without proof of damage.
Reforms after the Ipp Review of the Law of Negligence, recognizing that child abuse cases are different

However, the Ipp Review of the Law of Negligence in 2002 prompted some States to change their legislation. It recognised that cases where a child was injured by a parent or a ‘close associate’ of the child’s parent were a special class of cases. In the interests of justice, these cases required victims of abuse to be allowed more than the usual period of time to seek compensation in the courts, because of the nature of the acts, the nature of the context, and the nature of the injuries.

It was highly significant that the Ipp Review recommended this, because its terms of reference were to examine methods to reform the law to limit liability and amounts of damages in civil proceedings. Even with this brief, the Ipp Panel evidently felt compelled to recognise that these types of child abuse cases required the modification of existing laws, not to limit liability, but to expand liability.

Time limits for injury by a parent or close associate of a parent

So, in New South Wales (for injuries sustained on or after 6 December 2002), and in Victoria (for injuries sustained on or after 21 May 2003), a person injured when he/she was a child by a parent or a ‘close associate’ of a parent has the limitation period on their legal action only begin to run from age 25, and other provisions operate so that in many of these cases, such plaintiffs will have until age 37 to bring their claim.

The inadequacy of the ‘close associate of a parent’ provision

A ‘close associate’ is defined as a person whose relationship with the parent or guardian is such that:
(a) the parent/guardian might be influenced by the person not to bring an action on behalf of the victim; or
(b) the victim might be unwilling to disclose to the parent/guardian the act resulting in the injury.

Parliamentary debates in New South Wales indicate that the primary function of the special time limitation provision was to create an ‘important exception’ for cases of child abuse.

Similar provisions have since been enacted in Western Australia and Tasmania, although these are not as generous as those in NSW and Victoria. In Tasmania, for injuries sustained on or after 1 January 2005 where the defendant is the child’s parent or in a ‘close relationship’ with the child’s parent, the plaintiff generally has 3 years from turning 25. In Western Australia, for actions arising after 15 November 2005, a person injured when a child by a parent or a ‘person in a close relationship’ with the parent has until age 25 to bring an action. In contrast, other States have not modified

31 New South Wales, Parliamentary Debates, Legislative Council, 19 November 2002 (Michael Egan, Treasurer, Minister of State Development and Vice-President of the Executive Council), at6896ff.
their legislation even after these recommendations and changes in other States. It is clearly inequitable and illogical that there are such significant differences between States. At a minimum, every State and Territory should have a similar approach for enabling plaintiffs to bring actions where the perpetrator is a parent or a close associate of a parent.

However, there are other concerns regarding the scope of this provision and its suitability to deal with institutional and other child sexual abuse cases.

**The limited scope of the close associate provision means the reforms fall short of what is required**

These reforms will not satisfactorily accommodate claims arising from child sexual abuse, especially in institutional contexts. These changes have made the situation marginally better for victims of child sexual abuse in some States, in cases where the defendant is the child’s parent or is deemed to be a ‘close associate’ of the parent.

However, even these amended limits are still too narrow, as they only apply to selected subsets of cases. Furthermore, the definition of a ‘close associate’ does not appropriately accommodate the context, dynamics and sequelae of child sexual abuse, or the reasons for nondisclosure.

There are two reasons for this. First, under the first limb, a ‘close associate’ is **a person whose relationship with the parent or guardian is such that:**

(a) the parent/guardian might be influenced by the person not to bring an action on behalf of the victim’.

Yet, in cases of institutional abuse, and many of child sexual abuse generally, a parent’s failure to bring an action on the child’s behalf is not due to the wrongdoer having this type of relationship with the child’s parent. *In many cases, there will be no relationship at all.* Even where a relationship between parent and perpetrator does exist, the words of the provision indicate that there must be some influence brought to bear on the parent by the wrongdoer. Yet, such direct influence will rarely be present.

Second, under the second limb, a ‘close associate’ is **a person whose relationship with the parent or guardian is such that:**

(b) the victim might be unwilling to disclose to the parent/guardian the act resulting in the injury.’

Yet, in cases of institutional abuse, and many of child sexual abuse generally, the reason for nondisclosure by the child to the parent will not be because of the *identity* of the perpetrator and their relationship with the child’s parent. Rather, it is because of the nature of the acts, the child’s feelings about them, the threats or inducements made to the child, and the whole psychological context of the abuse.
As stated in Mathews (2004):\(^{32}\)

Will the close associate provision be capable of including wrongdoers such as priests, teachers, scoutmasters, de facto partners of the child’s mother, grandparents, and sports coaches? In both limbs of the definition, the phrase ‘might be’ suggests a broad ambit, being conceptually more inclusive than descriptors such as ‘is’. Moreover, since this special limitation period is a remedial provision, it should be interpreted beneficially in the event of any ambiguity.\(^{33}\) Therefore, in the context of the second limb, it seems reasonable to argue that in cases where a child is unwilling to disclose the abuse because of the wrongdoer’s identity and relationship with the child’s parent, or because of an unwillingness to disclose the abuse for some reason connected with the nature of the acts and the nature of any feelings produced by those acts, the victim should receive the benefit of the close associate special provision. \[[But] If construed only by reference to the identity of the wrongdoer, and if this construction negates the operation of the provision in cases where the child feels unwilling to disclose the acts because of the nature of them rather than because the child perceives a close relationship between the wrongdoer and his or her parent, the close associate provision could be framed too narrowly.\]

\section{3.6 Extension of time applications}

Most, but not all, statutes contain provisions under which a plaintiff is enabled to seek an extension of time, where she or he is prima facie out of time, and where the claim has been challenged by the defendant pleading the expiry of time. Even among those jurisdictions where extensions are possible, and while sometimes successful, such applications consume further cost and time, and may cause further psychological distress.

There are differences between jurisdictions but in general, there are three major conditions which must be met by a plaintiff seeking an extension of time. First, a plaintiff must demonstrate that they have recently discovered a ‘material fact’ of a ‘decisive character’. This generally refers to one of the key discoverability criteria, such as the nature and extent of the injury, the connection of the abuse with the injury.

Second, the plaintiff must not be judged to have failed to take reasonable steps to find out the material facts before they actually did. This has been the arguably flawed basis for many decisions not to extend time.\(^ {34}\) It can be noted that some recent case law has


\(^{33}\) Bull v Attorney-General (NSW) (1913) 17 CLR 370 at 384.

offered hope for plaintiffs regarding the reasonable steps issue. Namely, in Queensland, it has been found that it is not reasonable to expect someone to have found out all the relevant facts if they would have been personally affected at that time by having to revisit the relevant events. 35 Similarly, N v Queensland36 held that elements of a plaintiff’s condition that make her or him afraid to discuss her/his problems, and thus to avoid medical treatment, make the failure to ascertain the material facts not unreasonable. This finding was affirmed by the Queensland Court of Appeal in NF v Queensland37 where Keane JA stated that the relevant state of knowledge is that attainable not by an abstract reasonable person, but by the particular person who has suffered particular personal injuries [29-31]:

Whether an applicant for an extension of time has taken all reasonable steps to find out a fact can only be answered by reference to what can reasonably be expected from the actual person in the circumstances of the applicant...If that person has taken all the reasonable steps that she is able to take to find out the fact and has not found it out, that fact is not within her means of knowledge for the purpose of s 30(1)(c)...[Section] 30(1)(c) is not concerned with what might reasonably be expected of a reasonable person; it is concerned with what might reasonably be expected of the applicant in the particular case.

These findings hinge on a more sensitive understanding of the principle that the question of whether a person has taken all reasonable steps to ascertain the nature and extent of their injuries, must be answered by reference to what can reasonably be expected from the actual person in the circumstances of the plaintiff. 38

Court discretion – prejudice to defendant’s right to a fair trial

The third condition is frequently the fatal blow for those seeking access to a court to claim damages for historic child abuse. Often, this most problematic barrier for plaintiffs seeking extensions of time still remains, simply because of the effluxion of time.

The court must exercise its discretion to allow the extension of time. The court will only allow the extension if it considers the defendant’s right to a fair trial has not been unduly prejudiced. This does not mean there must be a complete absence of prejudice. These applications turn on their individual facts, and there are numerous

38 In addition, for jurisdictions having provisions similar to Queensland’s, material facts will only attain the status of having a ‘decisive character’ when it is found to be timely and in the plaintiff’s interests to bring an action. In Queensland v Stephenson (2006) 227 ALR 17, it was accepted that the plaintiff had knowledge of all the material facts before the relevant date. However, it was accepted by the court (in QCA and at first instance) - and by the defendant State of Queensland - that those facts, though constituting all material facts relating to the right of action, were not of a decisive character until after the critical date. One reason for this was that if the plaintiff had commenced the action before the time he actually did, it would have exacerbated the applicant’s psychiatric disability.
examples where applications have been denied. The key consideration is whether the defendant’s right to a fair trial has been unfairly prejudiced by the lapse of time. Such prejudice can be produced by, for example, the fading of memory, the death of or inability to locate witnesses, and the loss of other available evidence.

Accordingly, if the court determines that the delay involved and its effect produces such significant prejudice to the defendant that a fair trial cannot be secured, then a plaintiff will be defeated in obtaining an extension of time in which to bring proceedings. Where there is a substantial period of time between the alleged events and the application for an extension, it will only be in unusual cases that a plaintiff will overcome this obstacle by the existence of sufficiently extensive documentary records, witnesses still alive who had reasonable memories of events, and the like.\(^{39}\)

In other cases, these sources of evidence will usually be unavailable. The shorter the delay, the more likely it is that a plaintiff may be able to overcome this requirement. There are cases where a plaintiff alleging child sexual abuse has obtained an extension of time.\(^{40}\) However, many suits have been defeated before reaching court on this basis. Applications for extensions of time consume significant financial and emotional resources, and take time. Unscrupulous defendants can draw out the litigious process in the hope of exhausting or impoverishing a vulnerable plaintiff. In those applications that do proceed to a decision, where a longer period of time has elapsed from the alleged events to the extension application, the likelihood of discretion being exercised in the plaintiff’s favour diminishes and the application will be refused.\(^{41}\) There are even cases where a defendant has been criminally convicted on a higher burden of proof, yet the subsequent application for a civil extension of time has still been denied.\(^{42}\)

### 3.7 Defendant must plead expiry of time

An often overlooked feature of this context is that while the time limitation is set down in the legislation, a defendant must actively choose to plead the expiry of time to activate the time bar and defeat a plaintiff from having access to the civil justice system. Accordingly, the mere fact of the time period having expired does not automatically bar or defeat a claim. Institutions and government defendants often claim that they are bound by their insurers to rely on the expiry of time defence. However, this is not a convincing justification for forcing vulnerable plaintiffs into lengthy, costly and distressing legal proceedings where there is clear evidence of the relevant events and injuries having occurred. A defendant could choose to satisfy the

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\(^{39}\) See for example *N v State of Qld* [2004] QSC 290 McMurdo J Sup Ct; upheld on appeal in *NF v Qld* [2005] QCA 110.


\(^{41}\) *HWC v The Corporation of the Synod of the Diocese of Brisbane* [2009] QCA 168.

\(^{42}\) *MCA v State of Queensland* [2011] QSC 298.
reasonable requests of a plaintiff from their own resources, or could in other ways accept the financial consequences of the injuries occasioned to children in their care.

**Governments should act as a model litigant in legal proceedings**

It is relevant that in many claims, the defendant is a government or one of its agencies. This is significant because when governments are involved in litigation as defendants, there is an axiom of public policy and an expectation that they will conduct themselves as a model litigant. Most significantly in this context, the model litigant principle requires governments to refuse to rely on legal technicalities in the face of compelling evidence of a sound claim by a plaintiff.

The model litigant principle has long been recognized, and is reflected in policy statements by governments. It requires the State and its agencies when acting as a defendant in civil and criminal proceedings to act fairly, to settle claims which are legitimate without recourse to litigation, to resist reliance on its superior financial resources and access to legal advice to defeat plaintiffs, and not to plead legal technicalities when liability is not in dispute.

In the context of civil claims for damages arising from child sexual abuse, there are numerous cases where government defendants challenge plaintiffs’ claims on the basis of expiry of time, despite apparently ample evidence of the facts constituting abuse and injury. This suggests the model litigant principle has not been consistently observed in these cases.

### 3.8 Further pre-court procedures make the litigation process even more complex and costly

Some jurisdictions (eg Queensland, ACT, South Australia) have enacted further pre-court procedural requirements, which require additional steps to be taken in the commencement of civil claims, with these steps having their own time limits. An example is the *Personal Injuries Proceedings Act 2002* (Qld), which requires plaintiffs to lodge a notice of claim within nine months of the incident (or within nine months of the first appearance of symptoms of the injury if the injury is not immediately apparent), or within one month of seeking legal advice, whichever is the earlier.

While it appears that in practice, failure to comply with these requirements can often be overcome, to do so requires further legal steps and court orders, which causes

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43 See generally *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 342 (Griffith CJ); *Morely v ASIC* [2010] NSWCA 331; *ASIC v Hellicar* [2012] 2012 HCA 17.


extra burdens in financial expense and emotional strain, as well as further delaying any civil proceedings themselves. These requirements are therefore a significant additional burden on plaintiffs in these cases.

3.9 The State is not bound by time limits in criminal proceedings for child sexual assault claims

It seems both illogical and unjust to impose a different and harsher requirement on an individual plaintiff bringing a civil claim for damage they have suffered, than exists for the State when bringing a criminal prosecution of an offender for the same acts. Yet, this is the current situation.

The State is not limited by time in prosecuting indictable criminal offences, which include the acts constituting child sexual abuse. The High Court has held that individuals accused of criminal acts have no right to a speedy trial, or even to trial within a reasonable time.46

The fact that long delayed criminal prosecutions have been brought for child sexual abuse demonstrate that it is possible for a fair trial to be secured many years after the relevant events.47 The fact that this is so, even in the criminal context where the burden of proof is higher than in civil proceedings, endows this argument with even more cogency.

As well, judges in criminal courts have accepted that many survivors of child sexual abuse, for good reasons, take a long time to report it, hence delaying the commencement of a criminal proceeding. In 1995, for example, Wilcox J stated:48

> It is commonplace for there to be a substantial delay in the reporting of alleged sexual assaults, especially where the complainant is a child … [M]any 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.

46 *Jago v District Court of New South Wales* (1989) 168 CLR 23. It is recognised that delay may impede a fair trial and courts have occasionally stayed proceedings: see *Gill v DPP (NSW)* (1992) 64 A Crim R 82; *R v Davis* (1995) 57 FCR 152.


48 *R v Lane* (Unreported, Federal Court of Australia, Wilcox J, 19 June 1995) 2. See also *R v Austin* (1995) 14 WAR 484 (where Owen J states: ‘It is not at all uncommon for there to be a delay in the institution of proceedings for sexual offences’: at 493); *R v Davis* (1995) 57 FCR 152.

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Appendix

A Model Limitation of Actions Act Provision

This proposed model limitation provision for civil claims in relation to injuries suffered from sexual assault is based on the Canadian provisions (citations below).

The first subsection removes the limitation period for claims based on sexual assaults. If a jurisdiction chose to adopt it, it would need to decide whether to apply the provision to child abuse, abuse of adults, or both. The second subsection, if a jurisdiction chose to adopt it, removes the limitation retrospectively so that any pre-existing limitation period is voided for claims arising from events occurring prior to the enactment of the provision.

No limitation period

Section 7

(1) Notwithstanding sections 3-6 [the provisions of the Act setting out other limitation periods], where misconduct of a sexual nature, including without limitation any kind of sexual assault, has been committed against a minor or person, and that minor or person was:

(a) under the care or authority of; or
(b) financially, emotionally, physically or otherwise dependent upon

another person, organization or agency, there shall be no limitation period and an action arising from that sexual misconduct may be brought at any time.

(2) Section 7(1) applies whether or not the person’s right to bring the action was at any time governed by a limitation period.

Table 1: Canadian provincial and territorial legislation: limitation periods for civil claims based on sexual assault

<table>
<thead>
<tr>
<th>Province/territory</th>
<th>Legislative provision</th>
<th>Effect</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alberta</td>
<td>Limitations Act, RSA 2000, c L-12</td>
<td>Limitation period retained</td>
</tr>
<tr>
<td>British Columbia</td>
<td>Limitation Act, SBC 2012, c 13, s 3(1)(k)</td>
<td>No limitation period</td>
</tr>
<tr>
<td>Manitoba</td>
<td>The Limitation of Actions Act, CCSM c L 150, s 2.1(2)(a)</td>
<td>No limitation period</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>Limitation of Actions Act, SNB, 2009, c L-8.5, s 14.1</td>
<td>No limitation period</td>
</tr>
<tr>
<td>Newfoundland and Labrador</td>
<td>Limitations Act, SNI 1995, c L-16.1, s 8(2)</td>
<td>No limitation period</td>
</tr>
<tr>
<td>Northwest Territories</td>
<td>Limitation of Actions Act, RSNWT 1988, c L-8, s 2.1(2)</td>
<td>No limitation period</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>Limitation of Actions Act, RSNS 1989, c 258, s 2(5)</td>
<td>No limitation period while plaintiff not aware of injuries and causal connection</td>
</tr>
<tr>
<td>Ontario</td>
<td>Limitations Act, 2002, SO 2002, c 24, s 10</td>
<td>No limitation period</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>Statute of Limitations, RSPEI 1988, c S-7</td>
<td>Limitation period retained</td>
</tr>
<tr>
<td>Quebec</td>
<td>Civil Code of Quebec, LRQ, c C-1991, s 2926.1</td>
<td>30 years</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>The Limitation Act, SS 2004, c L-16.1, s 16(1)(a)</td>
<td>No limitation period</td>
</tr>
<tr>
<td>Yukon</td>
<td>Limitation of Actions Act, RSY 2002, c 139, s 2(3)</td>
<td>No limitation period</td>
</tr>
</tbody>
</table>
JUDICIAL CONSIDERATIONS OF REASONABLE CONDUCT BY SURVIVORS OF CHILD SEXUAL ABUSE

BEN MATHEWS∗

I INTRODUCTION

Typical consequences of child sexual abuse, particularly post-traumatic stress disorder (‘PTSD’), prevent many survivors of this abuse bringing civil legal proceedings within the statutory time limit. On discovering the nature and extent of their psychiatric injury, or its connection with the abuse, survivors may apply to the court for an extension of time to allow their claim to proceed. Outcomes of these applications often turn on judgments about the survivor’s knowledge of the injury and its cause, and about whether the survivor has taken reasonable steps to discover the nature, extent and cause of their injuries.

Reported cases of applications for extensions of time in this context are rare, but Queensland has an emerging body of decisions. These cases demonstrate that judgments about the issues of knowledge and reasonable conduct are made without considering evidence about the symptomatology of PTSD, especially the avoidance criterion. This article summarises the consequences of child sexual abuse, focussing on PTSD, before outlining the statutory provisions for extensions of time. Case studies of applications by survivors with PTSD to extend time are then synthesised. The psychological evidence is used as a standard against which to analyse judicial reasoning about survivors’ knowledge and ‘reasonable’ conduct. Finally, the question of whether PTSD can constitute a legal disability in the context of an application for an extension of time is addressed. Because similar questions are raised by extension provisions in nearly all Australian jurisdictions, the analysis in this article has implications for future cases in both Queensland and other jurisdictions.

II TYPICAL CONSEQUENCES OF CHILD SEXUAL ABUSE

The typical child sex offender is male, and is a family member or relative of the child, or is otherwise known to the child. The majority of victims suffer

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numerous abusive acts, which commonly occur over a period of months or years. In many cases, particularly when the abuser is known, a child will make no complaint about the abuse, for one or more of several reasons: being sworn to secrecy; compulsion by threats; imposed conviction of the normalness of the acts; imposed or misplaced feelings of responsibility for the acts; fear of family dissolution; fear of punishment of the wrongdoer; misplaced shame and guilt; and self-blame. Rather than disclosing the abuse, a child is likely to develop coping strategies.

A Psychological Injury: Short-Term and Long-Term

Immediate and short-term consequences for a child who is being, or has been, sexually abused commonly include PTSD, anxiety, depression, low self-esteem, inappropriate sexualised behaviour and difficulty in peer relationships.


4 Summit, above n 2.


8 Ibid.

relationships. Adolescents are likely to experience even higher levels of depression and anxiety than younger children because of their greater cognitive understanding of their abuse. Adolescents may also be more susceptible than younger children to self-harm and suicidal ideation and behaviour. Substance abuse and running away from home are also more frequent in adolescents than younger children. Low self-esteem continues throughout adolescence.

In the long-term, the adult survivor of child sexual abuse typically has PTSD, or depression, or both. Classical sequelae also include anxiety, shame, distrust, and other mental health issues. The long-term effects of child sexual abuse are significant and can persist throughout adulthood.

14 Wozencraft, Wagner and Pellegrin, above n 7.
anger, guilt, low self-esteem, and self-destructive behaviour such as alcoholism and other substance abuse. Relationships with other adults are affected due to a negative self-concept and survivors frequently have difficulty navigating adult sexual and non-sexual relationships.

B PTSD

1 Avoidance of Complaint and Litigation

PTSD, as defined by the Diagnostic and Statistical Manual of Mental Disorders, has several criteria, three of which are particularly relevant to this discussion. First, PTSD involves the existence of an unusually traumatic event which involved actual or threatened death or serious physical injury, and in which the patient felt intense fear, horror or helplessness (‘the stressor criterion’). Second, the patient repeatedly relives the event in one or more ways including recollections, dreams, flashbacks, distressed responses to cues symbolising the event, and physiological reactions to these cues (‘the intrusive recollection criterion’). Third, and most significantly in the legal context, the patient persistently avoids trauma-related stimuli, and has numbed general responsiveness, as shown by three or more factors, including: avoiding thoughts, feelings or conversations concerned with the event; avoiding activities, people or places that recall the event; and an inability to remember an important feature of the event (‘the avoidance criterion’).

Beyond the difficulties of disclosing the abuse at the time it occurs, the avoidance response means that many adult survivors of child sexual abuse will...
need a significant period of time to develop the capacity to make even a confidential disclosure of the abuse, or a tentative foray into psychological counselling. Many survivors will never be able to disclose the abuse. Whether a survivor silently suffered the abuse as a child and takes many years to disclose it as an adult, or whether a survivor complained initially but was ignored or punished, or whether a survivor had his or her complaint received but still suffered the typical consequences of the abuse, many adult survivors who eventually desire civil legal remedies will not be psychologically ready to pursue the perpetrator through the courts until some time into their 20s, 30s or even 40s. Statistics on disclosure, let alone readiness to pursue litigation, demonstrate this beyond doubt.22

It is therefore a normal and reasonable response by adult survivors of child sexual abuse with PTSD to avoid any activity – including legal action – that would require detailed reliving and description of the events, adversarial testing of their account of those events, and confrontation of the perpetrator. The symptoms of PTSD mean that, of those survivors who ever become able to take legal action, most require an extended period of time in which to gain knowledge of the facts required by law to institute civil proceedings for compensation. These facts include those of the personal injury, of the injuries’ nature and extent, and of the causal connection between the perpetrator’s abuse and those injuries.

Awareness of relevant facts is one thing; the survivor must then have resolved their PTSD symptoms to a sufficient degree to be able to institute civil legal proceedings. Thus, with statutory provisions that give a wronged party only a short period of time in which to institute civil action, PTSD is often an insurmountable barrier to adult survivors of child sexual abuse seeking access to the courts for civil compensation. Before turning to these provisions, it is necessary to comment briefly upon the legal implications of recently emerged psychological evidence of PTSD.

2 The Significance of New Evidence

PTSD was first recognised in the third edition of the Diagnostic and Statistical Manual of Mental Disorders in 1980.23 The youth of PTSD alone is significant, but when this is added to the recency of medical and social recognition of the incidence, prevalence and consequences of child sexual abuse, the difficulties that can be produced by outdated legal principles start to become obvious. The consequences of child sexual abuse, including PTSD, only became known to the psychiatric and psychological communities (much less to broader society, the legal community and survivors of abuse) in the late 1980s and 1990s. The

22 In Queensland, the Project AXIS survey found that of 212 adult survivors, 25 took 5–9 years to disclose it, 33 took 10–19 years, and 51 took over 20 years: Queensland Crime Commission and Queensland Police Service, Project AXIS Vol 1, above n 3, 84 (Table 23). Where the perpetrator is a relative, it is even more likely that the delay will be long. A Criminal Justice Commission analysis of Queensland Police Service data from 1994–98 found that, of 3721 reported offences committed by relatives, 25.5 per cent of survivors took 1–5 years to report the acts, 9.7 per cent took 5–10 years, 18.2 per cent took 10–20 years and 14.2 per cent took more than 20 years: at 86 (Table 25).

23 American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (3rd ed, 1980).
recency of this evidence is significant when assessing the justifiability of statutory time limits, and of judicial expectations about survivors’ knowledge of the nature, extent and cause of their injuries, and about what survivors could reasonably have done to discover this knowledge.

Given that statute and common law in this area was developed in a social context without the benefit of recent knowledge about child sexual abuse, those laws are likely to produce results that can now be identified as unjustifiable, but were perhaps understandable in the previous social context. Now that the incidence, extent and consequences of child sexual abuse are known, the failure of contemporary parliaments to change the law to reflect this new knowledge, and the unwillingness of judges to be informed by it, produces gaps in the law and unjust results which are inexcusable.

This problem is illustrated by the failure of the Queensland Parliament to respond to new evidence, and the apparently insufficiently informed nature of judicial reasoning in this area. This is an issue requiring attention, particularly given the significant numbers of children in Queensland who are sexually abused. Between 1994 and 1998, there were 15,774 child sex offences reported to Queensland Police.24 In 2002–03, there were 31,068 notifications of child abuse and neglect to State authorities, involving 22,027 children.25 Of these, there were 12,203 substantiated cases involving 9,032 children.26 Of the 12,203 substantiations, 610 were cases of sexual abuse.27 Queensland also has a history of child sexual abuse in State and religious institutions, and in State foster care.28

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24 Queensland Crime Commission and Queensland Police Service, Project AXIS Vol 1, above n 3, 32 (Table 3). The incidence of child sexual abuse is notoriously difficult to assess due to the low rate of reports. It is sufficient to state that the reported number of offences represents only a proportion of the actual number of incidents.


26 Ibid.

27 Ibid 16 (Table 2.5). The 12,203 substantiations comprised 2,806 of physical abuse, 610 of sexual abuse, 4,135 of emotional abuse and 4,652 of neglect.

III  STATUTORY LIMITATION PERIODS

A  Time Limits and Minority

The state is not limited by time in prosecuting indictable criminal offences, which include the acts constituting child sexual abuse. The High Court has held that individuals accused of criminal acts have no right to a speedy trial, or even to trial within a reasonable time. Cases of delayed prosecution for child sexual abuse demonstrate that it is possible for a fair trial to be secured many years after the relevant events. As well, judges in criminal courts have accepted that many survivors of child sexual abuse, for good reasons, take a long time to report it. In 1995, for example, Wilcox J stated:

It is commonplace for there to be a substantial delay in the reporting of alleged sexual assaults, especially where the complainant is a child … 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.

The civil context provides a marked contrast. Statutes set time limits on when a person can bring a civil claim for personal injuries, for several, usually justifiable, reasons. It is necessary to ensure a fair trial for the defendant by ensuring the availability of fresh evidence. People need to be able to proceed with their lives unencumbered by the threat of an old claim. Plaintiffs should not sleep on their rights. The public has an interest in the prompt resolution of disputes. Accordingly, in all Australian States and Territories, bar Western Australia, actions seeking damages for personal injuries must generally be commenced within three years from the date on which the cause of action arose.

29 Criminal Code (Qld) ss 349 (rape), 208 (unlawful sodomy), 210 (indecent treatment of a child under 16), 215 (carnal knowledge with or of a child under 16), 222 (incest), 229B (maintaining a sexual relationship with a child).
30 Jago v District Court of New South Wales (1989) 168 CLR 23. Recognition that delay may impede a fair trial remains and courts have, though rarely, stayed proceedings: see Gill v DPP (NSW) (1992) 64 A Crim R 82; R v Davis (1995) 57 FCR 152.
32 R v Lane (Unreported, Federal Court of Australia, Wilcox J, 19 June 1995) 2. See also R v Austin (1995) 14 WAR 484 (where Owen J states: ‘It is not at all uncommon for there to be a delay in the institution of proceedings for sexual offences’; at 493); R v Davis (1995) 57 FCR 152.
33 Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541, 551 ff.
34 Limitation of Actions Act 1974 (Qld) s 11; Limitation Act 1969 (NSW) ss 18A(2), 50C; Limitation of Actions Act 1958 (Vic) ss 5(1AA), 27D(1)(a); Limitation of Actions Act 1936 (SA) s 36; Limitation Act 1974 (Tas) s 5(1); Limitation Act 1985 (ACT) s 16B; Limitation Act 1981 (NT) s 12(1)(b). The Limitation Act 1935 (WA) s 38(1)(b) sets a time limit of four years for actions for trespass to the person, assault and battery, and s 38(1)(c)(vi) sets a period of six years for negligence. In Wilson v Horne (1999) 8 Tas R 363, it was held that an action exists in both negligence and trespass for the acts constituting
Minority has traditionally constituted a legal disability and has stopped time from running until the attainment of majority. In most, but not all, Australian jurisdictions, this effect of minority is still generally upheld.\(^{35}\) Thus, in Queensland, South Australia, the Northern Territory and the Australian Capital Territory, a survivor of child sexual abuse has three years from turning 18 in which to institute proceedings. In Tasmania, a survivor has until the age of 21, but only if he or she was not in the custody of a parent at the time of the events, and in Western Australia, a survivor will have until 22 or 24 depending on the action. In New South Wales and Victoria, however, where a child suffers injury from someone who is not a parent or a close associate of a parent, amendments motivated by the Commonwealth’s ‘Review of the Law of Negligence’\(^{36}\) (‘Ipp Report’) establish a different position. In these States, if the child is in the custody of a capable parent or guardian, then that child is deemed not to be under a legal disability or incapacity, and the child’s parent or guardian is required to bring the action on the child’s behalf within a set period of time, which may often be a much shorter period than exists even in other Australian jurisdictions.\(^{37}\) In New South Wales, the action must be brought within three years from when the action is discoverable, while in Victoria the action must be brought within six years from this time.\(^{38}\) In both cases, a long-stop of 12 years from the date of the wrongful acts applies.\(^{39}\)

2 Qualitative Differences in Child Abuse Cases

As discussed above, there is no doubt that the legal system must protect the defendant’s right to a fair trial. However, judicial and extra-judicial commentators have shown that qualitative differences in child abuse cases (in contrast to typical personal injury suits, such as motor accident cases) outweigh
the generally good reasons for a short standard time period. The differences flow primarily from the following facts: that the injury is inflicted on a child; that the acts occur in private and so are not often accompanied by objective evidence; that the acts are particularly egregious; that the psychological effects of the abuse commonly take many years or even decades to manifest; that the causal connection between abuse and injury also typically takes a long period of time to be realised; that the nature and extent of the injuries take a similarly long period of time to be diagnosed; that the victim’s frequent misplaced sense of guilt, shame and responsibility for the acts impedes their realisation of being the victim of a wrong; and that the wrongdoer’s position of superiority often deters survivors from proceeding until they feel psychologically equipped to do so.

Even the Ipp Report, whose terms of reference were to examine methods to reform the common law to limit liability and quantum of damages, recognised the unjustifiable difficulties posed by a short and rigid limitation period in at least some classes of child injury, namely where a child is injured by a parent or a close associate of a parent. Responding to the recommendations of the Ipp Report, legislatures in New South Wales and Victoria enacted a special limitation period for these cases. In these cases, the action is deemed to be discoverable by the victim when he or she turns 25 years of age, or when the cause of action is actually discoverable (not constructively discoverable), whichever is later. With the long-stop period of 12 years applying to these cases as well, this means that in this class of case, a plaintiff who has turned 25 has three years to institute proceedings once he or she has actual knowledge of the fact of the injury, of the defendant causing that injury, and of the injury being of sufficient seriousness that it justifies legal action. Effectively then, a plaintiff here can have until turning 37 to institute proceedings.

Despite cogent arguments that the rationales for strict time limits are outweighed by countervailing factors in cases of child abuse, and despite the fact that, in response to these arguments, overseas jurisdictions have amended their...
statutes of limitation for these cases, in Australian jurisdictions, these actions are treated no differently, save the specific classes of case now recognised in New South Wales and Victoria. The significance of this is that most adult survivors of child sexual abuse with PTSD (and many of those who do not have PTSD) will not be able to commence proceedings within the time allowed. Unless the defendant does not plead the expiry of time as a defence — expiry of the time limit must be pleaded as a defence; it does not operate automatically to bar the plaintiff’s access to the court — these plaintiffs will be out of time. They are then forced to abandon their claim, or to argue that they were under a legal disability since attaining majority so that time has not run until that disability ceased, or to apply to the court for an extension of time in which to bring their claim. Due to the cost of such an application, many will not pursue the matter.

B Extension Provisions

Most Australian jurisdictions have statutory provisions enabling time to be extended by the court, usually on the basis that critical facts about the injury (including the presence of the injury itself, as well as its cause) have only surfaced long after the wrongful event. Despite the technical availability of an extension, however, Queensland case law demonstrates that in child abuse cases the extension provisions have been almost impossible to satisfy. The discussion of Queensland decisions in Part III is instructive, not only for future Queensland cases, but also for extension applications in other Australian jurisdictions, given that extension provisions in these jurisdictions import considerations that are identical or similar to those that have proved decisive in Queensland. These

44 British Columbia, Manitoba, Newfoundland, the Northwest Territories, Nova Scotia, Nunavut, Ontario, Saskatchewan and the Yukon have abolished time limits for civil actions based on sexual assault: Limitation Act, RSBC 1996, c 266, s 3(4)(k)(i); Limitation of Actions Act, CCSM 2002, c L-150, s 2.1(2)(a), (b); Limitations Act, RSN 1995, c L-16.1, s 8(2); Limitation of Actions Act, RSNWT 1998, c L-8, s 2.1(2); Limitation of Actions Act, RSN 1989, c 258, s 2.1(3)(a), (b); Nunavut Act, SC 1993, c 28, s 29 (which adopts the Northwest Territories provisions); Limitations Act, RSO 2002, c 24, s 10(1)-(3); Limitation of Actions Act, RSS 1978, c L-15, s 3(1)(3.1)(a); Limitation of Actions Act, RSY 2002, c 139, s 2(3). In Manitoba, the Northwest Territories, Nunavut, Ontario, and Saskatchewan, the abolition of time limits extends to all actions for trespass to the person, assault or battery where at the time of the injury the person was in a relationship of financial, emotional, physical or other dependency with one of the parties who caused the injury: Limitation of Actions Act, CCSM 2002, c L-150, s 2.1(2)(b)(ii); Limitation of Actions Act, RSNWT 1998, c L-8, s 2.1(1)-(2) (adopted in Nunavut: Nunavut Act, SC 1993, c 28, s 29); Limitations Act, RSO 2002, c 24, s 10(1)-(3); Limitation of Actions Act, RSS 1978, c L-15, s 3(1)(3.1)(b)(ii).

45 Uniform Civil Procedure Rules 1999 (Qld) r 150(1)(c). Nor will the court consider expiry of time on its own initiative: Commonwealth v Verwayen (1990) 170 CLR 394, 498.

46 For a discussion of the disability argument, see below Part VI.


48 Limitation of Actions Act 1974 (Qld) s 31; Limitation Act 1969 (NSW) ss 58, 60A, 60G, 62A, 62D; Limitation of Actions Act 1958 (Vic) ss 23A, 27K; Limitation of Actions Act 1936 (SA) s 48; Limitation Act 1974 (Tas) s 5(3); Limitation Act 1985 (ACT) s 36; Limitation Act 1981 (NT) s 44. The Limitation Act 1935 (WA) has no general extension provision.
comparative provisions will be summarised after outlining the Queensland provisions.

In Queensland, assuming there is enough evidence to establish the action, an applicant is typically eligible for an extension of time if it is demonstrated to the court that a material fact of a decisive character relating to the action was neither known to the applicant, nor within the applicant’s means of knowledge, until a date after the applicant turned 20, and within one year of the applicant seeking the extension.49 ‘Material facts relating to a right of action’ include the fact of the occurrence of negligence or trespass; the fact that the negligence or trespass was capable of causing personal injury; the nature and extent of the injury; and the extent to which the injury was in fact caused by the negligence or trespass.50 A material fact will be of a decisive character if a reasonable person knowing that fact, and having taken appropriate advice, would regard it as showing (i) that an action would have a reasonable prospect of success and of resulting in an award of damages sufficient to justify bringing the action; and (ii) that the survivor of the abuse ought, in their own interests and taking their own circumstances into account, to bring an action.51

A pivotal provision deems a fact to be outside the applicant’s means of knowledge only if the applicant does not actually know of the fact, and, as far as the fact is discoverable, the applicant has taken all reasonable steps to discover it before it is actually discovered.52 The idea behind this provision is that even if a plaintiff could not have possessed the material facts and so have brought an action within time, that plaintiff is still expected, after time has expired, to take reasonable steps to ascertain those facts and institute proceedings quickly once their ascertainment is possible, in order to reduce the delay produced by otherwise unavoidable circumstances. Similar provisions in other jurisdictions contain, explicitly or implicitly, a requirement that the plaintiff take ‘reasonable steps’ to discover the decisive facts.

In New South Wales, different extension provisions are available depending on the time when the injury was sustained, or where other reasons for an extension may exist. Several of these provisions require the court to consider the reasonableness of the applicant’s conduct in ascertaining the relevant facts. First, for extension applications concerning actions where a person was injured before 1 September 1990, the substance of the Queensland provision discussed above, concerning whether a material fact of decisive character was not within the applicant’s means of knowledge, is implicitly duplicated.53 Second, for actions involving injury sustained between 1 September 1990 and 6 December 2002, when considering an application extension, the court must consider, among other things, the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any advice received.54 Third, the court must take

49 Limitation of Actions Act 1974 (Qld) s 31(2).
50 Limitation of Actions Act 1974 (Qld) s 30(1)(a).
51 Limitation of Actions Act 1974 (Qld) s 30(1)(b).
52 Limitation of Actions Act 1974 (Qld) s 30(1)(c).
53 Limitation Act 1969 (NSW) s 58(2).
54 Limitation Act 1969 (NSW) s 60E(1)(g).
into account the same considerations where a person applies for an extension of the 12 year long-stop in the case of an action concerning injury sustained after 6 December 2002. More significantly, the long-stop cannot be extended beyond three years from the date of discoverability, which introduces the element of constructive discoverability, that is, when it can be deemed that a plaintiff ‘ought’ to have known of the three decisive facts founding an action. A cause of action is discoverable on the first date the plaintiff knows or ought to know of three facts: the injury, the fact that the defendant caused that injury, and the fact that the injury is of sufficient seriousness to justify bringing an action. It is deemed that a person ought to know a fact at a particular time if the fact would have been ascertained by them had they taken all reasonable steps before that time to ascertain the fact.

Fourth, for applications seeking an extension on the ground of recent manifestation of latent injury, the court may also have to consider when the plaintiff ought to have become aware of the facts of the injury, its nature and extent, and the connection between the injury and the defendant’s conduct.

In Victoria, the court must consider the extent to which the plaintiff acted promptly and reasonably once he or she knew the defendant’s act might be capable at that time of giving rise to an action for damages. The steps, if any,
taken by the plaintiff to obtain medical, legal or other expert advice, and the nature of any advice received, must also be considered.\textsuperscript{59} In the Australian Capital Territory, the substance of the Victorian provision for this latter class of extension applications is duplicated.\textsuperscript{60}

In the three other jurisdictions, general discretionary powers enable the court to consider the plaintiff’s conduct. In South Australia, the court must consider the conduct of the parties generally, and any other relevant factors.\textsuperscript{61} In the Northern Territory, the court must consider, among other things, whether in all the circumstances it is just to grant the extension.\textsuperscript{62} In Tasmania, the court must consider whether it is just and reasonable to extend the limitation period.\textsuperscript{63}

Some final points need to be noted before turning to the case studies. Even if, in the relevant jurisdictions, all the conditions about recent discovery of decisive material facts and the taking of reasonable steps are satisfied, the court must still then consider the justice of extending time and exercise its discretion in the applicant’s favour. The applicant has a ‘positive burden’ of showing that justice requires the extension of time.\textsuperscript{64} Whether the court exercises its discretion to extend time depends on its estimation of the prejudice to the defendant’s right to a fair trial. This prejudice was the basis for the court’s refusal to extend time in the Victorian case of \textit{Calder v Uzelac}.\textsuperscript{65}

The intention of the extension provision is therefore to enable the institution of proceedings by someone who could not reasonably have done so within the time allowed, either through lack of knowledge of a material fact (such as the injury sustained or its cause), or because on the facts then available, the action was likely to fail or to produce insignificant damages. In \textit{Re Sihvola}, Wanstall CJ distilled the purpose like this:

\begin{quote}
The issuing of a writ presupposes knowledge, or at least belief, by the plaintiff or his legal advisers that he can establish the cause of action alleged in his writ by
\end{quote}

\begin{flushleft}
\textsuperscript{59} \textit{Limitation of Actions Act 1958} (Vic) ss 23A(f), 27L(1)(g).
\textsuperscript{60} \textit{Limitation Act 1985} (ACT) s 36(3)(e), (f).
\textsuperscript{61} \textit{Limitation of Actions Act 1936} (SA) s 48(3b), (c), (d).
\textsuperscript{62} \textit{Limitation Act 1981} (NT) s 44(3).
\textsuperscript{63} \textit{Limitation Act 1974} (Tas) s 5(3).
\textsuperscript{64} \textit{Limitation of Actions Act 1974} (Qld) s 31(2) (imported by the phrase ‘the court may order that the period of limitation for the action be extended’): see \textit{Brisbane South Regional Health Authority v Taylor} (1996) 186 CLR 541, 551, 554. This requirement is duplicated in other jurisdictions: see the provisions cited above n 48, which commonly refer to ‘the justice of the case’, or whether it is ‘just’ or ‘just and reasonable’ to extend time.
\textsuperscript{65} [2003] VSCA 175 (Unreported, Buchanan and Chernov JJA and Ashley AJA, 14 November 2003).
\end{flushleft}
proving the facts that are then within his knowledge. The antithesis of this proposition becomes the basic assumption of the scheme, ie, that he has not issued a writ because he lacked knowledge of some material fact, on proof of which his cause depended, either entirely or for a worthwhile result.66

In Sugden v Crawford,67 Connolly J (with whom Shepherdson J agreed) stated that an extension will be justified where there is such an enhancement of the prospect of success as, for example, would raise it from a possibility to a real likelihood. Even if a prima facie case of negligence already existed, legal advisers may deem it too risky to bring an action until the newly discovered fact emerges. In Sugden v Crawford, the applicant succeeded because his originally undiagnosed back fractures, sustained after a workplace accident, were diagnosed after the expiry of time. The court found that without this later diagnosis, this was the type of undiagnosed complaint (soft tissue injury to the back) which without evidence of fracture, would be treated with scepticism and would be unlikely to attract a significant award of damages. The diagnosis, therefore, had the effect of transforming his case. It will be seen that this reasoning has particular relevance in cases of child abuse heard to date, due to the recency of social, medical and legal recognition of such abuse.

IV CASE STUDIES: APPLICATIONS TO EXTEND TIME

A Woodhead v Elbourne

The applicant in Woodhead v Elbourne68 was born on 25 February 1974. She suffered alleged sexual assaults between July 1981 and December 1987 (aged 7–13), inflicted by a friend of her adoptive parents. The alleged assaults were of a relatively minor nature,69 the most serious incidents appeared to involve the defendant allegedly putting his hand ‘between the Plaintiff’s legs, in the area of her vagina’ and ‘mov[ing] his fingers over the Plaintiff’s vaginal area’.70 When aged 12 or 13 the plaintiff told her mother of the assaults and had counselling sessions and police interviews, but no action was taken. She had until 25 February 1995 to begin proceedings. She instituted proceedings on 23 December 1997 – a gap of two years and nine months from the expiry of the time limit. Relevantly, the claim was in assault and battery, not negligence, so the claim was actionable without proof of damage.

68 [2001] 1 Qd R 220.
70 Woodhead v Elbourne [2001] 1 Qd R 220, 222.
1 Discovery of Material Facts

The applicant suffered a crisis in November 1993 (aged 19) and saw a psychiatrist, who noted that the applicant had never been able to talk through or deal with the abuse, or explore how it had affected her. At this time, no analysis was conveyed to the applicant of her symptoms, their cause, or of the connection between the abuse and its consequences. Until this point she had not connected her symptoms with the abuse because, in her words as reported by a psychologist, ‘this would have meant confronting the trauma she was avoiding in the hope that it would just go away.’\textsuperscript{71}

Regular psychotherapy began in 1996. Towards the end of 1996, the applicant expressed anger at the assaults and the psychotherapist told her that she could see a lawyer. She consulted a solicitor on 26 March 1997, but was unable to provide details of her injury or condition except to say she was receiving counselling. That day, the psychotherapist told the applicant that she did not think that the applicant was ready for legal proceedings, and refused to provide a medico-legal report.

The applicant began treatment with another psychiatrist on 19 January 1998. After six visits, this psychiatrist wrote a report on 18 December 1998, which included a diagnosis and comments linking the abuse with the conditions suffered by the applicant. The applicant said that only after reading this report did she

\begin{quote}
first become aware that [she] was suffering from ‘post-traumatic stress disorder consequent upon childhood sexual abuse …’ and ‘borderline personality disorder’ … Before this time [she] did not know the nature of [her] condition, the extent of [her] condition or whether [her] condition related to the assaults by the defendant.\textsuperscript{72}
\end{quote}

The respondent argued that direct knowledge of the material facts existed in 1993, when the applicant began psychotherapy, or, alternatively, no later than 1996. This argument was relied on to the exclusion of the argument usually raised in these cases that the applicant should have taken reasonable steps to discover the fact before she did.

2 Judicial Reasoning

Despite assault and battery being actionable without proof of damage, the extension was granted. The judicial reasoning is concerned with the applicant’s direct knowledge, and the effect of the psychiatric diagnosis. Unusually, there is no discussion of the reasonable steps issue.

The first critical finding by White J was that only when the applicant read the December 1998 report did she have direct knowledge of the material facts which, if properly advised, would lead a reasonable person to institute proceedings. The knowledge gained at this time of the psychiatric diagnosis of the precise injury was held to raise the prospect of success from a possibility to a real likelihood by

\begin{footnotes}
\item[71] Ibid 223.
\item[72] Ibid 225.
\end{footnotes}
identifying the extent of the injury.\textsuperscript{73} Implicit here is the notion that without evidence of the extent of the injury, the applicant would have little chance of either success, or of a significant award of damages.

Second, the fact that the applicant had explored the events over two years of psychotherapy was not deemed to be direct knowledge sufficient to dismiss the application. Justice White stated that during this time the applicant ‘may have been led to think that possibly the alleged sexual assaults were the cause of her symptoms’,\textsuperscript{74} but that was deemed insufficient to demonstrate direct knowledge of the material facts.

Third, White J identified the applicant’s adverse life influences (the abuse, her school difficulties and problems with her brother). The psychiatric diagnosis was held to disentangle these influences and to clarify the causal consequences of particular experiences, including the causal link between the alleged abuse and the psychiatric injury.\textsuperscript{75}

This reasoning will be revisited during the analyses of the three cases which follow. It will be seen that the reasoning and conclusions of this decision are impossible to reconcile with the following decisions. However, one point all of the judgments have in common is that the effect of avoidance caused by PTSD is not discussed.

\section*{B \hspace{1em} \textit{Carter v Corporation of the Sisters of Mercy of the Diocese of Rockhampton}}

The applicant in \textit{Carter v Corporation of the Sisters of Mercy of the Diocese of Rockhampton}\textsuperscript{76} (‘\textit{Carter}’) was born on 23 March 1960. When two months old she was taken into State care and in 1961 she was placed at Neerkol Orphanage, a private institution licensed to care for children, run by an order of nuns. Between 1961 and 1972 (aged 1–12), the applicant suffered personal injuries from numerous incidents of physical and emotional cruelty from the nuns.\textsuperscript{77} From the age of five or six, she allegedly suffered numerous incidents of sexual assault by a Neerkol employee, including almost daily rape from age seven. In August 1968, aged eight, she complained to government employees of physical and sexual abuse, but was not believed and was beaten for complaining. Aged 15, she fled State care to live on the streets.

\begin{enumerate}
\item \textsuperscript{73} Ibid 227.
\item \textsuperscript{74} Ibid.
\item \textsuperscript{75} On the question of discretion and delay, White J held that there was no significant prejudice to the defendant. The plaintiff was entitled to bring her action until 25 February 1995, so there was no great delay (although the earliest of the actual events had allegedly occurred nearly 20 years previously), and no witness, document or other evidence was lost. The applicant could not be precise about the dates on which the alleged acts occurred, but there was unlikely to be any dispute about the facts of visits by the applicant to the defendant’s property. The applicant’s action would therefore ‘depend on the view that the tribunal of fact takes of the truthfulness of each of the parties’: ibid.
\item \textsuperscript{76} [2000] QSC 306 (Unreported, White J, 8 September 2000); aff’d [2001] QCA 335 (Unreported, McPherson JA, Muir and Atkinson JJ, 24 August 2001).
\item \textsuperscript{77} The Court of Appeal accepted that at least some of the appellant’s complaints of ill-treatment were confirmed by ‘ample evidence’: \textit{Carter} [2001] QCA 335 (Unreported, McPherson JA, Muir and Atkinson JJ, 24 August 2001) [5] (McPherson JA), [46], [77] (Atkinson J).
\end{enumerate}
Throughout her life, the applicant suffered numerous adverse influences and incidents apart from the alleged sexual abuse suffered as a child, including: being placed in State care at 14 months of age; having severe speech impediments; enduring regular severe physical assault, emotional cruelty and torture (for example, solitary confinement and being tied to a pole); enduring childhood emotional neglect; surviving regular forced use of sedative drugs as a child; being shifted to a number of foster placements; running away and living on the streets as a teenager; becoming pregnant while homeless; experiencing the death, in 1977, of her boyfriend who was the father of her first child; enduring the death of her youngest child in 1992; enduring a marriage characterised by verbal and emotional abuse; and suffering from longstanding alcohol abuse, beginning after the death of her boyfriend in 1977.

In 1997, she learned of others who had suffered abuse at Neerkol. At this point she complained to police and on 6 August 1997 she consulted her solicitor regarding criminal charges. Her solicitor offered to investigate a civil claim. The Neerkol Orphanage nuns wrote the applicant a letter of apology and regret for their actions and omissions, and, with the first defendant, agreed on a settlement of the claim. This was, therefore, an application for an extension of time to proceed against the State of Queensland and the alleged individual perpetrator. Despite the nuns’ admissions and settlement, the State of Queensland did not admit that the events occurred and claimed that a number of witnesses were either dead, unable to be located or very old. The applicant had until 23 March 1981 to begin proceedings. She instituted proceedings on 27 July 1998 – a gap of 17 years and nine months from the expiry of the time limit. The claim was in negligence against the State of Queensland (so requiring proof of damage), and in trespass to the person against the employee.

Discovery of Material Facts

The applicant claimed recent knowledge of two material facts of a decisive nature that previously were neither known to her nor within her means of knowledge. The first was the knowledge that she suffered psychiatric injuries (chronic depression, among other things, and PTSD, although the judgments are silent about the latter, save for brief mention by the minority judgment). The applicant claimed that she only gained this knowledge on 7 October 1998 after reading a psychiatrist’s report dated 29 September 1998. The second fact was the causal connection between the acts and the personal injury. The applicant said that only after reading the report did she appreciate that there was expert evidence indicating that the abuse had caused the psychiatric injuries she had suffered since leaving Neerkol. She had received psychological and psychiatric treatment over many years but, she said, ‘there was never any mention or indication of a connection between the abuse [she] suffered and [her] current condition’.\(^{78}\) The applicant admitted that she had harboured a hatred for her abusers (but did not ever consider that she was entitled to compensation), and, in her affidavit, had stated that she became angry and aggressive because of the

abuse and that this influenced her aggression as a child towards other children. Both at first instance and on appeal the applicant failed.

2 Judicial Reasoning at Trial

At first instance, White J appears to have based her refusal of the application on the assumption that the applicant had direct knowledge of the facts necessary to commence an action from the time the limitation period started to run, or at least to commence proceedings at any time between her marriage at the age of 19 – White J does not explain her selection of the significance of this point in the applicant’s life – and her complaint to police in 1997. Justice White also found that there was ‘nothing in the material to suggest that she could not have [commenced proceedings between 1978 and 1997 and] she would have been advised, had she sought advice, that the damages would be likely to be considerable’.

It is difficult to discern the key elements of judicial reasoning here. The applicant’s mere knowledge of the facts of the abuse seems to underpin the finding that she could have brought proceedings before she did. The judgment does not appear to be based on a finding that the applicant should have taken reasonable steps to ascertain her psychiatric injury before she actually did. The fact that there is no discussion or resolution of the reasonable steps issue in the judgment supports this conclusion. Justice White reaches her judgment without addressing the claim of recent discovery of material facts of a decisive character. This is so despite her Honour’s acknowledgement that the psychiatric diagnosis was relevant to the extent of the injury. Notwithstanding this acknowledgement, White J found that the applicant, if advised, could have brought the claim earlier based on facts she already knew since, if successful, she would have been likely to obtain significant damages.

This finding is problematic. It appears to be somewhat more arguable with respect to the assault and battery claim, which is actionable without proof of damage – although to bring an action in the 1980s, for example, when institutional abuse was unacknowledged in Queensland, would have presented arguably insurmountable difficulties. However, the more concerning difficulty with this reasoning lies with its application to the negligence claim against the State of Queensland, which requires proof of damage. Until obtaining the psychiatric diagnosis, all the applicant knew was that the acts had been done to her. She did not know that she had psychiatric injuries, nor did she know that there was a connection between the abuse and the injuries. Neither of these matters is discussed in the judgment. Furthermore, without giving any reasoning to justify the finding, White J assumes that the applicant would have had good prospects of success in a claim against the State, at any time between 1978 and 1997, without knowledge of the psychiatric injury, without knowledge of the causal connection between the abuse and the injury (which was unknown to the psychiatric community until at least the late 1980s), and before revelations and

79 Finally, White J stated that there was no suggestion that she was suffering the effects of the abuse to such an extent as to be legally unable to seek appropriate advice: ibid [13].
evidence of institutional abuse existed in Queensland. This is a highly dubious assumption.

Furthermore, in *Woodhead v Elbourne* (an assault and battery action), White J held that the psychiatric diagnosis raised the prospect of success from a mere possibility to a real likelihood, but this finding was not made in *Carter*. It is unclear what could distinguish these cases in this respect. Until gaining the material facts of the psychiatric diagnosis and of the causal connection between the abuse and the injury, the applicant in *Carter* had little evidence on which she could commence proceedings, and even less on which she could prove precise damage.

It is similarly difficult to reconcile these two cases on the issue of discovery of material facts. In *Woodhead v Elbourne*, White J found that the applicant did not have all necessary facts on which to commence proceedings until gaining the psychiatric diagnosis and the evidence of the causal link, yet the applicant in *Carter* was found to have all the necessary facts on which to bring an action without these same pieces of evidence. Neither applicant previously possessed the psychiatric diagnosis or the evidence of causal connection. The applicant in *Woodhead v Elbourne* had attended regular counselling for two years, and had received suggestions that the abuse could cause her injuries. The applicant in *Carter* had attended intermittent psychological and psychiatric counselling, but had endured multiple severe adverse influences in her life, and it had never been suggested to her that her sexual abuse may have produced her injuries. A related irreconcilable matter is that in *Carter*, there was no consideration given to the capacity of the psychiatric report to have the same disentangling effect as her Honour found in *Woodhead v Elbourne*. This is curious, since the applicant in *Woodhead v Elbourne* endured far less severe abuse, and had far fewer and less severe adverse influences in her life, than did the applicant in *Carter*.

Evidence of PTSD and avoidance was not referred to in the judgment.

### 3 Judicial Reasoning on Appeal

On appeal, the appellant had to show that the finding that the material facts were within her means of knowledge before reading the psychiatric report in October 1998 was not reasonably open to the Judge on the evidence presented. The majority (McPherson JA, with whom Muir J generally agreed) made several conclusions about direct knowledge, and about the taking of reasonable steps to ascertain material facts, before dismissing the appeal.80

First, regarding whether the appellant knew that she suffered from depression, McPherson JA held that before reading the psychiatric diagnosis of depression, the appellant 'was aware that she suffered from a depressed condition'81 because when she consulted the psychiatrist she reported that at times she felt depressed and she drank alcohol to ease this depression. This appears to indicate that, for

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80 Both at first instance and in the Court of Appeal by majority, it was held that the long delay produced sufficient prejudice to the State of Queensland to enliven the discretion to refuse the application as well. Curiously, White J would not have barred the proceedings regarding the fourth defendant (the employee alleged to have committed the rapes) by the exercise of discretion regarding fair trial: ibid [18]–[22].

81 *Carter* [2001] QCA 335 (Unreported, McPherson JA, Muir and Atkinson JJ, 24 August 2001) [12].
McPherson JA, the fact that the appellant stated that she was, in lay terms, ‘depressed’ equated with knowledge that she had depression in a psychiatric sense. This finding seems unjustifiable. Knowing that you have depression in a medical sense requires knowledge of the clinical symptoms of depression, and diagnosis of your exhibition of those symptoms. There is substantial authority for the principle that knowledge of symptoms is not knowledge of the injury, sufficient to make time run, until the nature and extent of the injury is ascertained by expert diagnosis. The appellant clearly did not know that she suffered depression, or, for that matter, any of her other psychiatric injuries, until she received the psychiatric diagnosis.

Second, regarding whether the appellant knew that her injuries were caused by her abuse, McPherson JA refers to the appellant’s statement that because of the abuse she suffered, she became an aggressive and angry person, and would assault other children. From this statement McPherson JA concludes that ‘even at that early stage of her life, she was herself able to make a connection between her treatment at Neerkol and her mental state or behavioural condition’. Justice Muir made a similar finding. This conclusion also appears to be unjustifiable. The psychiatric report itself states that ‘[i]t is difficult to know if the applicant’s violence towards others at a young age is in direct relation to her experiences of abuse and her own attempts to cope with the abuse’. Any one or more of several adverse influences in her life until that point could have caused her early aggression, including the fact of being placed in State care, her speech impediment and its consequences, her forced drug use, her physical abuse, her emotional neglect, and her sexual abuse. The appellant could not make her own psychiatric diagnosis as she was not an expert witness. The disentangling effect of a psychiatric diagnosis and opinion about causal factors referred to in Woodhead v Elbourne, if appropriate there, is surely appropriate here, since the number and severity of the appellant’s adverse influences are greater.

Third, regarding whether the appellant knew as an adult of the causal connection between her childhood suffering and her psychiatric injuries, McPherson JA found that she could or should have discovered this by acting ‘reasonably’:

If later in her life she did not appreciate that there was a connection between her childhood treatment and the alcoholism and her chronic depression, [these were facts] which she could have found out by taking the reasonable step of asking any psychiatrist whom she consulted. She was aware of her need to consult psychiatrists and psychologists because she had done so evidently more than once before … [in] August 1998.

It is true that she says that, before then, there was never any mention of a connection between the abuse suffered and her current condition; but it would have

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82 Commonwealth v Dinnie (1995) 129 ALR 239, 251–2; Donnelly v Victoria (Unreported, Supreme Court of Victoria, O’Bryan J, 30 June 1994).
84 See ibid [27] ff.
been a reasonable step for her on the occasion of those consultations for her to ask what caused her recurring states of depression.\footnote{Carter [2001] QCA 335 (Unreported, McPherson JA, Muir and Atkinson JJ, 24 August 2001) [15].}

Then, McPherson JA states that the question is not whether there is any expert evidence of her injury and the connection before that date, but whether the appellant realised the possible connection between the two, or had taken reasonable steps to find out if a connection existed. His Honour concludes, in this regard, that ‘one would have expected her to ask what it was that caused the depressive states’.\footnote{Ibid [16].}

These findings appear to be made in ignorance of the appellant’s psychiatric and emotional circumstances. The appellant cannot be judged to have had direct knowledge of the causal link between her childhood sexual abuse and her injuries including alcoholism, depression and PTSD as an adult. The most obvious reason is that until the late 1980s, no medical specialist in Australia – let alone any lay person – knew of the causal connection between childhood sexual abuse and psychiatric injury as a child or an adult. Even when this knowledge became known to the medical profession (which is not to say it was known generally), there were any number of the appellant’s adverse influences that alone, or in combination, could have produced these injuries. It is submitted that this matter of her knowledge of the causal connection between childhood abuse and adult injury is a moot point in any event, since she did not know of her psychiatric injuries until receiving the diagnosis.

The problem with the reasoning in this case is that, in fact, it is not reasoned, but more closely resembles mere opinion. Statements such as ‘one would have expected her to ask what it was that caused the depressive states’ are not supported by an analysis of psychiatric or psychological evidence, or substantiated by detailed reference to the psychiatric reports or by reference to the multitude of adverse influences in the applicant’s life. Such statements, rather than being justifiable conclusions made after an exposition of the grounds underpinning them, instead beg necessary questions such as ‘why would one expect her to ask what caused the depressive states?’ and ‘when could one reasonably expect her to ask what caused the depressive states?’ The answers to these questions can only be arrived at after adequate analysis of psychiatric evidence, of the psychiatric reports in the case, and of the appellant’s testimony.

Later in this article I will draw some conclusions about when the legal system may reasonably expect plaintiffs in this context to institute legal proceedings. At this stage, I will make two points about the issue of ‘reasonable steps’ to discover the injury and the causal connection between the abuse and injury. First, it is clearly unjustifiable to require such an investigation by the survivor before the medical evidence of the consequences of child sexual abuse was broadly known by Australian practitioners. This makes it impossible to find that an adult survivor of child abuse should have taken steps to discover the nature, extent and cause of their injury before the 1990s, and certainly before the late 1980s. Second, in determining what constitutes ‘reasonable steps’, at least where the
survivor has PTSD, the avoidance symptom must be a necessary consideration. In *Carter*, the expectation of reasonable conduct was decided in ignorance of the effects of PTSD, including avoidance. This imposes an unjustifiable strictness on the standard of ‘reasonable steps’.

C Applications 861 and 864 of 2001

The applicant (S) in *Applications 861 and 864 of 2001*88 (‘Application 864’) was born on 31 August 1955. She suffered sexual assaults between October 1963 and July 1965 (aged 8–10), inflicted by the respondent schoolteacher, who later became a member of parliament, and who was found guilty of child sexual offences involving this applicant by a criminal court.89 The assaults were of a very severe nature,90 and included multiple acts of penetrative intercourse. Under the law at the time, the applicant had until 1 March 1978 to begin proceedings.

The applicant made a complaint to police on 28 September 1998 and disclosed the sexual abuse of her by the defendant. After the respondent was criminally convicted on 1 November 2000, the applicant first thought about bringing civil proceedings. She was contacted by a solicitor and decided to proceed. On the solicitor’s advice she consulted a psychiatrist on 27 December 2000, and there, for the first time, disclosed to a medical specialist her treatment by the respondent. She had experienced several adverse life experiences and had sought help from doctors, but had not previously disclosed the abuse to a doctor. The applicant learned of her psychiatric diagnosis, which included PTSD, in early 2001, and instituted proceedings for negligence and assault on 27 February 2001—a gap of 22 years and 11 months from the expiry of the time limit. She agreed in evidence that in the last ten years she had heard of cases where people had been sued for sexually abusing children and had been held liable.

1 Discovery of Material Facts
(a) Criminal Conviction

The applicant claimed that the criminal conviction constituted a material fact of a decisive character, and Botting J accepted this on the basis that the conviction went to proving the tortious acts, and was therefore relevant to the action’s reasonable prospect of success.91 Significantly, and unlike as in *Carter*, the Court accepted that had the applicant obtained legal advice prior to the

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88 Unreported, District Court of Queensland, Botting J, 21 June 2002. Two applications were dealt with together in this judgment; the application discussed here is that of Applicant S, since she suffered from PTSD while the other applicant did not.
89 Bill D’Arcy, a former schoolteacher and Member of Parliament, was convicted on 1 November 2000 of 11 counts of indecently dealing with a girl under 12, 4 counts of indecently dealing with a boy under 14, and 3 counts of rape. On 17 November 2000, he was sentenced to concurrent gaol terms of between 3 and 14 years. His appeal against conviction was dismissed but appeals regarding the sentence were allowed to the extent that three of the terms of imprisonment were reduced to 10 years: *R v D’Arcy* [2001] QCA 325 (Unreported, McMurdo P, McPherson JA and Chesterman J, 11 October 2001).
90 Using Browne’s table: Brown and Herbert, above n 69.
91 *Application 864* (Unreported, District Court of Queensland, Botting J, 21 June 2002) 33–4. See also *Evidence Act 1977* (Qld) s 79.
convictions, she would have been told that it was unwise to proceed since her case was unlikely to succeed without corroborative evidence or fresh complaint, especially against a person of such good repute. The fact of the convictions was obviously not within the applicant’s means of knowledge until they occurred, so the reasonable steps argument could not be raised in this respect.

(b) Diagnosis of PTSD

For present purposes, the notable part of this case concerns the applicant’s psychiatric diagnosis. The applicant had seen a psychiatrist in late 2000 and for the first time had divulged the abuse to a medical specialist. The psychiatrist’s report stated that as a result of the abuse, S had moderately severe PTSD, as well as other conditions. The second material fact relied on was, therefore, her discovery in early 2001 of her psychiatric diagnosis of PTSD: the nature and extent of her injury. Before contacting police on 28 September 1998, the applicant had not disclosed the sexual assaults for several reasons, including feelings of guilt, shame and self-blame, and because ‘to tell someone else meant [she] would have had to describe what had occurred to [her] out aloud and, until [she] gave [her] statement to the police, [she] could not bring [herself] to do that as it meant reliving the events’.

2 Judicial Reasoning

The application was refused, but Botting J did not find that these facts were not material. Nor did he find that they were not decisive. Nor did he find that the applicant had direct knowledge of sufficient facts to institute proceedings before she did.

The judgment turned on the finding that these facts were not beyond S’s means of knowledge, because by taking reasonable steps the applicant would have discovered the facts about her psychiatric injuries. Demonstrating a certain degree of awareness of the position of adult survivors of child abuse, albeit not informed by psychiatric evidence – there is still no explicit discussion of PTSD and avoidance – Botting J accepted that ‘often child victims of sexual abuse will find it very hard, if not impossible, to tell others of their experiences [and] that when such a victim becomes an adult, it will continue to be extremely difficult for such a person to tell a doctor of the abuse’.


The defendant accepted that he had been found guilty of crimes but denied that he had committed the acts, and asserted that undue prejudice would be caused to him in the civil action because of the long delay. The Court accepted that, despite the criminal convictions on a higher standard of proof, which facilitated proof of the applicant’s civil action, prejudice was caused by the long delay, and the extension was refused. This remarkable result prompted Botting J to concede that in cases such as this, ‘[i]t may perhaps trouble some that … our legal system should deny the complainants the right to pursue their violator for compensation by civil action’. However, he went on to say: ‘It is not my function to seek to explain, let alone seek to resolve any such apparent incongruity. My task is to apply the law as I understand it to the facts as I find them’: ibid 49.
However, this did not lead to a finding that for a person with PTSD, taking ‘reasonable steps’ meant taking those steps when the person felt ready to do so. Justice Botting asserted that by the early 1990s there was a general societal awareness of child sexual abuse and generally held medical knowledge about the consequences of child sexual abuse. His Honour referred to the applicant’s awareness since the early 1990s of numerous health problems, and to her action in seeking medical help regarding them. His Honour also gave weight to the fact that she had made a complaint on 28 September 1998 to police, and to her testimony that she had heard of cases where people had been held civilly liable for child sexual abuse. From these findings, Botting J concluded that ‘[w]hilst one can understand her reluctance to raise such matters with her advisors, it seems to me that by the mid-1990s her failure to do so was not reasonable’.  

The conclusion about what steps should reasonably be taken, by someone suffering from PTSD, to ascertain knowledge of their injuries is made without guidance from the symptomatology of PTSD, and in particular, without reference to the PTSD sufferer’s avoidance of stimuli associated with the traumatic events – a process explicitly described by the applicant. Moreover, even if the applicant had taken ‘reasonable steps’ and been diagnosed in the mid-1990s, and had then sought legal advice, Botting J himself accepted (when considering the effect of the criminal conviction) that she would have been discouraged from proceeding by legal advisors because there was a high probability of failure in the absence of a criminal conviction. The reasoning is therefore illogical. If the applicant had instituted proceedings in the mid-1990s she would have been discouraged from proceeding by legal advisors; and if she had proceeded, she would almost certainly have failed, both in gaining an extension of time, and in proving liability on the balance of probabilities. Yet, now that she has instituted proceedings in 2001, informed by two decisive material facts, she is still bound to fail. On the reasoning of Botting J, at whatever time in her life the applicant instituted proceedings, she would have been unable to gain access to the civil litigation process.

D Hopkins v Queensland

The applicant in Hopkins v Queensland was born on 10 November 1974. She allegedly suffered physical, sexual and emotional abuse from December 1984 to October 1987, the sexual abuse allegedly beginning on 10 November 1985 (aged 11), inflicted by her foster father, with whose family she had been placed in December 1984. The judgment does not describe the abuse alleged, so it is impossible to estimate its severity. The applicant had until 10 November 1995 to begin proceedings. She instituted proceedings on 24 July 2003, after learning of her psychiatric diagnosis of PTSD and borderline personality disorder by reading a psychiatric report dated 19 June 2003, and after receiving her departmental file

95 Ibid.  
96 See above n 92 and accompanying text.  
on 25 July 2002 – a gap of seven years and eight months from the expiry of the time limit. The application was to extend time to allow a claim in damages for negligence or breach of statutory duty against the State of Queensland regarding acts and omissions of officers of the Children’s Services Department. The claim was that the applicant suffered psychiatric illness because of the abuse and that this would have been avoided or reduced if she had been removed from the family when she first complained of physical abuse in late 1986. Complaints of sexual abuse appear to have been made to neighbours and the Department earlier in 1986, but nothing eventuated from these: the applicant said that the officer did not believe the claim and forced her to apologise to the foster parents for telling lies. She was removed from foster care in late 1987. The applicant’s two sisters remained with the foster family until 1989, when they complained about sexual abuse by the foster father. At this time, the applicant was asked if she had ever been sexually abused by him and she said this had not occurred, but that she had been physically abused. The Court accepted that this statement was ‘consistent with her later attitude of not wanting to think about the issue, or do anything to revive her memories of it.’

In early 2002, one of the applicant’s sisters and the foster father’s own daughter complained to police of physical and sexual abuse by the foster father. The applicant then made a complaint to police in May 2002. It was suggested that she obtain her departmental file and see a lawyer. The applicant obtained her file in July 2002 and instructed solicitors on 11 September 2002 to investigate a claim. Before speaking to the police officer on 11 May 2002, the applicant had not disclosed the sexual abuse. She felt no-one would believe her because she had previously been told that she was lying. She had tried to block out all thoughts of the abuse and get on with her life. She found it difficult to think about the abuse, let alone talk about it. Since the abuse, she had experienced severe depression, was distrustful of people, had nightmares, was quick to anger, was excessively sensitive in relationships, had difficulty maintaining relationships, and had flashbacks triggered by events that reminded her of the abuse. She had not seen a psychiatrist or psychologist before being referred to a psychiatrist in June 2003 by her solicitors for the purpose of getting a psychiatric report.

1 **Discovery of Material Facts**

The psychiatric report of June 2003 diagnosed PTSD, which the applicant had continually suffered from since her abuse. The report said that the applicant would have been aware of the symptoms she was suffering, and because of the psychological trauma she suffered would have been greatly reduced if she had been removed when she complained about abuse in 1986. After this she developed severe anger and behavioural problems, and her personality difficulties escalated. The failure to remove her then increased her prospects of developing PTSD and personality disorder, and promoted her feelings of isolation, depression and emotional instability, which became severe and ongoing.

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98 Ibid [15].
99 Ibid [17]–[18].
100 The report stated that the psychological trauma she suffered would have been greatly reduced if she had been removed when she complained about abuse in 1986. After this she developed severe anger and behavioural problems, and her personality difficulties escalated. The failure to remove her then increased her prospects of developing PTSD and personality disorder, and promoted her feelings of isolation, depression and emotional instability, which became severe and ongoing.
The report said that a patient in the applicant’s position was aware that she was trying to avoid being reminded of the traumatic events, but that this desire was driven by anxiety and depressed moods when she has the reliving experiences — hence the desire to avoid confronting the issue was a product of the psychiatric condition.  

2 Judicial Reasoning

Using similar reasoning to that used by both courts in Carter, McGill J held that the psychiatric diagnosis was not a material fact of a decisive character. This decision primarily turned on the finding that, before she discovered her diagnosis, the applicant knew all the relevant facts about her psychiatric injury and its causal link to the Department’s failure to remove her before it did. The decision was, therefore, premised on knowledge already possessed by the applicant. The reasonable steps argument, used in Application 864 and relied on as a secondary reason in Carter, was not raised here.

(a) Knowledge of Symptoms and Causal Connection

The decisive finding by McGill J was that what matters is whether the applicant is aware of her symptoms, not whether she is aware of the particular psychiatric condition that they represent, and whether [the applicant] connects those symptoms with the relevant incident in the past, or whether that connection is only ascertained with the benefit of expert medical advice.  

Here, McGill J held that the applicant was aware of her symptoms, simply because of the fact of suffering them, and because she avoided stimuli associated with the abuse.

Like the findings in Carter, this decision is problematic because the applicant did not know that her symptoms were those of a psychiatric condition, and the judgment does not demonstrate the contrary. The applicant was simply aware of her feelings, her memories of the abuse, and her ways of behaving. In a lay sense, this knowledge of symptoms does not amount to knowledge of a psychiatric condition or of the extent of it. In a legal sense, by 2004 there was even more authority for the principle that knowledge of symptoms is not knowledge of the injury, sufficient to make time run, until the nature and extent of the injury is ascertained by expert diagnosis. Nor is this knowledge sufficient to enliven any demand that reasonable steps be taken to find out the exact nature of the

101 The applicant also relied on her discovery of her departmental file on 25 July 2002 as a decisive material fact, but this was also rejected. She claimed that only after access to the file did she become aware that departmental employees, responsible for her placement, had information in October 1986 which ought to have caused them to remove her from the family.


103 Ibid [17]–[18], [33].

injury. The applicant, therefore, should not have been deemed to have knowledge of the existence of either the nature or extent of her psychiatric conditions.

The applicant was also held to be aware of the causal connection between the abuse and these symptoms and, by extension, of their relationship to the department’s failure to remove her. Without referring to any evidence, McGill J concluded that sufferers of PTSD will always be aware of the particular trauma producing their symptoms and that, because of this, the sufferers’ responses will always be identified by the sufferer as an ‘obviously unnatural condition which was caused by that [traumatic] event’. This is problematic because it expects psychiatric diagnosis by a person with no medical expertise. What may be diagnosed by a psychiatrist as a product of abuse, and an unnatural condition, may appear to the lay victim as an ordinary result of their life. In addition, the avoidance criterion means that most sufferers of PTSD will likely not spend their time rationally pondering the causal connections between the traumatic events of their life and their current problems.

Even if Justice McGill’s conclusion is accurate, made in reliance on the nature of PTSD, the reasoning in this decision is still questionable. Even if the applicant knew of the fact of her symptoms, and knew that her feelings and ways of behaving were a causal consequence of her abuse, this is not the same as knowing that she had a psychiatric disorder resulting from those events. The reasoning simply does not prove that, before reading the psychiatric report, she knew the precise nature or extent of her injury.

(b) Nature and Extent of Injury, and Reasonable Prospect of Success

The psychiatric diagnosis in Woodhead v Elbourne was held to raise the prospect of success from a mere possibility to a real likelihood; this was why it was a material fact of a decisive character. Before that diagnosis, there was no medical evidence of injury. This conclusion followed the reasoning in Sugden v Crawford. An action instituted without medical proof of the condition suffered as a consequence of the event, particularly where the claimed injury may be received with scepticism – as psychological injuries produced by child abuse may well be – seems to be exactly the sort of case that legal advisors discourage before obtaining a diagnosis of the precise injury.

For McGill J, the diagnosis of PTSD was not a material fact of a decisive character. His Honour reached this conclusion without reference to the definitions of ‘material fact’ and ‘decisive character’. The justification for this conclusion was that what mattered was the applicant’s awareness of her symptoms; her ignorance of the medical condition from which she suffered was irrelevant. The condition of PTSD was held to be simply the technical label for the symptoms that she was aware of:

106 Hopkins v Queensland [2004] QDC 021 (Unreported, McGill J, 24 February 2004) [34], [38].
107 Ibid [38].
108 Tiernan v Tiernan (Unreported, Supreme Court of Queensland, Byrne J, 22 April 1993) 4.
Her condition of PTSD is simply a diagnostic label attached to a particular collection of unpleasant consequences to her of the particular traumatic events in her past … A person suffering symptoms of PTSD may well not know that that collection of symptoms is appropriately described in technical terms by that particular label, but will certainly know that those symptoms are present.109

The applicant’s ignorance of the severity of her condition, and of her prognosis, was held to be irrelevant as these facts only enlarged the damages. But even if the plaintiff was aware of her symptoms, and even of the causal link between her symptoms and her abuse, surely the diagnosis of PTSD defined the true nature and extent of her personal injury. Until obtaining that diagnosis, all she knew was that she had these feelings and behaviours, and, possibly, that some or all of them were caused by the sexual abuse inflicted on her. Would she really bring legal action based on such little knowledge? Before the injuries were revealed by the psychiatric report, would legal advisors have recommended instituting proceedings without knowledge of the exact nature and extent of her injuries?

The reasoning of McGill J appears contrived. In this class of case, medical diagnosis of the exact injury is usually treated as a material fact of a decisive character, as in Woodhead v Elbourne, Carter and Application 864. It is a ‘material fact’ because it is relevant to the nature and extent of the personal injury caused, and it is of a ‘decisive character’ since a reasonable person knowing of the diagnosis would regard it as evincing a right of action with a reasonable prospect of success and of an award of damages sufficient to justify bringing the action (whereas the survivor’s mere knowledge that he or she is depressed, anxious and has nightmares would not be so regarded). The conventional approach, exemplified by Carter and Application 864, is not to deny the diagnosis of PTSD being material and decisive, but to argue that the applicant had not taken reasonable steps to obtain that diagnosis. This is the terrain on which the argument should have proceeded.

(c) Disentangling

Because the applicant in this case was found to know of the causal connection between her abuse and her injury, McGill J distinguished this case from Woodhead v Elbourne, where White J held that the psychiatric diagnosis disentangled the applicant’s adverse life influences and their consequences. In Hopkins v Queensland, despite the applicant having PTSD, and despite evidence of other incidents in the applicant’s life of arguably more gravity than those of the applicant in Woodhead v Elbourne,110 the possibility that the psychiatric

110 The applicant in Hopkins v Queensland had experienced behaviour problems even before being placed with the foster parents. She had been diagnosed with epilepsy in 1982, aged seven, and she had taken an overdose of epilepsy tablets in January 1983 resulting in a massive fit requiring hospitalisation. As well, there was the fact itself of being a child requiring foster care (the reasons behind this are nowhere elaborated). In 1994, the applicant had seen a social worker for counselling about a drug overdose prompted by a custody dispute over her eight month old child. When considering the exercise of discretion, McGill J indicates that many other experiences in the applicant’s life were likely sources of psychological consequences: ibid [81].
report had this same disentangling effect was not considered. If the argument was relevant in *Woodhead v Elbourne*, why was it not discussed here?

In *Woodhead v Elbourne*, the applicant had spent two years in regular psychological counselling exploring the assaults (and so was aware of her symptoms and, on Justice McGill’s reasoning concerning PTSD, of the causal connection), yet this was held to be insufficient to deny the extension. If there was justification for the disentangling argument in *Woodhead v Elbourne* – with that applicant’s PTSD, comparatively minor sexual abuse and relatively normal home life – then when compared with the situation of the applicant in *Hopkins v Queensland* – with the same diagnosis of PTSD, arguably more severe abuse, and a less stable home life – there is a strong case for the same argument to be made.

## V EVALUATION OF JUDICIAL REASONING

The decision in *Woodhead v Elbourne* stands out from the other three cases. The applicant was suing for assault and battery (actionable without proof of damage). She suffered minor abuse, had PTSD and received extensive counselling, and had three identified minor adverse life influences, but was deemed not to have sufficient knowledge of the material facts to proceed until receiving the psychiatric diagnosis. The reasonable steps argument was not raised. In *Carter*, the applicant was suing for negligence (requiring proof of damage). She suffered very severe abuse, had PTSD and received intermittent counselling, and had multiple adverse life influences. She was deemed to have knowledge of the injuries and the causal connection, and if not, it was decided that she should have taken reasonable steps to find out the nature, extent and cause of her injury before she did. In *Application 864*, the applicant was suing for negligence and for assault. She suffered very severe abuse, had PTSD, and had several adverse life influences. She was denied the application, not on the basis of knowledge already possessed, nor on the basis that the diagnosis was neither material nor decisive, but on the basis that she had not taken reasonable steps to ascertain her diagnosis before she did. In *Hopkins v Queensland*, the applicant was suing for negligence. Her precise sexual abuse was not identified by the judgment. She had PTSD and had multiple adverse life influences. She was deemed by the Court to be aware of her symptoms and their cause, and this finding was used to justify the conclusion that she had sufficient knowledge on which to institute proceedings before she knew of the psychiatric diagnosis.

### A Knowledge of Symptoms

The decisions based on the applicants’ deemed knowledge – *Carter* at first instance, and *Hopkins v Queensland* – do not seem to be justifiable. An applicant’s mere awareness that she has been abused, and even her awareness, in lay terms, of the symptoms (‘I have flashbacks, I avoid thinking and talking about my abuse, I avoid things that will remind me of the abuse’), should not be sufficient to cause the application to fail and deny access to the courts. Even if an
applicant is deemed to be aware of the causal connection between her perceived symptoms and the abuse, this should not be considered direct knowledge of material facts sufficient to deny the application.

The reason for this, despite the finding of White J to the contrary in Carter at first instance, is that in these cases, without knowledge of the exact psychiatric injury and its extent, it is unlikely that an action would have a reasonable prospect of success, or result in an award of damages sufficient to commence proceedings. Under the principle in Sugden v Crawford, adopted in Woodhead v Elbourne, the psychiatric diagnosis raises the prospect of success from a mere possibility to a real likelihood. This is especially so in claims for negligence where proof of injury is required. Without diagnosis of the injuries, where is the proof of damage that creates a reasonable prospect of success, and the promise of sufficient damages to risk the economic and personal costs of litigation? Mere grief, distress, fear or anxiety is insufficient to be actionable damage if it does not amount to psychiatric illness.\footnote{Tame v New South Wales (2002) 211 CLR 317, 338 (Gaudron J), 382 (Gummow and Kirby JJ), 414–15 (Hayne J); Wilson v Horne (1999) 8 Tas R 363; Hicks v Chief Constable of South Yorkshire Police [1992] 2 All ER 56.} As with Sugden v Crawford, without medical evidence, claimed injury in these cases is likely to be met with scepticism, and will be unlikely to produce damages sufficient to justify legal proceedings. Claims brought before the late 1990s would have faced the added difficulty of proving liability in a social context where institutional child abuse was undisclosed, and even successful claims for individual child abuse were rare and not widely known.

In contrast, an applicant who knows of her abuse and its causal consequences, and who knows of her exact injury (and who is psychologically capable of initiating and withstanding legal proceedings), should not receive an extension of time one year after possessing all that knowledge. If this reasoning is accepted, the next question becomes: when is it reasonable to expect survivors of child sexual abuse to take reasonable steps to gain this knowledge?

### B Taking Reasonable Steps to Ascertain Material Facts

In Pizer v Ansett Australia, Thomas JA stated that there is no requirement to take appropriate advice or to ask appropriate questions ‘if in all the circumstances it would not be reasonable to expect a reasonable person in the shoes of the plaintiff to have done so’.\footnote{Unreported, Supreme Court of Queensland, Court of Appeal, Pincus and Thomas JJA, and Byrne J, 29 September 1998, [18].} Is it reasonable to expect an adult survivor of child sexual abuse who has PTSD to take steps to ascertain the nature, extent and cause of their injury? Is it reasonable to expect this given that, in the post-1990s era, there is broader medical recognition of the consequences of child sexual abuse, broader social recognition of the phenomenon of child sexual abuse, and more common knowledge that perpetrators of abuse have been found civilly liable to their victims? Or should the avoidance symptom of PTSD mean that there should
not be a standard of reasonable steps imposed, and that each survivor should be able to take those steps when he or she feels individually able to do so?

The avoidance criterion of PTSD underpins an argument that, when it comes to discovering material facts and commencing litigation, at the very least, the survivor of child sexual abuse who has PTSD cannot justifiably be held to the standard of reasonable behaviour expected of individuals who are not victims of such abuse and who do not suffer from the condition. The avoidance criterion must be part of any reasoned deliberation about what can reasonably be expected of a plaintiff in this context.

None of the judgments in the case studies discusses the symptomatology of PTSD, or the avoidance criterion, in detail. The judicial determinations of what is reasonable for a survivor of child sexual abuse with PTSD are either uninformed by psychological evidence, or are inadequately informed, with insufficient examination of the psychiatric literature and of the psychiatric reports presented in the case. Those that turn wholly, or partly, on the reasonable steps issue – Application 864 and Carter on appeal – do not consider this evidence when determining what the applicants in those circumstances should reasonably have done. Justice Botting makes a partial acknowledgment of the applicant’s difficulty in discussing the abuse, but does not refer to medical literature or the applicant’s psychiatric reports in detail, and reaches a conclusion that imposes an unreasonable demand upon the applicant. Justice McGill, in an aside, accepts that the avoidance symptom (analysed not as a psychiatric symptom but in a lay sense) may be relevant to a judgment about whether it is reasonable for an applicant to seek advice, but this is deemed to be an irrelevant issue. Justice McGill also comments that

the effect of the reluctance to talk or think about the events is not accommodated by the extension provision: the provision is not concerned with the situation where an applicant who was in possession of the important facts simply did not want to pursue the matter, for whatever reason. I do not think that the situation is changed by the fact that the desire not to pursue the issue is in a sense caused by the psychiatric injury itself … any understandable reluctance of the plaintiff to pursue this matter earlier because of her psychiatric state is not a factor which can be taken into account.

A distinction needs to be drawn between whether it would be possible for a plaintiff to ascertain the nature, extent and cause of an injury, if the plaintiff were able to consult appropriate experts, and whether a person in the plaintiff’s position could reasonably be expected to take steps to ascertain those things. Due to the avoidance criterion of PTSD, it may not be possible for many survivors of child sexual abuse to take these steps until they feel ready to do so; this readiness will differ among individuals and arguably cannot be reduced to a typical model which enables judgments about what is reasonable. This is a context where, as Thomas J states in W v Attorney-General, the test should be subjective.

113 Hopkins v Queensland [2004] QDC 021 (Unreported, McGill J, 24 February 2004) [44], although his Honour seems to contradict this at [42] so it is difficult to discern exactly what the judgment represents.
114 Ibid [41]–[42].
Having made a disclosure should not automatically disentitle an applicant from an extension of time. Such an applicant (for example, the applicant in Application 864) may not yet be able to engage in a detailed reliving and retelling of the abuse in a receptive atmosphere, let alone in the hostile and adversarial atmosphere of the civil litigation arena. It is one thing to make a simple report of abuse to a police officer or a doctor; it is quite another to relive the full details of the events. In contrast, where a person with PTSD has brought other proceedings requiring a reliving of the abuse, this would produce a finding against that person’s requested extension if they had not acted within one year of being able to bring those proceedings.

Judgments that recognise the psychiatric evidence have reached more reasoned conclusions. In Carter on appeal, apart from the finding of the recent discovery of a number of decisive material facts which were relevant to the reasonable prospect of success, Justice Atkinson’s dissent was primarily motivated by an acceptance of psychological evidence and its impact on the survivor’s understanding of the acts and their consequences, and on the conduct that could reasonably be demanded of the survivor as a reasonable litigator. Her Honour referred to research about the psychological effects of childhood sexual abuse, and referred to judicial and extra-judicial recognition of the fact that delay in making and acting on disclosures of child sexual abuse is a common and expected consequence of that abuse. Justice Atkinson concluded that ‘[t]he resultant inability of a victim of childhood sexual abuse to recognise the true nature of the abuse and the damage caused by it is well documented, as is the difficulty for the victim in complaining of the abuse’. This reasoning produced the finding that, for survivors of child sexual abuse, the cognitive understanding of the injury, and the standard of ‘reasonable’ conduct that can justifiably be expected, is different from that of plaintiffs who have not been so abused. In the applicant’s case:

While a reasonably well-adjusted, ordinarily self-confident person might be able to make the requisite [causal] link and be prepared and able to take civil action for the wrongs done to them, typically adults who have survived such abuse are lacking in self-esteem and remain powerless. This particularly applies to Ms Carter.

Judgments in the New Zealand Court of Appeal regarding negligence claims brought by adult survivors of child sexual abuse are similarly notable. In W v Attorney-General, counsel for the defendant argued that the plaintiff had longstanding awareness of her symptoms, and that insufficient weight had been

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117 Ibid [88].
118 Ibid [86]. In addition, Atkinson J refused to accept that public policy reasons justified the operation of the delay defence in this context, thinking it ‘plainly unjust’ not to exercise discretion in the applicant’s favour: departmental officers were still alive, as were many former residents and staff, and hundreds of pages of relevant evidence had been disclosed in this action, together with evidence contained in Forde Commission, above n 28. As well, a fiduciary claim needed to be determined based on the same evidence as was relevant to the negligence action against the State of Queensland: ibid [93]–[97].
given to this when deciding the reasonable discoverability issue: the plaintiff had also made an accident compensation claim in 1985. The Court stated that what counsel called a description by EW of her symptoms was in fact her memories of the abuse. The psychiatric evidence [is] that most child abuse victims will ... remember the abuse, although they may try (consciously or subconsciously) to blot it out from their memory. Counsel’s argument ... confused knowledge of the event of abuse with knowledge of the link between that event and the dysfunction it is causing in the present life of the victim.120

Informed by the psychiatric evidence, this reasoning and outcome is a stark contrast to the knowledge of symptoms argument in Carter and Hopkins v Queensland.

Even if the outcome in Woodhead v Elbourne appears more justifiable than that in Carter or Hopkins v Queensland, the reasoning is flawed. Sound reasoning for the decision in Woodhead v Elbourne could have developed along the following lines: the applicant did not require proof of damage because assault and battery is actionable per se. However, because of PTSD and, in particular, the avoidance symptom, she could not institute proceedings within time – not because she could not take 'reasonable steps', before she did, to ascertain her damage (which would only have been relevant to a claim in negligence) but because she could not institute proceedings that would force her to relate and relive her trauma for the purposes of litigation. This reasoning is more properly based, not on the reasonable steps argument but on the concept of legal disability. It is therefore appropriate to turn briefly to the question of disability.

VI CAN PTSD CONSTITUTE A DISABILITY?

This article has argued that PTSD prevents a typical adult survivor of child sexual abuse from being able to discover the necessary facts on which to bring an action and that, even once the individual is in possession of those facts, PTSD prevents the institution of legal proceedings until the individual is able to do so. The argument has been made in the context of evaluating judicial reasoning about the possession of sufficient knowledge and the taking of reasonable steps.

However, beyond the relevance of PTSD to the reasonable steps issue, the above arguments may amount to a claim that PTSD is an incapacity which constitutes a legal disability. If, because of his or her psychiatric condition, a person cannot ascertain facts necessary to bring litigation, instruct counsel and endure the rigours of the litigation process, this should constitute a disability such that time does not run until the disability ends. A survivor with PTSD may not always be under a disability; if he or she is still able to institute proceedings and make decisions about the action, but requires the diagnosis for the purpose of ascertaining the nature and extent of the injury, then the reasonable steps issue will remain relevant.121

120 Ibid [25]. See also S v A-G [2003] 3 NZLR 450.
In Queensland, a person is under a disability if he or she is an infant or of ‘unsound mind’. In King v Coupland, Macrossan J interpreted soundness of mind as involving, for example, the capacity to properly instruct a solicitor, to exercise reasonable judgment on a possible settlement, and to understand the nature and extent of any available claim. The lack of such capacities was held to be part of a broader concept of mental illness, causing inability to manage affairs in relation to the injury in the way that a reasonable person would. A similar interpretation is now enshrined in statutory definitions of incapacity in New South Wales, Victoria and South Australia. Since the effect of incapacity is to suspend the running of time, it is quite possible that, if a child is abused and sustains sufficient psychological injury to constitute incapacity, then, if the condition continues, this could effectively prevent time running even after majority. It could even prevent time running in New South Wales and Victoria, despite the new provisions requiring a capable parent to bring the action.

In Smith v Advanced Electrics, where the plaintiff electrician suffered burns and shock when making electrical repairs, Fryberg J (with whom McMurdo P agreed) found that the plaintiff was under a disability due to unsoundness of mind, on the basis of psychiatric evidence of PTSD. Fifteen months after the event, the plaintiff had instituted proceedings against the owner and occupier of the premises in which he was injured, but he had not commenced proceedings against his employer. Four years and eight months after the event, the plaintiff commenced proceedings against the employer, claiming disability since the date of the event. Despite instituting the other proceedings within time, the plaintiff, who had been diagnosed with PTSD existing from the date of the event, was found to be under a legal disability regarding the action against the defendant employer so that time was suspended in relation to that action.

In Flemming v Gibson, where the plaintiff was injured in a car accident, a finding of disability was upheld based on psychiatric evidence of the plaintiff’s intellectual deficit and social phobia. Therefore, there is no doubt that psychiatric conditions including, but not limited to PTSD, can constitute legal disabilities sufficient to stop time running. This argument does not yet appear to have been made in Queensland in the context of an adult survivor of child sexual abuse who has sustained PTSD or some other psychiatric condition. It has, however, been used successfully in this context in New Zealand.
VII CONCLUSION

In Hawkins v Clayton, Deane J stated that

[i]f a wrongful action … 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 the recovery of damages for the first.128

The statutory time limit of three years from majority is unjustifiable in child sexual abuse cases, at the very least for survivors who have PTSD, because of their avoidance of stimuli associated with the traumatic events. Judgments in applications to extend time are important because they enable or deny access to justice. If extensions are not granted where appropriate, the applicant is ‘doubly injured’ and justice miscarries.

If psychiatric evidence of PTSD and avoidance is not appropriately considered by courts in applications to extend time, then unjust results will flow, compounding the initial statutory injustice. This argument may also apply to evidence of other psychiatric conditions having comparable effects on one’s ability to institute proceedings. It is acceptable for the law to take time to incorporate advances in knowledge from other disciplines, but it is not acceptable to deny access to justice once that evidence is settled. Evidence of PTSD in child sexual abuse cases needs no more ripening. It is likely that, throughout Australia, more applications to extend time will be made in the wake of the 2004 Commonwealth Senate inquiry into children in institutional care.129 It is also possible that an inquiry in South Australia, if eventuating, will have similar results.130 It is time for Australian legislatures and courts to respond appropriately in this class of case.

130 The Commission of Inquiry (Children in State Care) Bill 2004 (SA) was introduced on 1 July. The Commission of Inquiry (Children in State Care) Act 2004 (SA) has since been enacted but has not yet commenced.
Post-Ipp special limitation periods for cases of injury to a child by a parent or close associate: New jurisdictional gulfs

Dr Ben Mathews*

The Ipp Review of the Law of Negligence made several recommendations concerning time limitation periods within which civil claims may be instituted. Among these was a recommendation for a special limitation period where a child is injured by a parent or a person in a close relationship with the child’s parent, recognising the unfairness of a standard limitation period for these cases. New South Wales and Victoria have enacted legislative changes pursuant to this recommendation, giving much more time to commence litigation where a child is injured by a parent or a parent’s ‘close associate’. These provisions provide particular relief to plaintiffs in many cases of child abuse. This article examines these provisions and their rationales, and explores how they will operate. It will be argued that other jurisdictions should follow the lead of New South Wales and Victoria to eliminate unjustifiable jurisdictional differences in access to justice.

1. Limitation periods and minority

In all States and Territories of Australia, except Western Australia, actions for damages for personal injuries must generally be commenced within three years from when the cause of action arose.¹ In Western Australia, a plaintiff has four years to commence litigation for damages in trespass to the person, assault and battery, and six years if proceeding in negligence.² In New South Wales and Victoria, actions brought concerning injury sustained after recent amendments in the wake of the Ipp Report³ have time running from the date of discoverability rather than from when the cause of action arose.⁴ The date of discoverability is the date when the plaintiff knew or ought to have known

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¹ Limitation Act 1969 (NSW) ss 18A(2) and 50C; Limitation of Actions Act 1974 (Qld) s 11; Limitation of Actions Act 1936 (SA) s 36; Limitation Act 1974 (Tas) s 5(1); Limitation of Actions Act 1958 (Vic) ss 5(1AA) and 27D(1)(a); Limitation Act 1985 (ACT) s 16B; Limitation Act 1981 (NT) s 12(1)(b).
² Limitation Act 1935 (WA) ss 38(1)(b) and 38(1)(c)(vi) respectively. Since Wilson v Horne (1999) 8 Tas R 363 held that an action exists in both negligence and trespass for the acts constituting child sexual abuse, this can therefore bring different limitation periods into play in Western Australia. As this article was going to press, new legislation to amend the statute of limitations was introduced into the parliament of Western Australia: see AAP, ‘WA: Statute of Limitations Reduced for Birth Problems’, CCH News Headlines, 20 October 2004 <http://www.cch.com.au/cch_news.asp?document_id=549300&topic_code=7&category_code=0> (accessed 20 October 2004). All references in the article to Western Australia must be understood as subject to any changes this legislation might make.
⁴ Limitation Act 1969 (NSW) s 50C; Limitation of Actions Act 1958 (Vic) s 27D. In New
of the injury, the defendant having caused that injury, and the fact that the injury is of sufficient seriousness to justify bringing an action.\textsuperscript{5}

1.1 Suspension of limitation period during minority

In jurisdictions other than New South Wales and Victoria, children are exempted, because of their lack of legal capacity, from the expectation that they will bring an action within the limited time; where a child suffers personal injury the time period is suspended until the child attains legal majority.\textsuperscript{6} There is a significant restriction on this exemption in Tasmania. There, the suspension of time does not operate in cases of personal injury to a child through negligence, nuisance or breach of duty, if the child was in the custody of a parent.\textsuperscript{7} In most Australian jurisdictions, therefore, a survivor of child abuse has until turning 21 to institute proceedings.\textsuperscript{8} For reasons discussed shortly, even this time period is impossible for many survivors of child abuse to meet, so many plaintiffs in this class of case who are faced with a defendant who is unwilling to settle the claim are forced to apply to the court for an extension of time or to abandon the action.

1.2 Abolition of suspension during minority: New South Wales and Victoria

However, the suspension of the three-year period so that it runs from majority now no longer applies in New South Wales and Victoria. Where a child suffers injury caused by someone who is not a parent or a close associate of a parent, amendments motivated by the Ipp Report abolish this position. Instead, provided that a child is in the custody of a capable parent or guardian, the child is deemed not to be under a legal disability or incapacity,\textsuperscript{9} and the child’s parent or guardian is required to bring the action on the child’s behalf within a set period of time, which may often be a much shorter period than would exist in other Australian jurisdictions. Discoverability in these cases is sheeted home to the child’s parent or guardian.\textsuperscript{10} In New South Wales, the action is

\begin{footnotesize}
\begin{enumerate}
\item Limitation Act 1969 (NSW) s 50D; Limitation of Actions Act 1958 (Vic) s 27F.
\item Limitation of Actions Act 1974 (Qld) ss 5(2), 11, 29(2)(c); Limitation of Actions Act 1936 (SA) s 45; Limitation Act 1974 (Tas) ss 2(2), 26(1); Limitation Act 1935 (WA) s 40; Limitation Act 1985 (ACT) ss 8(3), 30; Limitation Act 1981 (NT) ss 4(1), 36.
\item Limitation Act 1969 (NSW) s 50F(2); Limitation of Actions Act 1958 (Vic) s 27J(1)(a).
\item Compare the Trade Practices Act 1974 (Cth) s 87(1), inserted by the Trade Practices Amendment (Personal Injuries and Death) Act (No 2) 2004 (Cth) as part of the new Pt VIB, which implements the Ipp Report’s recommendations in relation to actions for personal injury damages suffered by contraventions of the Trade Practices Act. Contrast Tasmania, where a child in the custody of a parent is not expressly deemed to be ‘not under a disability’: Limitation Act 1974 (Tas) s 26(6). The phrase ‘breach of duty’ has been held by the Victorian Court of Appeal to include acts of intentional trespass: Mason v Mason [1997] 1 VR 325 at 330. This means that the exclusion of the suspension operates whether the action is brought in trespass or negligence.
\item In Western Australia a survivor of child abuse will have until 22 or 24 depending on the cause of action relied on.
\item Limitation Act 1969 (NSW) s 50F(2)(a); Limitation of Actions Act 1958 (Vic) s 27J(1)(a). Compare the Trade Practices Act 1974 (Cth) s 87(1), inserted by the Trade Practices Amendment (Personal Injuries and Death) Act (No 2) 2004 (Cth) as part of the new Pt VIB, which implements the Ipp Report’s recommendations in relation to actions for personal injury damages suffered by contraventions of the Trade Practices Act. Contrast Tasmania, where a child in the custody of a parent is not expressly deemed to be ‘not under a disability’: Limitation Act 1974 (Tas) s 26(6). The phrase ‘breach of duty’ has been held by the Victorian Court of Appeal to include acts of intentional trespass: Mason v Mason [1997] 1 VR 325 at 330. This means that the exclusion of the suspension operates whether the action is brought in trespass or negligence.
\item Limitation Act 1969 (NSW) s 50F(3); Limitation of Actions Act 1958 (Vic) s 27J(3); and cf
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primarily treated indifferently from any other and so must be brought within three years from when the action is discoverable. In Victoria, the action is accorded some distinction from those simply involving adults and must be brought within six years from when the action is discoverable. In both cases, a longstop of 12 years from the date of the wrongful acts applies, which is meant to work as an ultimate bar.

The abolition of the traditional suspension of the running of time during minority promotes recommendations made by the Ipp Report. The motive behind this development is to finalise legal proceedings as quickly as possible from the date of discoverability. This promotes the object of streamlining the civil litigation system to decrease public cost and to guard against insurance premium inflation. Some protection is offered to an adult survivor of injury sustained as a child in the event of a parent not instituting proceedings within time. In particular, the NSW legislation has an extension provision devoted to cases where there has been an irrational failure by a parent to bring an action for a minor, but this may only be of use in limited circumstances. Victoria lacks a comparable provision but still has a general extension provision that could be used by plaintiffs in this circumstance.

11 Limitation Act 1969 (NSW) s 50C(1)(a).
12 Limitation of Actions Act 1958 (Vic) s 27E(2)(a). Section 27D(2) makes it clear that the three-year post-discoverability limitation period that generally applies in personal injuries actions in Victoria under s 27D(1)(a) does not apply to actions where the injured person was under a disability, which includes being a child: s 3(2). Section 27E effectively creates a special limitation period for actions where the injured person is a child.
13 Limitation Act 1969 (NSW) s 50C(1)(b); Limitation of Actions Act 1958 (Vic) s 27E(2)(b).
15 Limitation Act 1969 (NSW) s 62D. There appear to be two demanding qualifications which must be met to enliven this extension. First, the parent must have irrationally failed to bring the action on the child’s behalf. In the second reading of the amending legislation, it was remarked that the irrationality extension provision will be more difficult to meet than an extension based on unreasonableness: New South Wales, Parliamentary Debates, Legislative Council, 19 November 2002 (Michael Egan, Treasurer, Minister of State Development and Vice-President of the Executive Council), pp 6896ff. It is submitted that this extension provision should not be construed too severely; people should not suffer because of a parent’s omission to bring proceedings on their behalf. Secondly, under s 62D(2)(a) it must appear to the court that the limitation period ended before the child turned 19. This may restrict the availability of this extension provision in cases where, for example, the seriousness of the injury did not become apparent before this date or where the child was very young when the abuse occurred.
16 Limitation of Actions Act 1958 (Vic) s 27K.
2. Ipp Report

These developments exemplify the purpose of the Ipp Report, which had terms of reference to examine methods to reform the common law to limit liability and quantum of damages in civil proceedings.\(^\text{17}\) Within this brief, the Review Panel was required to develop and evaluate options for a uniform limitation period of three years for all persons.\(^\text{18}\) Given these terms of reference, and in light of the recommendations made to achieve those objects, the recommendations made by the Ipp Report about cases of injury to a child inflicted by a parent or close associate of a parent arguably constitute an even stronger endorsement than could otherwise be made by a sympathetic advocate of the reasons for enacting special provisions for certain classes of case.

The Ipp Report recognised the unjustifiable difficulties posed by a standard limitation period in cases where a child is injured by a parent or a close associate of a parent.\(^\text{19}\) It recommended that a special limitation period be enacted to provide a justifiable period for plaintiffs to institute proceedings in these cases. The reasons for this recommendation were not thoroughly clarified, although there is a brief explicit reference to the ‘delayed psychological effect of sexual or other physical abuse’ as an example of a type of damage which must be considered when framing limitation provisions,\(^\text{20}\) and more significantly there is an express statement that the recommended strategy would ‘give plaintiffs a reasonable time to be free of the influence of the parent, guardian or potential defendant (as the case may be) before having to commence proceedings’.\(^\text{21}\) Although the Ipp Report did not fully explore the reasons for such a recommendation, there is an emerging body of literature — judicial and academic — that does detail the arguments for a limitation period in cases of child abuse that is longer than the standard time period.\(^\text{22}\) In addition, a number of jurisdictions elsewhere have abolished or amended limitation periods for these cases.\(^\text{23}\)

\(^{17}\) Ipp Report, above n 3, p ix.
\(^{18}\) Ibid, p x.
\(^{19}\) Ibid, pp 96–7, paras 6.52–6.55.
\(^{20}\) Ibid, p 88, para 6.11.
\(^{21}\) Ibid, at 96, para 6.54.
\(^{23}\) British Columbia, Manitoba, Newfoundland, the Northwest Territories, Nova Scotia, Nunavut, Ontario, Saskatchewan and the Yukon have abolished time limits for civil actions based on sexual assault: Limitation Act, RSBC 1996, c 266, s 3(4)(k)(i); Limitation of Actions Act, CCSM 2002, c L150, s 2.1(2)(a) and (b); Limitations Act, RSNL 1995, c L-16.1, s 8(2); Limitation of Actions Act, RSNWT 1998, c L-8, s 2.1(2); Limitation of Actions Act, RSNS 1989, c 258, s 2(5)(a) and (b); Nunavut Act, SC 1993, c 28, s 29 (which
2.1 Qualitative differences in child abuse cases

In sum, the argument proceeds from the recognition that there are qualitative differences in child abuse cases which distinguish them from other personal injury cases, which make the generally sound policy reasons informing a standard limitation period less applicable. The policy reasons are that defendants have a right to a fair trial and need to be able to defend themselves with relatively fresh evidence; people should be able to proceed with their lives unencumbered by the threat of long-delayed claims; plaintiffs should not sleep on their rights; and the public has an interest in the prompt settlement of disputes.24 The references in the Ipp Report to the latent psychological injuries typically occurring in cases of child sexual and physical abuse and to the influence commonly exerted over the victim by the wrongdoer, which deter the institution of legal proceedings, are two of the most significant qualitative differences in these classes of case.

The qualitative differences in child abuse cases as opposed to other personal injury cases flow from the nature of the acts and injuries involved. The differences discussed here apply in particular to cases of child sexual abuse, but, as the Ipp Report observed, they are also amenable to at least some cases of child physical abuse. The loss of evidence argument is affected by the facts that typically the acts occur in private, and so are rarely accompanied by objective evidence, and are often kept secret. The sleeping on rights argument is undermined by the fact that the injury is inflicted on a child, who is incapable of bringing proceedings independently. In addition to this, a typical plaintiff in this class of case will not know of the nature and extent of his or her injury, or its cause, until long after attaining majority. This knowledge typically only arises from psychiatric diagnosis.25 Even when this knowledge is obtained, many survivors will still not feel capable of instituting legal proceedings.26 Survivors of child abuse often have a misplaced sense of guilt,
shame and responsibility for the acts which impedes their realisation of being the victim of a wrong. These misplaced feelings are factors contributing to some survivors’ inability ever to disclose the events and, where the survivor is able eventually to disclose, the amount of time taken to do so. As well, in cases of familial abuse, the wrongdoer’s position of superiority can work as an even more potent psychological deterrent from proceeding. The public interest argument in this context actually should work in favour of a long limitation period because the acts are particularly egregious and because a significant number of perpetrators are likely to commit the acts against other individuals. The heinous nature of the acts also works against the principle that people should not live with the threat of delayed claims.

The Ipp Report recommended that where a child is injured by a parent, guardian or a person in a close relationship with the parent or guardian, the limitation period should only start to run when the plaintiff turns 25. In such cases, the limitation period should be three years. A person would be in a ‘close relationship’ with the child’s parent or guardian if the parent or guardian might be influenced by the potential defendant not to bring a claim on behalf of the child; or if the minor might be unwilling to disclose to the parent or guardian the nature of the actions that allegedly caused the damage. Since in some of these cases the date of discoverability may not occur until after expiry of this period, the court should have discretion at any time to extend the

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28 In Queensland, the Project Axis survey found that of 212 adult survivors of child sexual abuse, 25 took 5–9 years to disclose it, 33 took 10–19 years, and 51 took over 20 years: above n 27, p 84 (Table 23).

29 Where the perpetrator is a relative, it is even more likely that the delay in disclosure (much less the ability to commence civil proceedings) will be long. An analysis of Queensland Police Service data from 1994–1998 found that of 3721 reported offences committed by relatives, 25.5% of survivors took 1–5 years to report the acts; 9.7% took 5–10 years; 18.2% took 10–20 years, and 14.2% took more than 20 years: ibid, p 86 (Table 25). In contrast, of the 1058 cases where the offender was not known to the complainant, 27.4% reported the offence within a week, 34.4% reported it within 1–4 weeks, and a further 18.5% reported it within 1–6 months: ibid.

30 For more detailed explanation, see Mathews, above n 22.

31 Ipp Report, above n 3, p 96, para 6.54.

32 Ibid.

33 Ibid, p 96, para 6.52.
limitation period to the expiry of a period of three years from the date of
discoverability.  

3. Legislative changes in New South Wales and Victoria

Responding to the Ipp Report, legislatures in New South Wales and Victoria
enacted a special limitation period for cases where a child is injured by a
parent or a close associate of a parent. Although similar, the changes made are
not identical to those envisaged by the Ipp Report. The changes apply to
injuries sustained after commencement of the relevant provisions.  

In New South Wales, s 50E creates a special limitation period for minors
injured by close ‘relatives’, which is a somewhat misleading term. The
comparable Victorian provision, s 27I, is entitled ‘Special limitation period for
minors injured by close relatives or close associates’, which description seems
more accurate. Apart from this difference and some apparently
inconsequential variations in wording, the two provisions are identical.

The provisions state that in these cases, the action is discoverable by the
victim when he or she turns 25 years of age or when the cause of action is
actually discoverable, whichever is later. The longest stop period of 12 years
runs from when the victim turns 25, hence ending when the victim turns 37.

The stipulation of actual discoverability is significant because it rules out any
possibility of an argument by a defendant based on constructive
discoverability; that is, an argument that a plaintiff’s time period started to run
from when it could be argued that the plaintiff ought to have known of the
three discoverability factors. Such arguments about what a survivor of child
abuse ought to have known, and when that person ought to have known
particular facts related to discoverability and hence ought to have instituted
proceedings, have been successfully used by defendants to defeat applications
for extensions of time. If the time period here ran from discoverability
whether actual or constructive, rather than running only from actual
discoverability, much of the benefit of the special limitation period could be
lost.

34 Ibid, p 97, para 6.55.
35 In New South Wales, to injuries sustained on or after 6 December 2002; in Victoria, to
injuries sustained on or after 21 May 2003.
36 Limitation Act 1969 (NSW) s 50E(1)(a); Limitation of Actions Act 1958 (Vic) s 27I(1)(a);
compare the Trade Practices Act 1974 (Cth) s 87K(1).
37 Limitation Act 1969 (NSW) s 50E(1)(b); Limitation of Actions Act 1958 (Vic) s 27I(1)(b).
38 Applications for extensions of time in personal injury cases including those involving child
abuse are technically available in most but not all Australian jurisdictions, based on the
claim that the plaintiff has only recently discovered material facts decisive to the case after
expiry of the time period: Limitation Act 1969 (NSW) ss 58, 60A, 60G, 62A and 62D;
Limitation of Actions Act 1974 (Qld) s 31; Limitation of Actions Act 1936 (SA) s 48;
Limitation of Actions Act 1958 (Vic) ss 23A and 27K; Limitation Act 1985 (ACT) s 36;
Limitation Act 1981 (NT) s 44. However, even where an extension provision exists, an
application can be defeated by judicial findings about the knowledge the applicant is
perceived to have already possessed of his or her injuries and by expectations about when
it was reasonable for him or her to have instituted proceedings: see, for example, Hopkins,
av Director of Community Services (Vic) [2000] Aust Torts Reports 81-540; McGuinness v
Clark (unreported, County Court of Victoria, Judge Duckett, 7 May 2003); SD v
This means that in this class of case, a plaintiff who has turned 25 has three years to institute proceedings once he or she has actual knowledge of the facts of the injury, of the defendant causing that injury and of the injury being of sufficient seriousness that it justifies legal action. Effectively then, a plaintiff here can have until turning 37 to institute proceedings. On the basis of the passage of time, a plaintiff could only be prevented from bringing an action within this 12-year period if it can be shown by a defendant that a plaintiff had actual knowledge of the three discoverability factors at a date more than three years before the plaintiff actually instituted proceedings. This is a significant widening of time for plaintiffs in this context.

3.1 The close associate provision

Apart from the subset of cases that arise from injury caused by a parent or guardian, a large part of the ambit of the provision will turn on the interpretation of the definition of ‘close associate’. A ‘close associate’ of a parent or guardian of the victim is defined as:

a person whose relationship with the parent or guardian is such that:

(a) the parent or guardian might be influenced by the person not to bring an action on behalf of the victim; or
(b) the victim might be unwilling to disclose to the parent or guardian the act resulting in the injury.39

Parliamentary debates in New South Wales indicate that the primary function of the special time limitation provision is to create an ‘important exception’ for cases of child abuse.40 The definition of close associate appears to represent two justifications for extending the special time period beyond wrongdoing parents and guardians alone. The first limb embodies the possibility that the wrongdoer’s identity can dissuade a child’s parent from bringing an action on behalf of the child against the wrongdoer, even if the parent possesses knowledge of the events, the child’s injury and the seriousness of the child’s injuries. The second limb appears to embody the situation where because of the wrongdoer’s identity, the child might be dissuaded from disclosing the events. If conceptually limited to this identity-related rationale, as suggested by the Ipp Report’s reference to the rationale for the provision being to give a plaintiff time to be free of the wrongdoer’s influence, the second limb may be too narrow since a major reason for a child not disclosing sexual abuse is not simply the identity of the abuser, but the nature of the acts and the nature of any feelings about those acts the child may either have by himself or herself or which have been imposed on the child.

39 Limitation Act 1969 (NSW) s 50E(2); Limitation of Actions Act 1958 (Vic) s 27f(2) (emphasis added). The comparable provision in the Trade Practices Act 1974 (Cth) is s 87k(2).
40 New South Wales, Parliamentary Debates, above n 15, pp 6896ff: ‘There will be very few cases that fall within this important exception. In the main, this exception will be used when a child has been the victim of abuse.’
However, the breadth of coverage in practice of the close associate concept remains to be seen. One matter determining the extent of its use is the raw number of cases of child sexual abuse. This will be discussed in Part 4.1 of this article, but at this point it is useful to observe that the number of cases may well be more than the ‘very few cases’ anticipated in parliamentary debates. Another factor relevant to the use of the close associate provision depends on the scope of its construction. Will the close associate provision be capable of including wrongdoers such as priests, teachers, scoutmasters, de facto partners of the child’s mother, grandparents, and sports coaches? In both limbs of the definition, the phrase ‘might be’ suggests a broad ambit, being conceptually more inclusive than descriptors such as ‘is’. Moreover, since this special limitation period is a remedial provision, it should be interpreted beneficially in the event of any ambiguity. Therefore, in the context of the second limb, it seems reasonable to argue that in cases where a child is unwilling to disclose the abuse because of the wrongdoer’s identity and relationship with the child’s parent or because of an unwillingness to disclose the abuse for some reason connected with the nature of the acts and the nature of any feelings produced by those acts, the victim should receive the benefit of the close associate special provision. If construed only by reference to the identity of the wrongdoer and if this construction negates the operation of the provision in cases where the child feels unwilling to disclose the acts because of the nature of them rather than because the child perceives a close relationship between the wrongdoer and his or her parent, the close associate provision could be framed too narrowly. It is useful to explore the operation of the provision in two circumstances to ascertain its ambit and outcome and to compare this with other jurisdictions.

3.2 Operation of special limitation period: child injured by a parent or close associate

Purely from the perspective of gaining access to civil courts, the optimum situation in New South Wales and Victoria for a survivor of child abuse is if the wrongdoer was a parent or ‘close associate’ of a parent. Suppose that a plaintiff, referred to here as ‘X’, is 10 years old when his father sexually abuses him. Since X was a minor at the time of the act and since the cause of action is against X’s parent, then the action is discoverable when X turns 25 or when it is actually discoverable, whichever is later, and the 12-year longstop runs from when X turns 25. The cause of action will be actually discoverable when X actually knows that the injury has occurred; the injury was caused by the defendant; and the injury was sufficiently serious to justify bringing an action. Time will expire for X three years after X actually knows these three facts, provided he has turned 25. Since the 12-year longstop runs from when X turns 25, it will end when he turns 37. This means that X potentially has until he turns 37 to bring the action.

If X knows the three factors when he turns 24, then the action is still deemed not discoverable until he is 25, so he will still have until he turns 28 to bring the action. If X knows the three factors when he turns 28, then he has

41 Bull v Attorney-General (NSW) (1913) 17 CLR 370 at 384.
until he turns 31 to commence proceedings. If X knows the three factors when he turns 34, 35 or 36, then he has until he turns 37 because of the longstop.

If X does not know the three factors by the time he turns 37, time will have run out. His option to attempt to enliven the claim in New South Wales then is to apply under s 62A for an extension of the longstop. Under that provision, the court may, if it decides it is just and reasonable to do so, extend the longstop for whatever period it determines, provided that the extension will not extend the limitation period beyond three years from when the action was discoverable by the plaintiff. In deciding whether to extend the longstop, under s 62B(1) the court must consider all the circumstances of the case, including the length of the delay; reasons for the delay; prejudice to the defendant through loss of evidence; the nature and extent of the plaintiff’s injury; anything the defendant did to induce the plaintiff’s delay in proceeding; the steps taken by the plaintiff to obtain expert advice and the nature of any such advice received; and the time when the action was discoverable by the plaintiff.

If X resides in Victoria, this entire scenario will work the same way. As well, the situation if the longstop expires will also be similar, with the extension provision in Victoria, s 27K, being essentially the same as s 62A. In Victoria, the factors that the court must consider on an application for an extension of time are set out in s 27L, which too are largely the same as the NSW counterparts. However, s 27L(1)(f) creates one clear difference, with the court being directed to consider ‘the extent to which the plaintiff acted promptly and reasonably’ once the plaintiff knew that the act of the defendant ‘might be capable at that time of giving rise to an action for damages’. This subsection could form the focus of many defence arguments against the granting of an extension. Depending on interpretation and application of this provision, this may make the situation more difficult in Victoria than New South Wales if courts were to have demanding expectations about the promptness and reasonableness of plaintiffs’ actions once they know an act ‘might’ be capable of giving rise to an action for damages.

Access to the courts is therefore much changed for plaintiffs in child abuse cases in these two jurisdictions, at least where the wrongdoer is a parent or falls within the close associate definition. The adult survivor of child abuse will at a minimum have until he or she turns 28 to institute proceedings, and, arguably, in many cases will effectively have until 37. These citizens therefore will have much more time than do their counterparts elsewhere in Australia, who under current provisions (apart from Western Australia) have until turning 21 to institute proceedings. If X lived in these jurisdictions and did not commence proceedings by the time he turned 21, he would have to rely on a successful application for an extension of time. Extensions of time are technically available in most jurisdictions where a plaintiff discovers decisive material facts relevant to the action after expiry of time, but gaining an extension in child abuse cases is frequently difficult, particularly if a long

42 See above n 38.
43 As found in Carter, above n 22; Applications 861 and 864, above n 25; and Hopkins, above n 25.
period of time has elapsed from the date of the events.\textsuperscript{44} A clear example of this difference is that in the Queensland case of \textit{Hopkins}, the applicant alleged sexual abuse by her foster father but could not bring her case within time and made an application for an extension when aged 28, which was refused.\textsuperscript{45} If the plaintiff in \textit{Hopkins} was governed by these new provisions, she would have been entitled as of right to bring the claim. The contrast between New South Wales and Victoria, on one hand, and Western Australia and Tasmania, on the other, is even more marked, because there is no extension provision in Western Australia, and only a limited provision in Tasmania.\textsuperscript{46}

The operation of the special limitation period is fairly clear when the wrongdoer is a parent. However, the question of whether a wrongdoer is a close associate is not as concrete. Because of the consequences for litigants flowing from whether the wrongdoer is classed as a close associate or not, there may be some disputes about whether a particular wrongdoer falls within the definition or remains outside it.

3.3 Operation of special limitation period: child injured by a wrongdoer who is not a parent or close associate

Suppose that on the date that another plaintiff, referred to here as ‘Y’, turns 10, her mother’s boyfriend (Z) sexually abuses her. She tells her mother about the abuse and she has indicators of it, such as being upset, anxious, and not wanting to be left alone with Z. The time limit depends on whether Z (her mother’s boyfriend) falls within the definition of a close associate. If Z is classified as a close associate, then the special time period will apply and the outcomes of X’s situation will be duplicated, giving Y effectively until 37 to bring her claim. If not, the outcome is much different.

3.3.1 Characterising a wrongdoer as a close associate

Depending on the facts of the case, on the application of each limb of the definition, Z may or may not be classed as a close associate. The provision regarding the definition of close associate seems to turn on the identity of the wrongdoer and its effect on the parent’s willingness to bring proceedings (the first limb); and in the second limb, the effect of the wrongdoer’s identity on the victim’s willingness to disclose the events, rather than the effect of the nature of the acts on this willingness to disclose.

For the purpose of the first limb, assume that Y has told her mother about the abuse. If Y’s mother is in love with Z and harbours strong hopes about the continuation and development of their relationship, or if for some other reason her behaviour is strongly influenced by Z, he will be a close associate if this means that Y’s mother ‘might be’ influenced by Z not to bring an action on Y’s behalf. Equally, even if these circumstances exist, they might not actually dissuade Y’s mother from bringing an action and if this is the case then

\textsuperscript{44} This is because the court retains discretion to refuse to extend time based on the prejudice to the defendant perceived to arise through the lapse of time: see for example \textit{Calder}, above n 25; \textit{Carter}, above n 22; and \textit{Applications 861 and 864}, above n 25.

\textsuperscript{45} \textit{Hopkins}, above n 25

\textsuperscript{46} The \textit{Limitation Act 1974 (Tas)} s 5(3) does not enable an extension of time beyond six years from the date the cause of action accrued.
counsel for Z would argue that he is not a close associate. Alternatively, suppose that Y’s mother had not known Z for long and the relationship was not serious. In this case, if Z had no capacity directly to influence Y’s mother about whether or not to take legal action, then Z would not be a close associate under the first limb.

Even so, under the second limb of the definition, Z in any of these circumstances may be classed as a close associate if Y feels unwilling to disclose the events. If Y was unwilling to disclose because of her perception of Z’s relationship with her mother, then Z should be classed as a close associate. However, if Y feels unwilling to disclose not because of Z’s identity or his relationship with her mother, but because of the nature of the acts and her feelings about them, a very narrow interpretation may result in Z not being classed as a close associate. It is submitted that this interpretation is unjustifiable when compared with the purpose of the provision.

It is clearly advantageous for a plaintiff to successfully argue that the wrongdoer was a close associate, since the effect is to suspend time until turning 25 and possessing actual discoverability, and this can operate to mean that the victim effectively has until 37 to institute proceedings. The alternative — if the wrongdoer is not a close associate — is that time runs from the victim’s parent’s discoverability, whether actual or constructive, and even if the action is not discoverable (for example, through non-disclosure and no other circumstance creating knowledge on the parent’s part) then time will expire on the date 12 years after the events. This different outcome will be replicated if instead of the wrongdoer in the hypothetical scenario being Y’s mother’s boyfriend, it is Y’s parish priest, maths teacher, swimming coach or friend’s father, who is deemed not to be a close associate. Because of these contrasts in the running of time, it is anticipated that defendants will argue for a narrow interpretation of who constitutes a close associate in cases such as the example outlined above, while plaintiffs will argue for a broader construction.

If the wrongdoer is found not to be a close associate, then since Y is in the custody of a capable parent, she is deemed not to be under a disability. Because she is not under a disability, the limitation period is not suspended and in New South Wales the standard time period will apply. This means that the action must be brought within three years of discoverability, or within 12 years of the event, whichever is first to expire. The situation in Victoria is identical except instead of three years post-discoverability, the parent will have six years post-discoverability.47

The question then becomes: when was Y’s action discoverable? In determining this, the facts that are known or ought to be known by Y’s capable parent are taken to be the facts known or which ought to be known by Y. This means that if the parent knows of the injury, of the defendant causing it and of the sufficient seriousness of the injury, then the action must be brought within three years (six in Victoria) of the possession of this knowledge. This also means that if it is deemed that the parent ought to have known of the three facts by a certain date, then the action must be brought in New South Wales within three years (six in Victoria) of that date. It will be deemed that Y’s

mother ought to have known a fact at a particular time if the fact would have been ascertained by her if she had taken all reasonable steps by that time to ascertain the fact.

3.3.2 If the action is actually discoverable

If the parent actually knows the three facts, then the parent must bring the action within three years (six in Victoria) of the date on which that actual knowledge exists. Therefore, if the child tells the parent about the abuse and the parent investigates and ascertains that the child was injured due to the defendant’s fault and the injury is sufficiently serious to justify proceeding, then the three-year (six-year in Victoria) period operates from the date of that knowledge. In this example, if Y disclosed the abuse to her mother immediately then an action would have to be brought by Y’s mother on Y’s behalf within three years (six in Victoria): that is, by the time Y turned 13 (16, in Victoria). This is a much narrower time period than would occur in other Australian jurisdictions.

Similarly, if Y was 7 or 13 or 16 when the abuse occurred and the disclosure was made and her mother had actual knowledge of the defendant’s abuse and of the fact that the injury was of sufficient seriousness to justify bringing an action, then the action would have to be commenced within three years (six in Victoria): that is, by the time the child turned 10, 16 or 19 (in Victoria, 13, 19 or 22) respectively. Again, this can produce a much tighter time period than exists in other jurisdictions. This places a heavy onus on parents who may know about the act (or some part of it), but who might not appreciate the seriousness of the consequences.

3.3.3 If the action is constructively discoverable

If the parent does not actually know the three facts, the question then may arise: ought the parent to have known the three facts? That is, did the parent have constructive knowledge? This will be a problematic area if, for example, the child does not disclose. Since there could be a large difference between the date time expired based on constructive discoverability, and the date time will expire through application of the longstop, defendants may attempt to demonstrate that the victim’s parent ought to have known the three discoverability factors. For example, if Y began exhibiting a number of overt signs of having been abused — for example, through sexualised play, self-harming, and extreme anxiety — a defendant may argue that this should have put Y’s parent on notice that something had happened to Y sufficient to require the parent to find out what exactly had occurred. If constructive discoverability is argued to have crystallised by the time Y turned 11, for example, then time would expire three years (six in Victoria) from that date: by the time Y turned 14 (17 in Victoria). In contrast, if in this circumstance it was decided that the action was not discoverable, then the longstop would operate and time would expire 12 years after the event, which is when Y turns 22.

For reasons similar to those that motivate the argument that the close associate provision should not be read too narrowly, it is submitted that an argument about a parent’s constructive discoverability should not be accepted unless there is very clear evidence that the child’s parent ought to have known
of the three discoverability factors in a case of child sexual abuse. Child victims frequently do not disclose the abuse and abused children may exhibit few or only vague signs of abuse that may be explicable on other less sinister grounds. Because of the concealment of the acts and the fact that the consequences may be difficult to link to any obvious causal factor, in many cases there may be no blame that can reasonably be attached to a parent for not knowing what is happening to his or her child, particularly if the child is older. As well as these arguments about a fair interpretation of constructive discoverability based on what is reasonable to require of a parent, there is the effect of such steep expectations to consider. An abused child should not be visited with the consequences of a harsh expectation of what a parent ought to have known and done. Again, because these provisions are remedial, they should be interpreted beneficially.48

Alternatively, there may be situations where a strong case for constructive discoverability is made out. If, for example, a child discloses the abuse to the parent and is clearly suffering serious injury from the effects of the abuse but the parent does not believe the child or does not make investigations, without any good reason for such disbelief or inactivity, then such a parent may more justifiably be argued to have had constructive knowledge. A finding of constructive discoverability would activate the period in which the parent is expected by the legislation to institute proceedings on behalf of the child. This is the type of situation that the NSW provision enabling an extension of time for a parent’s irrational failure to act is intended for. While this provision lacks a Victorian counterpart, it is submitted that in equivalent circumstances in Victoria, an outcome should be reached in a normal extension of time application that would mirror the result if the application were brought in New South Wales.

3.3.4 If the action is not discoverable: application of the longstop

If it is found that the action was not discoverable, then the longstop will apply, ending the time period 12 years after the event. In the example of Y, if she did not disclose the abuse then the action would not be actually discoverable and, assuming the action was also not constructively discoverable, then the longstop would cause time to expire when Y turns 22. By itself, the application of the longstop could produce extremely narrow time limits and would produce results much different even to the current situation in other Australian jurisdictions. If a child is aged six when the injury is inflicted and if the parent lacks actual or constructive knowledge, the longstop will make the time limit end 12 years from the date of the event, so the longstop will make time expire when the child turns 18.

The only option for a plaintiff in this situation to enliven the action is to apply for an extension of the longstop under s 62A. However, the ultimate bar in New South Wales of 30 years will mean that even this avenue is closed, for Y, by the time she turns 40; and if a child is injured at age six, by the time that child turns 36.49 Such results may be unjust, and may produce other

48 Bull, above n 41.
49 Limitation Act 1969 (NSW) s 51.
jurisdictional differences. There is no similar ultimate bar in the Victorian statute.

It is likely that in many cases that are not discoverable by the parent, the longstop period of 12 years from the date of the act will operate. This will mean that applications for extensions of time will determine some applicants’ access to courts.50 In these applications, judicial findings about what is just and reasonable will be decisive.51 These findings may often depend on the court’s conclusion about what conduct was reasonable to expect of the survivor of the abuse.52 In particular, the question of whether it was reasonable to expect that the survivor institute proceedings before he or she actually did so may often determine the extension application. To arrive at justifiable conclusions about this question, judicial reasoning needs to be adequately informed by psychological and psychiatric evidence about the effects of child sexual abuse on survivors in general, and the effects of the abuse in the particular applicant’s case.

4. Contrast with other States

The new special limitation period for cases where a child is injured by a parent or a close associate of a parent suspends the running of time until the adult survivor of child abuse turns 25, and may effectively give many people in these cases until turning 37, provided that a plaintiff does not fail to bring proceedings within three years of actual discoverability. This gives plaintiffs in New South Wales and Victoria a far longer period of time in which to bring a civil action than is conferred by limitations statutes in the rest of Australia, which generally give plaintiffs until turning 21 to institute proceedings (save Western Australia and Tasmania), regardless of the knowledge they have about their case. If a plaintiff in one of these jurisdictions fails to commence proceedings within time, then in most but not all States, an extension of time is technically possible in some circumstances, but even if these circumstances are satisfied, the application for an extension may be denied, hence barring access to the courts.

The new provisions will benefit a significant number of plaintiffs in New South Wales and Victoria. Exactly how many people will benefit is impossible to predict, but by referring to recent statistics on substantiated cases of child abuse in various jurisdictions, we can see that there is a substantial number of people to whom these provisions will be directly relevant. The corollary of this is that the absence of similar amendments in other Australian jurisdictions will also assume significance, since a failure to enact similar provisions in these jurisdictions will create a situation where plaintiffs in some States will be enabled to bring civil proceedings under certain conditions, while plaintiffs in identical circumstances in other jurisdictions will be barred from access to civil courts. The statistics about the raw numbers of child sexual abuse

50 In New South Wales, the victim may apply for an extension of the longstop under the Limitation Act 1969 (NSW) s 62A; in Victoria, under the Limitation of Actions Act 1958 (Vic) s 27K.
51 Limitation Act 1969 (NSW) s 62A(2); Limitation of Actions Act 1958 (Vic) s 27K(2)(b).
52 The provisions enabling this assessment of the person’s conduct include the Limitation Act 1969 (NSW) s 62B(1)(c) and (f); Limitation of Actions Act 1958 (Vic) s 27L(f) and (g).
substantiations do not inform us about the number of cases in these statistics where the wrongdoer was a parent or a close associate of a parent. However, two recent investigations into the relationship between victims and offenders demonstrate that the incidence of abuse by family members and other individuals who are known to the child (and who may therefore fall within the close associate definition) easily outnumber those cases where the wrongdoer is a stranger or is otherwise unlikely to qualify as a close associate.\(^{53}\)

**4.1 Potential numerical significance of legislative changes: the incidence of child abuse**

It is generally accepted that child abuse is an underreported phenomenon, but even the available statistics of its incidence suggest that these provisions have the potential to affect significant numbers of people throughout Australia. In New South Wales in 2002–03 there were 109,498 notifications of child abuse and neglect to State authorities, involving 66,503 children.\(^{54}\) Of these, there were 16,765 substantiated cases, involving 11,534 children.\(^{55}\) Of the 16,765 substantiations, 2427 were cases of sexual abuse.\(^{56}\) In Victoria in 2002–03 there were 37,635 notifications of child abuse and neglect to State authorities, involving 28,421 children.\(^{57}\) Of these, there were 7287 substantiated cases involving 6846 children.\(^{58}\) Of the 7287 substantiations, 562 were cases of sexual abuse.\(^{59}\) In these two States in one year, then, there were 2989 child victims of sexual abuse.

Other jurisdictions have smaller numbers of reported substantiations due in part to their smaller populations. In Queensland in 2002–03 there were 31,068 notifications of child abuse and neglect to State authorities, involving 22,027 children.\(^{60}\) Of these, there were 12,203 substantiated cases involving 9032

\(^{53}\) In Queensland, the Project Axis survey in 2000 of 104 survivors of child sexual abuse (which involved 211 offenders) found that 108 offenders (51.2%) were family members of the abused child; 36 offenders (17.1%) were a family friend; 16 offenders (7.6%) were strangers; 15 offenders (7.1%) were clergy; 3 offenders (1.4%) were guardians or foster parents; 6 offenders (2.8%) were teachers; and 27 offenders (12.8%) were in none of these classes: Queensland Crime Commission and Queensland Police Service, above n 27, p 56 (Table 8). Also in Queensland, a Criminal Justice Commission analysis of Queensland Police data regarding the relationship of offenders to complainants in reported child sex offences shows that over the two years from 1997–98, out of 8504 offences, only 686 (8%) were committed by strangers and 3046 (35.8%) were committed by relatives. A further 1158 (13.6%) were committed by acquaintances (including family friends, housemates, neighbours and new acquaintances) and 315 (3.7%) were committed by professionals (including teachers, carers and foster parents): ibid, p 56 (Table 7).

\(^{54}\) Australian Institute of Health and Welfare, *Child Protection Australia 2002–03*, Canberra, 2004, p 17 (Table 2.6).

\(^{55}\) Ibid.

\(^{56}\) Ibid, p 16 (Table 2.5). The 16,765 substantiations comprised 5435 of physical abuse; 2427 of sexual abuse; 5582 of emotional abuse; 3263 of neglect; and 58 children identified as being at high risk but with no identifiable injury or harm.

\(^{57}\) Ibid, p 17 (Table 2.6).

\(^{58}\) Ibid.

\(^{59}\) Ibid, p 16 (Table 2.5). The 7287 substantiations comprised 1787 of physical abuse; 562 of sexual abuse; 3202 of emotional abuse; and 1736 of neglect.

\(^{60}\) Ibid, p 17 (Table 2.6).
Of the 12,203 substantiations, 610 were cases of sexual abuse. The numbers of substantiated cases of child abuse are even smaller in Western Australia (243), South Australia (180), Tasmania (61), the ACT (21) and the Northern Territory (33), but they are still significant. Altogether, in a 12-month period from 2002-03 throughout Australia, there were 198,355 notifications of child abuse and neglect, with 40,416 substantiated cases, containing 4137 substantiated notifications of child sexual abuse.

Individual wrongdoers are not the only possible future target of litigation. Queensland has a history of child sexual abuse in State and religious institutions and in State foster care. The 2003 Commonwealth Senate Inquiry into children in institutional care revealed a similar record of institutional abuse, which could hold implications for State and institutional future liabilities. It is also possible that an inquiry in South Australia may have similar results. The statistics cited here about the incidence of child sexual abuse, and the evidence cited about the proportion of offenders who are family members of the victim or who are otherwise known to the child and who therefore may satisfy the close associate definition, demonstrate that there probably are not ‘very few’ cases to which the special limitation period

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61 Ibid.
62 Ibid, p 16 (Table 2.5). The 12,203 substantiations comprised 2806 of physical abuse; 610 of sexual abuse; 4135 of emotional abuse; and 4652 of neglect.
63 In Western Australia there were 2293 notifications of child abuse and neglect to State authorities, involving 2152 children. Of these, there were 888 substantiated cases involving 847 children. Of the 888 substantiations, 243 were cases of sexual abuse. In South Australia there were 13,442 notifications of child abuse and neglect to State authorities, involving 9288 children. Of these, there were 2423 substantiated cases involving 1908 children. Of the 2423 substantiations, 180 were cases of sexual abuse. In Tasmania there were 741 notifications of child abuse and neglect to State authorities, involving 540 children. Of these, there were 213 substantiated cases involving 208 children. Of the 213 substantiations, 61 were cases of sexual abuse. In the ACT there were 2124 notifications of child abuse and neglect to State authorities, involving 1512 children. Of these, there were 310 substantiated cases involving 266 children. Of the 310 substantiations, 21 were cases of sexual abuse. In the Northern Territory there were 1554 notifications of child abuse and neglect to State authorities, involving 1340 children. Of these, there were 327 substantiated cases involving 312 children. Of the 327 substantiations, 33 were cases of sexual abuse: ibid, pp 16–17 (Tables 2.5 and 2.6).
66 See the Commission of Inquiry (Children in State Care) Act 2004 (SA), assented to 5 August 2004 but not yet in force at the date of writing.
is potentially important, but a significant number. This remains so even when one accepts that many instances of child abuse are never revealed and that many survivors will either be unable to ever bring proceedings or be unwilling to do so even if accommodating legal provisions exist.

4.2 Reasons for substantial uniformity across jurisdictions

There are several reasons why there should not be disparities between limitation periods in child abuse cases within Australian jurisdictions. First, as a matter of justice, there should not be significant inequalities between jurisdictions in access to civil courts and compensation. There are no sound jurisdiction-specific reasons for having such differences, nor are there good theoretical reasons for having these differences. There is strong theoretical evidence underpinning the special limitation period, which has been acknowledged even by bodies charged with the contraction of the civil litigation system. In this context, for the fundamental purpose of seeking access to the court system, like cases should be treated similarly. This is a matter of equality in a liberal society which aspires to embody the rule of law. A child abuse victim in one State should not receive a significantly smaller temporal opportunity to access the civil courts than that granted to his or her counterparts in another Australian jurisdiction, provided that the longer period is justified. For the purpose of deciding how long a person should have to bring a civil claim for a defined class of action, citizens in the same country should be treated equally.

Second, since some families will live in a number of jurisdictions over time and since child abuse often occurs over extended periods of time, especially when inflicted by a family member, jurisdictional disparities in limitation periods on the scale of these now existing will encourage forum shopping. A survivor of child abuse where the acts of abuse occurred in a number of jurisdictions could not be blamed for seeking civil compensation in the jurisdiction having a legal framework that was most likely to advance his or her case. This selection between jurisdictions will be likely to create technical legal problems and will add to the length, cost and complexity of trials.

Finally, related to the first two problems, the presence of inequalities that create disparate outcomes in matters of social justice constitutes especially strong evidence of an unjust legal system that adds to its disrepute with the public. Especially in contexts where legal provisions are created to offer relief to those who have been particularly mistreated, there is a need for largely consistent legal provisions to avoid this disrepute and loss of public confidence in the legal system.

5. Conclusion

The Ipp Report acknowledged the ‘bewildering array of different limitation regimes in Australian jurisdictions’.67 The amendments made in New South Wales and Victoria create more justifiable conditions for survivors of child abuse committed by certain classes of wrongdoers in those two jurisdictions. However, the bewildering array of legislative provisions in these types of

cases has not been in any way diminished. The actions of these two legislatures in recognising the unjustifiability of short limitation periods in at least these types of child abuse cases creates more fragments in an already fractured legislative environment. Yet, the reform of those provisions serves to illuminate even more sharply the shortcomings of comparable provisions in other Australian jurisdictions.

Appendix: Exclusion of suspension of the running of time where an infant was ‘in the custody of a parent’

The Victorian and Tasmanian incursions into the suspension of time for infants in 1958 and 1974 respectively, and the revival of the incursion in Victoria and the adoption of it in New South Wales in 2002–03, replicate mid-twentieth century developments in the United Kingdom. Until those developments, for three centuries the limitation period for actions in trespass was suspended during minority because an infant could not bring a claim and no other person was compelled to bring a claim on his or her behalf. This suspension of time was embodied in the Limitation Act 1623, 21 Jac 1, c 16 s 7. The running of time was suspended for infants in other actions as well: see, for example, An Act for the Amendment of the Law and the Better Advancement of Justice 1705, 4 & 5 Anne, c 16 s 18. However, the Public Authorities Protection Act 1893, 56 & 57 Vict, c 61 made an initial incursion into this general protection of infants by giving only six months to institute proceedings against persons acting in execution of statutory or public duties. The Limitation Act 1939, 2 & 3 Geo 6, c 21 s 22(d) made the exclusion of the infancy extension against public authorities operate unless the injured child was not in the custody of a parent (this provision was duplicated in the New Zealand legislation: Limitation Act 1950 (NZ) s 24f). Section 22 of the Limitation Act 1939 (UK) otherwise embodied the 1623 provision, extending time from the date the disability ceased, which gave an injured minor six years from attaining majority to institute proceedings.

A broader change occurred when the 1939 provision was expanded by the Law Reform (Limitation of Actions) Act 1954, 2 & 3 Eliz 2, c 36 s 2(2). This reform took the principle behind the ‘custody of a parent’ exclusion of the extension for cases against public authorities and applied it to all personal injury cases where a child was in the custody of a parent. However, this dramatic change was cancelled by the Limitation Act 1975 (UK) c 54 s 2. The Limitation Act 1980 (UK) c 58 s 28(1) now restates the 1623 principle, suspending the running of time until the cessation of disability, with s 38(2) providing that an infant is a person under a disability. New Zealand’s duplication of the 1939 UK encroachment on the suspension of the running of time was also repealed in 1963: Limitation Amendment Act 1963 (NZ). For judicial remarks on the English developments, see Hewer v Bryant [1970] 1 QB 357 at 367–8 per Lord Denning MR, 370 per Sachs LJ; Todd v Davison [1972] AC 392 at 402–3 per Viscount Dilhorne, 409–12 per Lord Pearson; Tolley v Morris [1979] 2 All ER 561; and McDonnell v Congregation of Christian Brothers Trustees [2004] 1 AC 1101 at 1104–10; [2004] 1 All ER 641 at 644–9 per Lord Bingham.

Other Australian jurisdictions did not adopt Victoria’s 1958 strategy or
Tasmania’s 1974 enactment. In New South Wales, the position before 1969 essentially adopted the 1623 English legislation and the 1969 statute retained the suspension of time for infants. This was not changed until the 2002 amendments. In Queensland, the Limitation of Actions Act 1974 has not been changed in this respect and previous enactments retained the suspension of time for infants: Limitation Act 1960 (Qld) s 27; Limitation (Persons under Disabilities) Act 1962 (Qld) s 2. In South Australia, the original 1936 provision which suspended time running during infancy (s 45) was preceded by another provision having the same effect: Limitation of Suits and Actions Act 1866 (SA) s 47. The 1936 provision has not been amended since. In Western Australia, the 1935 statute suspended time for infants until infancy ceased and this has not been amended since (although the public authorities exception in s 47A giving one year from the cause of action’s accrual to institute proceedings was inserted by the Limitation Act Amendment Act 1954 (WA)). In the Australian Capital Territory, the original Limitation Ordinance 1985, No 66 (Cth) s 30(1) suspended time running during infancy and this has not been amended. Similarly, the Northern Territory suspended time for infants in the 1981 statute and this has not been amended; the position before 1981 adopted the 1623 English position.
I INTRODUCTION

History reveals a pattern of physical, sexual and emotional maltreatment of children in Anglo-Saxon societies. Children’s traditional status as mere units of economic labour and chattels for sale, without legal recognition or rights, meant that adults were able to subject children to multiple forms of abuse and neglect with impunity. Most commonly, this abuse and neglect has been perpetrated by individuals within families, but it has also been perpetrated on children entrusted to the care of government and religious institutions.

It is only in the last few decades that this incidence of abuse and neglect of children in State and religious institutions has begun to be revealed. In a number of jurisdictions, bodies of inquiry have discovered appalling records of institutional abuse and neglect of children. In Queensland, the Forde Commission of Inquiry into Abuse of Children in

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1 See generally L de Mause (ed), *The History Of Childhood* (Bellew, 1974) and L de Mause, ‘The Evolution Of Childhood’ in L de Mause (ed), *The History Of Childhood* (Bellew, 1974) 1. During the Dark and Middle Ages, childhood was a period of life characterised by brutality and exploitation. There were no laws protecting children. Children’s lack of legal rights was embodied in the concept of patria potestas, which gave a father dominion over his children (and his wife). The extent of this power was such that in early Roman law the father had the right to abandon infants to the elements: A Borkowski, *Textbook on Roman Law* (Blackstone Press, 1994) 103; J Gardner, *Women in Roman Law and Society* (Routledge, 1986) 155. A father had the right to punish his children, which could include imposing a penalty of death: Gardner, 6-7; and the right to sell his children; from at least the seventh century a father could legally sell his children aged under seven: P Thane, ‘Childhood in History’, in M King (ed), *Childhood, Welfare & Justice* (Batsford, 1981) 12.

2 In Canada, for example, New Brunswick established its compensation scheme in 1995 after it commissioned the Miller Inquiry in 1992, the government of British Columbia established its compensation scheme in 1995 after it commissioned the Berger Report in 1993, and Nova Scotia established its compensation program in 1996 after its Stratton Inquiry found that the State had a
Institutions was commendably established by the Queensland government on 13 August 1998 after growing evidence of abuse of children in State and religious institutions. The Forde Inquiry found endemic emotional, physical, sexual and systems abuse, as well as breaches of statutory obligations to provide food, clothing, education and appropriate discipline. Tragically, after the Forde Inquiry, another inquiry into the abuse of children in State foster care has been necessary in Queensland, with similarly damning results.

These inquiries exemplify the fact that the historical record of child abuse and neglect has only recently been given anything approaching the attention it needs. It is undeniable that in the general context of child abuse and neglect, advances in knowledge and social policy have been made. As a social phenomenon, ‘child abuse and neglect’ has been identified. The psychological, educational and social effects of moral obligation to respond to the claims of victims: G Shea, Redress Programs Relating to Institutional Child Abuse in Canada (1999) Ottawa: Law Commission of Canada <http://www.lcc.gc.ca/en/themes/mr/ica/shearredress/redress_main.asp> at 31 January 2004. In Ireland in 1970, the Kennedy Report first investigated State-run and State-certified reformatories and industrial schools and uncovered the problems of neglect, deprivation and emotional abuse. In 1999, Prime Minister Bertie Ahern introduced several strategies to address more recent revelations of child abuse in State institutions, including the establishment of the Commission to Inquire into Child Abuse, chaired by Justice LaFoy, which is due to report in 2005: Ireland, Compensation Advisory Committee, Towards Redress And Recovery: Report To The Minister For Education And Science (2002) <http://www.rirb.ie/documents/cac_report2002.pdf> at 31 January 2004 (hereafter referred to as Towards Redress And Recovery).


See especially the most influential and most cited scholarly article in the field, C Kempe, F Silverman, B Steele, W Droegemuller and A Silver, ‘The Battered Child Syndrome’ (1962) 187 Journal of the American Medical Association 17; and D Kline, ‘Educational and Psychological Problems of Abused Children’ (1977) 1 Child Abuse and Neglect 301, contained in the first publication of the scholarly journal Child Abuse and Neglect. The emergence of a body of evidence concerning the psychological sequelae of child sexual abuse, and the heightened general awareness of child sexual abuse, are therefore relatively recent developments: confirming this in a legal context in Australia, see the psychiatric testimony of Dr Kippax in Tiernan v Tiernan (Unreported, Supreme Court of Queensland, Byrne J, 22 April 1993). Cases of child sexual abuse were known of by authorities, however, at least as long ago as the early 1900s. According to Dorothy Scott and Shurlee Swain’s Confronting Cruelty: Historical Perspectives on Child Abuse (Melbourne University Press, 2002) 52, between 1891 and 1907 there were 177 reported cases of child sexual abuse in Queensland; the Argus newspaper stated ‘We cannot believe such a state of things exists in this community’: cited in R Yallop, ‘Too Hard to Cope With’ The Australian, 27 May 2003, 9. Early children’s rights activists knew of these phenomena also, and their activities in the late 1800s and early 1900s motivated the formation of children’s rights and advocacy bodies such as the National Society for the Prevention of Cruelty to Children in the United Kingdom.
abuse and neglect have been researched and documented.\(^8\) Government departments are empowered to receive and investigate complaints, and to take protective action in certain cases.\(^9\) The incidence of child abuse and neglect is monitored.\(^10\) The inquiries into institutional abuse should also constitute an advance in this context, since their findings should inform future government policy and practice to ensure that the perpetration of cruelty and violence within State care does not happen again.

Because of these advances, it is fair to judge that the worst excesses of this tradition have passed, at least in modern liberal states. The evolution of liberal society, the academic recognition of childhood as a stage of life that is qualitatively different from adulthood, legislative recognition of children’s needs and rights, and the creation of government departments responsible for child protection, all have positive consequences for the quality of children’s lives. In Australian States and Territories, adults can no longer kill, abandon and sell children without dire consequences, and criminal laws are at least capable of punishing those who inflict physical and sexual abuse on children.\(^11\)

This judgment is qualified and should not be accompanied by satisfaction. There is substantial evidence that despite these piecemeal advances, there remain fundamental defects in individuals’ treatment of children, and in public authorities’ protection of

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\(^9\) For example, the *Child Protection Act 1999* (Qld).

\(^10\) For example, by the Australian Institute of Health and Welfare.

\(^11\) The qualification is necessary since incidents of physical and sexual abuse of children are by their nature seldom reported, and therefore seldom prosecuted. *The Criminal Code* Chapter 22 deals with offences against morality, including sexual offences involving children (including, for example, s 208 (unlawful sodomy), s 210 (indecent treatment of children under 16), s 215 (carnal knowledge with or of children under 16), s 222 (incest) and s 229B (maintaining a sexual relationship with a child). Chapter 30 contains offences based on assaults; and Chapter 32 deals with sexual offences generally. See also the *Criminal Offence Victims Act 1995* (Qld) which provides for compensation for victims of indictable offences. The scheme applies to acts committed after 18 December 1995. Section 46 preserves the previous compensation scheme, which applies to acts committed between 1 January 1969 and 18 December 1995. *The Criminal Code Amendment Act 1968* (Qld) established in Chapter 65A of *The Criminal Code* a compensation scheme for injury arising out of indictable offences relating to the person, but s 3 stated that the Act did not apply in respect of compensation for injury suffered before commencement of the Act. The Act commenced on 1 January 1969.
children in their care.\textsuperscript{12} Recent evidence indicates that the occurrence of child abuse and neglect is still appalling. From 1994-98 in Queensland, 15,774 child sex offences were reported to police.\textsuperscript{13} In Queensland in 2002-03 there were 31,068 notifications of child abuse and neglect to State authorities, involving 22,027 children.\textsuperscript{14} Of these, there were 12,203 substantiated cases involving 9,032 children.\textsuperscript{15} In 2002-03 in Queensland, 4,107 children were living under care and protection orders issued by the State.\textsuperscript{16} Perhaps most disturbing of all, some of these children in State care, even after the revelations of the Forde Inquiry, have been found to have suffered abuse and neglect while in State care.\textsuperscript{17} In a preventative sense, then, evidence suggests that what progress may have been made is not nearly enough, both in individual and State-governed contexts.

Moreover, there is a second sense in which it is clear that the responses of the State have been deficient. This second responsive sense concerns the issue of how the State responds to people who have been abused and neglected in its institutions, and this context is the focus of this article. The responsive context has two main concerns: first, the compensation of survivors of State institutional abuse; and second, the question of amendment of statutory limitation periods to enable civil suits.

In contrast to several comparable overseas jurisdictions and one other jurisdiction in Australia, survivors of institutional abuse in Queensland have not been financially compensated for their suffering at the hands of the State. As well, in contrast to jurisdictions where the unfair operation of limitation statutes on plaintiffs in this class has been recognised, and amendments have enabled individual survivors to institute legal proceedings, the Queensland government has instead relied on statutory obstacles to deny survivors of institutional abuse access to the courts. In addition, the Queensland government amended new personal injuries legislation in 2002, making pre-court procedural requirements retrospective, which further complicates legal redress for survivors of historical abuse.

The actions taken by comparable governments forms the closest measure by which the financial and legal responses of the Queensland government can be evaluated. Like Queensland, these governments initiated inquiries that revealed direct and substantial evidence of the extent of child abuse in State institutions. In the unusual case of Tasmania, the fact of the abuse has been accepted without establishing an inquiry, but its response in establishing a compensation scheme qualifies it too as a comparable jurisdiction. Queensland is the only Australian jurisdiction to have recently conducted a

\textsuperscript{12} Although any balanced comment in this context must recognise that it is not possible to eradicate cases of child abuse and neglect, there are limits to what is acceptable.

\textsuperscript{13} Queensland Crime Commission and Queensland Police Service, \textit{Project AXIS – Child Sexual Abuse in Queensland: The Nature and Extent}, 2000, Brisbane, 28 (Table 3). The incidence of child sexual abuse is notoriously difficult to assess due to the low rate of reports. The reported number of offences represents only a proportion of the actual number of incidents.

\textsuperscript{14} AIH\textsuperscript{W}, above n 6, 17 (Table 2.6).

\textsuperscript{15} Ibid 17 (Table 2.6). The 12,203 substantiations in Queensland comprised 2,806 of physical abuse; 610 of sexual abuse; 4,135 of emotional abuse; and 4,652 of neglect: AIH\textsuperscript{W} 16 (Table 2.5).

\textsuperscript{16} Ibid 31 (Table 3.5). These orders comprise guardianship or custody orders (3,831), supervisory orders (135) and interim and temporary orders (141): 31 (Table 3.6). In Australia, in 2002-2003, there were 198,355 child protection notifications: 14 (Table 2.3), and there were 40,416 substantiated cases of child abuse and neglect: 15 (Table 2.4). As at 30 June 2003, there were 22,130 children on care and protection orders: 31 (Table 3.5).

\textsuperscript{17} Crime and Misconduct Commission, above n 5.
detailed inquiry into institutional child abuse and neglect, although South Australia may soon do so after the introduction on 1 July 2004 of the Commission of Inquiry (Children in State Care) Bill. As well, the Commonwealth Senate Community Affairs References Committee recently completed its Australia-wide Inquiry Into Children In Institutional Care, but is yet to report. The findings of this Senate report, and any made by an inquiry eventuating in South Australia, may warrant assessments of responses in coming years by other Australian jurisdictions. The focus of this article is therefore on Queensland, primarily due to the overwhelming evidence from two inquiries about the extent of child abuse in State care, the express recommendation of the Forde Inquiry that survivors of institutional abuse should be financially compensated, and because of Queensland’s strikingly different responses to these inquiries when compared to other jurisdictions. In Part 2 of this article, the responses of other jurisdictions in this context are summarised, detailing financial redress schemes and the amendment of statutes of limitation. Part 3 describes the Queensland government’s response to the recommendations of the Forde Inquiry regarding compensation, which was to do nothing except direct survivors to take action in the courts. Part 4 discusses the implications of that direction by summarising the personal injuries litigation framework

18 In other Australian jurisdictions not having a compensation scheme, any adult survivors of long past institutional abuse (or non-institutional abuse) will face identical or similar problems posed by statutes of limitation that confront plaintiffs in this class in Queensland. In New South Wales, Victoria, South Australia, Tasmania, the Northern Territory and the Australian Capital Territory, plaintiffs who have suffered personal injury have three years from the date of that injury to institute proceedings: Limitation Act 1969 (NSW) ss 18A(2) and 50C; Limitation of Actions Act 1958 (Vic) ss 5(1A) and 27D(1)(a); Limitation of Actions Act 1936 (SA) s 36; Limitation Act 1974 (Tas) s 5(1); Limitation Act 1981 (NT) s 12(1)(b); Limitation Act 1985 (ACT) s 16B. In Western Australia, a plaintiff has four or six years if the cause of action is in assault and battery, or negligence respectively: Limitation Act 1935 (WA) ss 38(1)(b) and 38(1)(c)(vi). Even where there is a State-sponsored scheme, as in Tasmania, this will not assist survivors of abuse by private individuals. Minority does constitute a legal disability in most jurisdictions, but this only suspends the limitation period until majority, so most plaintiffs have until they turn 21 to institute proceedings, which is not possible for many plaintiffs in this class due to the nature of the events and injuries: Limitation of Actions Act 1974 (Qld) ss 5(2), 11, 29(2)(c); Limitation Act 1974 (Tas) ss 2(2), 26; Limitation Act 1935 (WA) s 40; Limitation Act 1981 (NT) ss 4(1), 36; Limitation Act 1985 (ACT) ss 8(3), 30. Recent legislative changes in New South Wales and Victoria alter this position to require a minor who is injured to bring proceedings within three years of injury through a capable parent or guardian, rather than suspending the running of time: Limitation Act 1969 (NSW) ss 11(3), 50F(2)(a), 50C(1)(a); Limitation of Actions Act 1958 (Vic) ss 27(1)(a), 27D(1)(a) – contrast the situation where the wrongdoer is the victim’s parent or a close associate of the parent: s 50E(1)(a) and s 271(1)(a) respectively. In South Australia, a less stringent amendment has been enacted, but this still can require a child who suffers personal injury to give notice of the intended action to certain defendants within six years of the date the injury was sustained: Limitation of Actions Act 1936 (SA) s 45A. In most but not all jurisdictions, extension provisions are available, but even where this is so, applications by plaintiffs in this class will face strong difficulties: see for example in Queensland the Limitation of Actions Act 1974 (Qld) ss 30, 31, and the unsuccessful applications for an extension of time by institutional survivors such as those referred to later in this article. For a fuller discussion of the difficulties posed by traditional time limitation periods in this context, see B Mathews, ‘Limitation Periods and Child Sexual Abuse Cases: Law, Psychology, Time and Justice’ (2003) 11 (3) Torts Law Journal 218, and other references below, n 58. Extension provisions in other jurisdictions that are relevant here include Limitation Act 1969 (NSW) ss 57-60 (if injured before 1 September 1990); ss 60A-66E (if injured between 1 Sep 1990-5 December 2002); ss 62A and 62B (if injured on or after 6 December 2002); ss 60F-60J for all causes of action, if there is latent injury; Limitation of Actions Act 1958 (Vic) ss 23A, 27K, 27L; Limitation of Actions Act 1936 (SA) s 48; Limitation Act 1974 (Tas) s 5(3) (but limited to maximum six years from date of cause of action); Limitation Act 1981 (NT) s 44; and Limitation Act 1985 (ACT) s 36(1)-(3). In Western Australia there are no comparable extension provisions.
in Queensland at two points: pre-2002, governed by the Limitation of Actions Act 1974 (Qld) (‘the Limitation of Actions Act’), and post-2002, governed by both the Personal Injuries Proceedings Act 2002 (Qld) and the Limitation of Actions Act. This comparative exploration will then inform conclusions about the Queensland government’s responses, and recommendations for practical and legal reform.

II REDRESS SCHEMES AND AMENDMENTS TO STATUTES OF LIMITATION

A Redress Schemes

Either independently, or motivated by the recommendations of these bodies of inquiry, a number of governments have taken strong practical and moral action to remedy the damage inflicted on survivors of these institutions by designing redress schemes. Avenues of redress commonly included in these schemes include apologies, acknowledgment of the harm done, counselling, education programs, access to records, and assistance reunifying families. A central feature of the redress schemes is the design and implementation of financial compensation schemes, to which responsible religious institutions contribute. Both inquiries and government initiatives independent of inquiries have accepted that the provision of financial compensation for pain and suffering to those who have suffered damage at the hands of the State is a moral imperative.

The Law Commission of Canada, which undertook a comprehensive review of State responses to institutional abuse, declared that five principles must be respected in all processes through which survivors of institutional abuse seek redress. First, survivors should possess all information necessary to make informed choices about what course of redress to undertake. Second, they should have access to counselling and support. Third, those conducting or managing the process (judges, lawyers, police) should have the training necessary to enable them to understand the circumstances of survivors. Fourth, continual efforts should be made to improve redress programs. Fifth, the process should not cause further harm to survivors.

I Canada

In Canada, provincial governments have established compensation schemes in situations where children were abused and neglected in State-funded and State-operated institutions. These include the British Columbia Jericho Individual Compensation Program 1995; the New Brunswick Compensation Program; the Nova Scotia Compensation Program 1996; the Ontario Grandview Agreement Compensation Scheme 1994; and the Ontario St John’s and St Joseph’s Helpline Agreement 1993.

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20 See generally Law Commission of Canada, ibid.
21 Ibid 9-10.
The Law Commission of Canada recommended as the most effective official response in meeting the needs of survivors the use of redress programs that are designed with survivors, which involve responses to all their needs. Such programs are more flexible, less costly, less time-consuming, less psychologically traumatic and less confrontational than conventional legal proceedings. It also recommended that ex gratia payments should be offered in cases where an otherwise meritorious and provable claim cannot be pursued because it falls outside a limitation period.

2 Ireland

In Ireland, revelations of abuse in State orphanages, industrial schools and other institutions influenced Prime Minister Bertie Ahern to make a statement on 11 May 1999 acknowledging and apologising for the abuse suffered by children in institutional care. Mr Ahern acknowledged that the effects of abuse ‘ruined their childhoods and has been an ever-present part of their adult lives’, and admitted that they were ‘grossly wronged, and that we must do all we can now to overcome the lasting effects of their ordeals’. Several strategies were implemented to address the situation including the establishment of the Commission to Inquire into Child Abuse. On 3 October 2000 the Minister for Education and Science announced that the government had agreed in principle to a compensatory scheme, and in February 2001 he revealed that the government had agreed to his plan for the scheme. The Residential Institutions Redress Bill was presented on 11 June 2001, establishing the Compensation Advisory Committee. The CAC responded to the Minister for Education and Science in January 2002 in its report entitled Towards Redress And Recovery, making recommendations about the form and content of the compensatory scheme. The Residential Institutions Redress Act 2002 was passed on 10 April 2002, establishing the Residential Institutions Redress Board and associated bodies (eg the RIR Review Committee) and its functions and powers. The Residential Institutions Redress Board scheme, funded by government with contributions from responsible religious authorities, was launched on
2 December 2002. The average award to date is 80 000 euros (approximately $A137 000).31

3 Tasmania

Albeit on a vastly reduced monetary scale, the Tasmanian government has established a similar scheme32 pursuant to a Protocol Agreement made between the Ombudsman and the Department of Health and Human Services.33 The review of claims system was established after revelations in July 2003 of sexual abuse of a former State ward in high as 2 billion euros: B O’Kelly, ‘Letter Shows State Caved in on Deal’, Sunday Business Post, 5 October 2003. If there are 10 800 claims (as estimated in a report by the government’s Auditor-General), each averaging 80 000 euro awards, the amount of compensation awarded will be 864 million euros (approximately $A1.4 billion).

See generally the website of the RIRB at <http://www.rirb.ie/>. Applications must be made within three years of 2 December 2002. By 22 December 2003, the Board had received 2553 applications and had completed 587 applications. Of these 587, 431 offers of compensation had been made following settlement talks with the Board, and 104 awards of compensation had been made after Board hearings. Fifty-two applications had been refused by the Board because the applicant did not reside in one of the named institutions. The largest award by 22 December 2003 had been one of 270 000 euros (approximately $A463 000): Residential Institutions Redress Board, Newsletter, 22 December 2003, <http://www.rirb.ie/updates_article.asp?NID=56> at 31 January 2004. By 11 May 2004, 1070 cases had been finalised: Residential Institutions Redress Board, Statement, 11 May 2004, <http://www.rirb.ie/updates_article.asp?NID=58> at 9 July 2004.

There are four heads of compensation: severity of abuse and injury, additional redress, medical expenses, and other costs and expenses. There are guidelines for assessing the severity of abuse and there is a schedule of ratings (weightings) which equate to 5 redress ‘bands’, demarcating the amount of redress payable. Band 5 represents cases of the most severe abuse and this band comprises amounts payable of 200 000 – 300 000 Euros (approximately $A343 000 – 515 000). Band 4 enables payments of 150 000 – 200 000 euros (approximately $A257 000 – 343 000). Band 3: 100 000 – 150 000 (approximately $A170 000 – 255 000). Band 2: 50 000 – 100 000 euros (approximately $A85 000 – 170 000). Band 1: up to 50 000 euros (approximately $A85 000).

Eligible applicants must have suffered sexual, physical or emotional abuse while residing at an industrial school, reformatory, children’s home, special hospital or similar institution and have suffered physical, psychiatric or other injury consistent with that abuse. The person must have been residing in one of the named institutions (there are some 128 of these), and must not have received compensation from a court or settlement. The alleged perpetrator does not have to have been criminally convicted. There is an application form that must be completed and submitted to the Board. The Board will obtain evidence from any person and institution named in an application. If the Board judges that an applicant is entitled to redress, it may make an offer of settlement which the applicant can accept or reject. If accepted, no further action is necessary; but the applicant cannot seek other compensation through the courts. If rejected, the application will then be heard by the Board at a hearing. Hearings are closed to the public, informal, conducted by a panel of 2-3 Board members, and enable the calling of witnesses. Persons and institutions named in the application can participate in the hearing. Awards made by the Board can be reviewed by a Review Committee, which can uphold, increase or decrease the Board’s award.


foster care. While not establishing an inquiry into the abuse of children in State care, the Tasmanian government established this system to assist people who had made claims of past abuse.

In the speech presenting the scheme to Tasmania’s Parliament, the themes of compensation as a moral imperative, and of the unfairness of individuals in this class being excluded from access to justice by limitation statutes, are evident:

The Government takes the issue of past abuse of children in State care very seriously and through this process is seeking to provide a reasonable basis for closure upon what, for them, has been a difficult chapter in their lives…A substantial number of the claims that have been made to the Ombudsman relate to actions that occurred many years ago and, in most cases, some decades ago. It is likely that in most of these cases civil legal action can no longer be taken because of the time that has elapsed. This is one of the reasons that the Government has put into place the[s] procedures…The Government believes that the victims of past abuse ought to at least receive some acknowledgment of their experience and, where appropriate, some form of compensation.

Under the Tasmanian scheme, claims must first be made to the Ombudsman. A Review team investigates the claim, which includes record-checking and interviews. Part of the interview process involves finding out what the claimant wants from the process. Desired outcomes can include an apology; official acknowledgment that the abuse occurred; assistance finding lost family members; guided access to their Departmental files; professional counselling; payment of medical expenses; compensation; and an assurance that children in future State care will not be subjected to abuse. Completed files for each claimant are referred to the Department of Health and Human Services for further action if recommended. An Independent Assessor then assesses claims and decides whether an ex gratia payment is made. The Assessor can determine payments up to $60 000 or more in exceptional circumstances.

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34 Greens Opposition Justice Spokesperson Nick McKim lodged a Notice of Motion on 26 November 2003 to establish a Commission of Inquiry into child abuse in institutions in Tasmania.

35 Tasmania, Parliamentary Debates, above n 32.

36 See generally the Ombudsman’s Interim Report, above n 32; and the speech presenting the scheme to Parliament, above n 32.

37 By 23 December 2003, 232 claims had been made, involving allegations of abuse at Catholic, Anglican and Salvation Army homes, and foster homes. Sixty-nine per cent of claims involve allegations of abuse committed over 30 years ago, with most occurring between 1961 and 1970. Thirty-four per cent of allegations involve abuse in foster homes, and 2.4 per cent in adopted homes. Sixty-three per cent of the claims concern allegations of abuse inflicted in institutional care. The claims concern sexual abuse (25.5 per cent), physical abuse (39 per cent), and emotional abuse and neglect (35.5 per cent). Five claims involve allegations of abuse occurring since 1991: Ombudsman, Interim Report, above n 32. By 2 July 2004, 225 assessments had been completed, with 105 files referred to the Ombudsman for transfer to the DHHS: Ombudsman, Child Abuse Review Weekly Statistics, <http://www.justice.tas.gov.au/ombudsman/Cart20Weekly%20Stats.pdf> at 9 July 2004. The Ombudsman will also prepare a final report for tabling in Parliament, including findings about any systemic issues that have emerged, to inform recommended changes to current practice and policy necessary to prevent further abuse of children in State care.
B Amendments of Statutes of Limitation

An easy strategy for governments in this situation to escape civil liability is to deny survivors of long past institutional abuse access to courts by pleading the expiry of the permitted amount of time in which an individual can bring legal proceedings. This strategy bars plaintiffs from access to the courts to have an opportunity of presenting their cases, with the attendant denial of any possibility of receiving an award of damages. As will be seen in Part 4, this is what the Queensland government has done.

Yet there is a clear choice to be made. Expiry of the limitation period is irrelevant unless the defendant pleads it. The statutory time limit does not operate automatically to bar a plaintiff’s action. Furthermore, the court will not consider the expiry of time of its own volition. This means that the government has to choose to obstruct plaintiffs in these cases.

The Law Commission of Canada made two recommendations in this respect. First, legislatures should amend limitation periods in these cases so that survivors of institutional abuse cannot be impeded from bringing civil actions. Second, governments should not rely on limitation periods in these cases to prevent plaintiffs proceeding to trial. These recommendations are motivated by recognition of the ethical, practical and theoretical circumstances precluding plaintiffs in these cases from bringing actions within time.

Governments in other jurisdictions have made choices that illuminate those made to date by the Queensland government. In Canada, British Columbia, Saskatchewan, Manitoba, Ontario, Newfoundland, the Northwest Territories and Nunavut have abolished time limits for civil actions based on sexual assault, giving adult survivors of abuse unlimited time in which to institute proceedings. In Ontario, Manitoba and

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38 Uniform Civil Procedure Rules 1999 (Qld) r 150(1)(c).
40 Law Commission of Canada, above n 19, 20.
41 Cases of child abuse and neglect and their psychological sequelae were little known, much less considered, when limitation period rationales were formulated and when limitation statutes were written: see further Part 4; and for a discussion of this and an exposition of the circumstances preventing plaintiffs proceeding in cases of child sexual abuse, whether institutional or familial or otherwise, see Mathews, above n 18. Some of the reasons why these plaintiffs could not bring civil proceedings within time are the following: the individuals’ legal minority at the time of the events; the individuals’ lack of literacy, financial resources and understanding of the legal system; in many cases a lack of knowledge of the wrong done to them; psychological inability to confront the details of the abuse; and the lack of social and legal recognition of sexual abuse and physical abuse occurring within institutions at the time (leading to a lack of likelihood of success, and even if success eventuated, a likelihood of a low award of damages).
42 See British Columbia’s Limitation Act, RSBC 1996, c 266, s 3(4)(k)(i); Saskatchewan’s Limitation of Actions Act, RSS 1978, c L-15, s 3(1)(3.1)(a); Ontario’s Limitations Act, RSO 2002, c 24, ss 10(1)-(3), 16; Manitoba’s Limitation of Actions Act, CCSM 2002, c L150, s 2.1(2)(a); Newfoundland’s Limitations Act, RSNL 1995, c L-16.1, s 8(2); Nunavut and the Northwest Territories’ Limitation of Actions Act, RSNWT 1998, c L-8, s 2.1; see also Nova Scotia’s Limitation of Actions Act, RSNS 1989, c 258, s 2(5)(a) and (b), which although not abolishing the time limit deems time not to run while the victim is not reasonably capable of proceeding because of their injuries. Alberta’s Limitations Act, RSA 2000, c L-12 merely suspends the limitation period while the plaintiff is a minor (s 5); although fraudulent concealment also suspends the running of time until discovery of the fraud. Canadian jurisdictions that have not amended legislation include Prince Edward Island, New Brunswick, the Yukon and Quebec.
Saskatchewan, the abolition of time limits in which to proceed also applies to actions for trespass to the person, assault or battery where at the time of the injury the person was in a relationship of financial, emotional, physical or other dependency with one of the parties who caused the injury. In Ireland, amending legislation in 2000 gave plaintiffs a further year in which to bring civil actions arising out of acts of sexual abuse. In several American jurisdictions, the effect of limitations statutes on survivors of child sexual abuse is being eroded. In California, legislative amendments in 2002 revived certain classes of expired claims to allow civil proceedings against the Roman Catholic Church for sexual abuse allegedly committed by priests, and enabled those claims to be launched in the year 2003.

Governments in Ireland, Canadian provinces and most recently Tasmania have acted to compensate survivors of abuse and in some cases have amended limitation statutes to enable those individuals who wish it to gain access to courts. In both moral and legal senses, the weight and scope of the responses in other jurisdictions provides a standard of government conduct against which the responses of the Queensland government must be measured. It is therefore of moral and legal significance that in comparable circumstances, the Queensland government has not taken any such action.

III THE QUEENSLAND GOVERNMENT RESPONSE

It is difficult to imagine a response that in moral and practical substance contrasts more starkly with these jurisdictions’, than that of the Queensland government.

The Forde Inquiry Recommendation 39 provides:

That the Queensland Government and responsible religious authorities establish principles of compensation in dialogue with victims of institutional abuse and strike a balance between individual monetary compensation and provision of services.

43 Ontario’s Limitations Act, RSO 2002, c 24, s 10(1)-(3); Manitoba’s Limitation of Actions Act, CCSM 2002, c L150, s 2.1(2)(b)(ii); Saskatchewan’s Limitation of Actions Act, RSS 1978, c L-15, s 3(1)(3.1)(b)(ii).

44 The Statute of Limitations (Amendment) Act 2000 amended the Statute of Limitations 1957 by inserting a new s 48A, which deems certain persons to be under a disability for the purposes of bringing civil actions arising out of acts of sexual abuse, and to give them an extension of time of one year after the passing of the amending Act in which to proceed. The Towards Redress And Recovery Report noted that its authors were unaware of any such cases being resolved in court, although they did know about some cases being settled out of court without public disclosure and without any defendant admitting liability: above n 2, 2.


46 Senate Bill No 1779, Chapter 149, 2002, amending Section 340.1 of the California Code of Civil Procedure. The actions revived included actions against persons or entities who owed a duty of care to the plaintiff, who knew or had notice of any unlawful sexual conduct by an employee, and failed to take reasonable steps and to implement reasonable safeguards to avoid future acts of unlawful sexual conduct. Plaintiffs in California generally have eight years from attainment of the age of majority to institute proceedings, or three years from discovery of the injury, whichever occurs later.

47 Forde Inquiry, above n 4, 288.
Recommendation 40 requires the establishment of support services such as counselling, and is conceptually and substantially different from Recommendation 39. Recommendation 39 is focussed on developing a method of monetary compensation, which would exist alongside the support services established under the purview of Recommendation 40.

Despite representations to the contrary, there has been no action taken to implement Recommendation 39. The government has claimed that measures taken in establishing the Forde Foundation constitute responses to Recommendation 39. However, this is not true, since the powers and functions of the Forde Foundation clearly do not count in this respect. Those powers and functions address support services, falling within Recommendation 40. The Forde Foundation is neither empowered nor equipped to award monetary compensation.

The government’s failure to compensate survivors of institutional abuse has been made even more reprehensible because the flouting of Recommendation 39 has been accompanied by deceptive statements about the availability of civil legal remedies. The government’s 1999 response regarding Recommendation 39 was to advise former residents who had suffered abuse to take civil action in the courts through existing legal processes. This response was repeated in its 2001 Progress Report. That year, the government recognised that the Forde Monitoring Committee was dissatisfied with the government’s inaction and had urged the government to consider Canadian

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48 Ibid. Recommendation 40 concerns the establishment of a central service that provides ongoing counselling for victims and their families, facilitation of educational programs, advice regarding access to individual records, specialised counselling for indigenous survivors of abuse, and assistance to former child migrants for family reunification. The government has not fully implemented this Recommendation either. The government’s response to Recommendation 40 was to contribute $1 million to establish the Forde Foundation, a charitable trust, to provide financial support to enable family reunions, counselling and self-improvement expenses. After the 2001 election, a further $1 million was added. This action on Recommendation 40 has not been sufficient. The Forde Implementation Monitoring Committee reported to the government in 2001 that the Forde Foundation is insufficiently funded to satisfy the needs of former residents. So far, about $393 000 has been disbursed over four rounds of grants. The Forde Foundation Trust Fund has suffered from the economic downturn of the last few years, has little developmental capacity, struggles to attract external funding, and has not been granted the power to adapt its practice. Major criticisms from former residents about the Foundation include the small amount of funds available, the geographical centralisation of the scheme and its attendant inaccessibility to all residents concerned, and the trauma associated with the application process: see generally Board of Advice of the Forde Foundation, Submission to the Senate Community Affairs References Committee Inquiry Into Children In Institutional Care, 2004, <http://www.aph.gov.au/senate/committee/clac_ctte/inst_care/submissions/sub159.doc> at 31 January 2004.


51 1999 Report, above n 3, 43.

52 2001 Progress Report, above n 49, 8, 72.
compensation schemes with a view to implementing a similar scheme. The Monitoring Committee found that no adequate response to Recommendation 39 had been made, and urged the government and religious organisations to do three things: treat the matter of compensation for former residents as a serious issue that urgently needs to be addressed; consider the compensation models discussed by the Law Commission of Canada as methods for use in Queensland; and establish a forum for the processing and resolution of compensation claims.

Despite a clear finding of an omission to act, the exhortation by the Monitoring Committee to take action, and even the release in 2002 of a policy by the Queensland National-Liberal Opposition directed at remedying the situation, the government has since continued its failure to compensate victims of State care. In its 2001 Progress Report, the government maintained that ‘the appropriate mechanism for aggrieved people seeking monetary compensation is the Queensland court system. To establish a separate arrangement for one group of Queenslanders over another would be iniquitous’.

When made, this response compounded the abuse suffered by all individuals in State and religious institutions, and it continues to do so. This response is hypocritical since it is exactly this group of people that is treated differently in adverse ways by the legal system than other claimants. Survivors of abuse are effectively ‘under a separate arrangement’ because of the unique nature of their cases and injuries. As well as being hypocritical, the response is cruel because it consciously denies access to redress to those who deserve it, and because in doing so it causes further psychological, emotional and financial distress (the government is aware that Legal Aid does not provide assistance in these cases). Finally, the response is deceptive because the government knows that provisions under limitations and personal injuries statutes make proceedings costly and extremely unlikely to succeed. In 2001, the position under the Limitation of Actions Act made civil compensation virtually impossible for survivors of long past abuse. Since then, new legislation imposing further conditions on the conduct of personal injuries actions have made that position more difficult, more protracted, and more costly. Part 4 gives a synopsis of these two situations.

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53 Forde Implementation Monitoring Committee, above n 50, 124-131.
54 Ibid 131; see also Board of Advice of the Forde Foundation, above n 48, 6-9.
55 In December 2002, Queensland Shadow Minister for Families Stuart Copeland published a policy that sought to remedy the failure to implement Recommendations 39 and 40 of the Forde Inquiry: M Wenham, ‘Compo Plan for Abuse Victims’, Courier Mail, 3 December 2002. The policy responded to the need to compensate victims of past abuse in State institutions, and in involved a survey to ascertain the number of claimants and the amount of compensation required, followed by the establishment of a working group which would design an appropriate compensation scheme. Disappointingly, and for unknown reasons, in January 2004, during an election campaign, the Opposition has not only resiled from its 2002 position, it has asked that the broad issue of child abuse be erased from the agenda, claiming that with the drafting of the Child Protection Legislation Amendment Bill 2004, which will be introduced to Parliament on 24 February, there was no difference between the government’s and the Queensland National-Liberal Opposition’s policy, and that the issue of reform had bipartisan commitment: A Wilson, ‘Child Mandate a “Red Herring”’, The Australian, 15 January 2004. The draft bill is informed by the CMC Report, and is directed at reforming the child protection system, but contains no provision regarding compensation for survivors of abuse suffered either in foster care, or in institutional care covered by the Forde Inquiry.
56 2001 Progress Report, above n 49, 8.
IV COMPENSATION THROUGH THE QUEENSLAND COURT SYSTEM

A Pre-2002: The Limitation of Actions Act 1974 (Qld)

At the times of the Forde Inquiry and the government’s 1999 and 2001 responses to Recommendation 39, the personal injuries litigation framework in Queensland produced a lengthy, costly and almost certainly negative outcome for plaintiffs in cases of long-past sexual abuse in State institutions. The difficulties presented by Queensland’s Limitation of Actions Act, which gives plaintiffs in this context three years from the attainment of majority in which to institute proceedings, have been thoroughly documented. The key difficulties are first, that for reasons documented in worldwide psychological literature, plaintiffs in this class will commonly be psychologically unable to institute legal proceedings within time; and second, these plaintiffs will almost certainly fail to be granted an extension of time in which to proceed because of the passage of time and the attendant deemed prejudice to the defendant’s right to a fair trial, among other reasons. These difficulties are not remedied in Australian law by the equitable doctrine of fiduciary duties.

These problems are particularly prominent for plaintiffs alleging long past sexual abuse, but are arguably no less insuperable for plaintiffs alleging damage caused by long past institutional physical and emotional abuse. There are several reasons for this. Just as adult survivors of child sexual abuse typically will avoid stimuli connected with the

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57 Through the operation of ss 11, 29(2)(c) and 5(2).
59 Mathews, above n 18, 219-221.
60 Which is available under s 31(2).
62 In stark contrast to Canada (M (K) v M (H) [1992] 3 SCR 6), the constricted ambit of fiduciary relationships in Australia excludes parent/child relationships (Paramasivam v Flynn (1998) 160 ALR 203) and mere acquaintances, so excluding fiduciary claims in the majority of sexual and physical abuse cases. This should not affect the basis for proceeding with a fiduciary claim in this context, since the relationship between State and child resident of a State institution is one of guardian and ward, which has been recognised as a relationship capable of attracting fiduciary duties: Clay v Clay (2001) 202 CLR 410, 430; Paramasivam v Flynn). However, satisfying this definitional status will not help plaintiffs in this context, because, again in contrast with the Canadian Supreme Court, Australian courts have consistently held that fiduciary principles protect economic interests and not personal interests, thereby preventing the possibility of fiduciary claims for physical, sexual and psychological abuse: Breen v Williams (1996) 186 CLR 71; Paramasivam v Flynn.
63 See the comments made above, n 41.
abuse until psychologically able to confront it,\textsuperscript{64} so too may survivors of physical and emotional abuse in this context.\textsuperscript{65} Just as the long-term injuries caused by child sexual abuse, typically Post Traumatic Stress Disorder and depression, take time to manifest and to become known to the survivor of child sexual abuse,\textsuperscript{66} so too will the injuries caused by physical and emotional abuse.\textsuperscript{67} Just as adult survivors of child sexual abuse commonly are precluded from commencing litigation within the time set by statutory provisions,\textsuperscript{68} due to the nature of the acts inflicted on them - which are frequently accompanied by feelings of guilt and shame, and by threats and an imposed sense of responsibility\textsuperscript{69} - adult survivors of physical abuse routinely inflicted on them as children by authority figures in a position of trust will commonly not recognise that they have been wronged until long after the attainment of majority.

What this means is that the government’s advice that survivors of institutional abuse should pursue civil litigation was promoting the institution of legal proceedings by citizens who had been physically and psychologically damaged by the State; proceedings that would cost those citizens time, money, and further emotional and psychological trauma, and which were bound to fail. The example of one of these individuals instituting legal proceedings against the State of Queensland, with the case reaching the Queensland Court of Appeal, is instructive.\textsuperscript{70} In \textit{Carter}, the government pleaded the expiry of the limitation period as a defence, and the plaintiff was denied a civil trial.\textsuperscript{71} The plaintiff had been taken into State care when two months old and in 1961 she was placed at Neerkol Orphanage, a private institution licensed to care for children, run by an order of nuns. Between 1961 and 1972 (aged 1-12), the applicant suffered personal injuries from numerous incidents of physical and emotional cruelty from the nuns.\textsuperscript{72} She had severe speech impediments and was teased cruelly about these, and she endured regular severe physical assault including being beaten, burned

\begin{itemize}
\item Evidence demonstrates that in many cases a long period of time elapses before a survivor even feels able to report the abuse, let alone to endure the trauma associated with legal proceedings. In Queensland, the report of the Queensland Crime Commission and Queensland Police Service, \textit{Child Sexual Abuse in Queensland: The Nature and Extent}, above n 13, found that of 212 adult survivors, 25 took 5-9 years to disclose it, 33 took 10-19 years, and 51 took over 20 years: 80 (Table 23). Where the perpetrator is a relative, it is even more likely that the delay will be long. A Criminal Justice Commission analysis of Queensland Police Service data from 1994-1998 found that of 3721 reported offences committed by relatives, 25.5 per cent of survivors took 1-5 years to report the acts; 9.7 per cent took 5-10 years; 18.2 per cent took 10-20 years, and 14.2 per cent took more than 20 years: ibid 82 (Table 25).
\item See Forde Inquiry, above n 4, 284-287.
\item See for example Dunne and Legosz, above n 8.
\item See Forde Inquiry, above n 4, 284-287.
\item For judicial acknowledgment of this fact, see for example Atkinson J’s judgment in \textit{Carter v Corporation of the Sisters of Mercy of the Diocese of Rockhampton} [2001] QCA 335 (Unreported, Queensland Court of Appeal, McPherson JA, Muir and Atkinson JJ, 24 August 2001) [86] and [88]; Botting DCJ in \textit{Applications 861 and 864} (Unreported, District Court of Queensland, 21 June 2002) 36; see also Wilcox J in \textit{R v Lane} (Unreported, Federal Court, 19 June 1995) 2.
\item See also \textit{Hopkins v State of Queensland} [2004] QDC 021 (Unreported, District Court of Queensland, McGill DCJ, 24 February 2004), where the State pleaded expiry of time to defeat an application for an extension of time by a plaintiff alleging sexual abuse suffered while in foster care.
\item Both in the Supreme Court and the Queensland Court of Appeal: above n 61 (contrast the more fully informed judgment of Atkinson J in the appeal).
\item The Court of Appeal accepted that at least some of the appellant’s complaints of ill-treatment were confirmed by ‘ample evidence’: ibid [5] (McPherson JA); [46] and [77] (Atkinson J).
\end{itemize}
and near-drownings in the bath. She endured emotional cruelty and torture (eg solitary confinement, and being tied to a pole), emotional neglect, and regular forced use of sedative drugs. From the age of five or six, she allegedly suffered numerous incidents of severe sexual assault by a Neerkol employee, and from when she was aged seven, she allegedly suffered almost daily rape by this employee. In August 1968, aged eight, she complained to government employees of physical and sexual abuse, but she was not believed and instead was beaten for complaining. Aged 15, she fled State care to live on the streets.

When she instituted legal proceedings against the institutions responsible for her suffering, this plaintiff received an apology and a legal settlement from the religious institutions involved. These institutions did not plead the expiry of time as a defence. In contrast, the Queensland government did not settle the matter, and instead successfully pleaded expiry of time as a defence, after its direction to survivors to take action against the State in the courts. This plaintiff, and others, have therefore not been able to access civil trials involving the State government. Any humane assessment of the government’s statements in 1999 and 2001, and of its responses during litigation, must condemn those statements and responses in the strongest possible terms.


As if the initial abuse and neglect at the hands of the State was not painful enough, and as if the response to the revelation of the abuse by recommending futile, costly and traumatic litigation was not cruel enough, there has since 2001 been a further deterioration in the situation. Legislation passed in 2002 added still more difficulties for any person in this class of claimant who wants to pursue perpetrators of abuse in the courts. Whether by design or omission, the Personal Injuries Proceedings Act 2002 (Qld) contains no provision about how to proceed if the limitation period under the Limitation of Actions Act has expired. An associated problem is that there is no definition of what constitutes a reasonable excuse for delay in commencing litigation. These gaps in the legislation create confusion and further costly and time-consuming obstacles that must be overcome before a plaintiff can gain access to remedies.

1 Personal Injuries Proceedings Act 2002

The original Personal Injuries Proceedings Act 2002 (Qld)\(^\text{73}\) commenced on 18 June 2002, introducing a statutory framework governing all claims for personal injuries occurring on or after 18 June 2002. Most significantly, this framework includes a pre-court claim, discovery and negotiation process that must be observed by claimants and respondents. \(^\text{74}\) The Act’s explicit purpose is to assist the ongoing affordability of insurance through appropriate and sustainable awards of damages for personal injury. \(^\text{75}\) Second Reading Speeches and Explanatory Notes explain that the purpose of the Act is to reduce the number and size of legal claims, with the accompanying effect of decreasing the premiums charged by insurance companies for public liability and

\(^{73}\) Hereafter referred to as the Act.

\(^{74}\) Just as significantly in this context, the Act was modelled on the scheme of the Motor Accident Insurance Act 1994 (Qld), assuming that claimants have an immediate awareness and appreciation of an obvious and recent injury, and are unimpeded psychologically from proceeding.

\(^{75}\) Section 4(1).
medical indemnity insurance. This object is to be achieved by, among other things, providing a procedure for the quick resolution of claims, promoting early settlement of claims, ensuring that a person may not start a proceeding in court without being prepared for resolution of the claim by settlement or trial, limiting awards of damages, and minimising the costs of claims.

Despite the fundamental legislative principle that legislation should not retrospectively adversely affect rights and liberties, or impose obligations, soon after commencement the Act was amended to make the original Act apply retrospectively. The amended Act, assented to on 29 August 2002, makes the pre-court procedures apply to all claims for damages for personal injury, including those claims where the incident producing the claim occurred before 18 June 2002. Therefore, the Act now applies to all personal injury claims regardless of when the incident producing the injury occurred. It therefore applies to all possible claimants covered by the Forde Inquiry. This retrospectivity produces many but not all of the difficulties in this context.

2 **Pre-Court Process**

The pre-court process imposes obligations on claimants and respondents with the object of providing a mechanism for the speedy settlement of disputes out of court. The process begins with the claimant being compelled to provide a respondent with a written notice of the claim. Part 1 of the notice of claim must be given within nine months of the day of the incident giving rise to the injury, or if the symptoms are not immediately apparent then within nine months of the first appearance of the symptoms; or within one month after first instructing a solicitor to act on their behalf, whichever is earlier. If the claimant is a child, a parent or guardian may give the notice, but the pre-court requirements are suspended until majority. Therefore, if the plaintiff is proceeding for

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77 Section 2(a)-(f).

78 *Legislative Standards Act 1992* (Qld) s 4(3)(g).

79 As well, s 77E of the amended Act captures claims where the occurrence of injury was before 18 June 2002, and proceedings had been filed between 1 July and 29 August 2002, a class of cases to which the original Act did not apply. For cases in this category, proceedings are stayed until the pre-court procedures are complied with.

80 With the exception of dust-related claims: s 6(3)(b); personal injury as defined under the *Motor Accident Insurance Act 1994* (Qld) and in relation to which that Act applies: s 6(2)(a); or injury as defined by the *Workers’ Compensation and Rehabilitation Act 2003* (Qld), to the extent that an entitlement to seek damages as defined under that Act fro the injury is regulated by Chapter 5 of that Act: s 6(2)(b).

81 The Act does not apply only if court proceedings had been commenced before 18 June 2002: s 6(3)(a), or between 18 and 30 June 2002: s 77A(4); or if a written offer of settlement had been made before 1 July 2002: s 77C; or if other legislation applies to the particular type of injury: s 6(2); or if the action relates to personal injury that is a dust-related condition: s 6(3)(b).

82 Section 9(1).

83 Section 9(3).

84 Section 9(4).

85 Section 19.
an incident occurring when they were a child, the notice of claim must be lodged within 9 months of their 18th birthday, or within one month of them instructing a solicitor, whichever occurs earlier.  

A key provision states that if the notice is not given within time, the obligation to give it continues – the pre-court procedures are provisions of substantive law under s7(1) - and a reasonable excuse for the delay must be given. If a notice of claim is not given within time, then the respondent must identify the non-compliance and state whether the non-compliance is waived. If the non-compliance is not waived, at least one month must be given to the claimant to satisfy the respondent that compliance has been observed, or to so comply.

A complying notice of claim imposes obligations on the respondent. The respondent must give written acknowledgment that they are a proper respondent to the claim (s 10); and under s 12(2)(a) the respondent must give the claimant written notice stating that they are satisfied that the notice of claim is a complying Part 1 notice of claim. Further obligations are then placed on the respondent and the claimant to attempt to resolve the claim through settlement.

3 Problems with Notice of Claim Requirements in this Context

Some of the difficulties for claimants in this context flow from the Act’s retrospective operation. For claimants who suffered injury long before the commencement of the Act, it is logically and practically impossible to meet the obligation to submit a notice of claim within the time allotted, since the Act and its obligations did not exist both at the time of the events and at the claimants’ majority. For example, a claimant born on 1 January 1960, who was abused in an institution between 1967 and 1978, cannot have submitted a notice of claim within the time prescribed. Because the Act is retrospective, the claimant’s time period in which they had to submit the notice of claim would be nine months from turning 18. This means that their notice of claim was due on 1 October 1978. At that time, the Act did not exist, nor did the notice of claim requirement, and nor did the notice of claim form. It was impossible for the claimant to comply with the statutory requirement.

By retrospectively imposing statutory obligations that are impossible to satisfy, and without making provision exempting claimants in these cases, or at least clarifying what claimants in this class should do, the Act has done two things. First, it has added to the

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86 Sections 19(1) and (2).
87 Section 9(5).
88 Section 12(2)(b).
89 Section 20. Division 2 of this chapter of the Act (ss 21-34) compels the parties to provide sufficient information to each other to enable an assessment of liability and quantum of damages. If settlement has not been reached by this point, s 36 provides for a compulsory conference to take place. This conference can be convened by agreement but should occur within 6 months of the claimant’s notice of claim or within 6 months of the respondent notifying the claimant that the respondent was a proper respondent under s 10(1). If the claim is not settled at the conference, then the parties must exchange written final offers: s 39. Section 42 then provides a period of 60 days from the conclusion of the compulsory conference within which a proceeding in court should be started.
90 This reasoning also applies to cases of past abuse where court proceedings were instituted between 1 July 2002 and 29 August 2002, with the proceedings stayed under s 77E of the amended Act.
legal confusion and procedural legal complexities that plague plaintiffs in this class. Second, it has added to legal costs and judicial proceedings to seek clarification of what claimants in this class are required to do.

Claimants in this position who submit a notice of claim can be impeded from proceeding. In responding to the notice of claim, the respondent can argue that the notice is noncompliant because it was not given within nine months of the incident, and can refuse to waive compliance. The claimant’s reply that it was logically and practically impossible to do so, and therefore there is a reasonable excuse for delay, can be rejected. The claimant could argue that if the period of limitation is deemed to have expired, then the Act does not make provision as to how a claimant in this situation is to lodge a notice of claim. A respondent can refuse this claim as well.

As a result, a claimant can be forced to take one or even two further steps before even getting to the stage of seeking the court’s discretion under the Limitation of Actions Act for an extension of time in which to proceed. First, claimants can be forced to bring originating applications to seek court leave to proceed. Section 18(1)(c)(ii) empowers the court to authorise the claimant to proceed with the claim despite the non-compliance, and this leave is not contingent on the demonstration of a reasonable excuse for delay, although the reason for delay is relevant. Yet even if this leave was granted, the need to apply for it causes delay and escalation of costs, which is avoidable and contravenes the purposes of the Act.

Second, claimants who are relying on the recent discovery of a material fact of a decisive character, where the period of twelve months after the discovery of which fact the time in which to proceed is nearing expiry, will have to seek court leave to proceed on the basis of an urgent need to proceed. If a claimant in this situation is successful in gaining this leave to proceed, the proceeding is stayed, and the notice of claim must be submitted, which takes the claimant back to the beginning of the process, therefore creating the need to seek court leave under s 18 to proceed.

The case of Grimes v Synod of the Diocese of Brisbane demonstrates some of these and associated problems. The applicant sought leave under s 43 to commence proceedings despite non-compliance with the Act, based on an urgent need to start a proceeding. The applicant claimed he had suffered incidents of sexual abuse from 1968-71. He proposed to claim damages for negligence, breach of contract, breach of fiduciary duty, and unconscionable conduct and damages under the Trade Practices Act.

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91 Gillam v State of Queensland [2003] QCA 566 (Unreported, Queensland Court of Appeal, Jerrard JA and Dutney and Philippides JJ, 12 September 2003). For applicants seeking the court’s indulgence under this provision, adequacy of the explanation for delay will be one relevant factor; others include the length of the delay, the likelihood of prejudice to the defendant arising from the delay, the circumstances creating the claim, and the claimant’s ultimate prospects of success: see for example Stanton v DMK Forest Products Pty Ltd [2003] QDC 150 (Unreported, District Court of Queensland, Wilson DCJ, 14 April 2003); Hodges v Avdyl [2003] QDC 347 (Unreported, District Court of Queensland, Boulton DCJ, 14 October 2003); and Arai v Sushi Train (Australia) Pty Ltd [2004] QDC 162 (Unreported, District Court of Queensland, Forde DCJ, 4 June 2004).

92 Under s 43.

93 According to s 43(3).

94 Grimes v Synod of the Diocese of Brisbane (Unreported, Supreme Court of Queensland, Muir J, 8 January 2003). While this case concerns the alleged infliction of abuse in a private school setting, its relevance in legal terms applies equally to survivors of past State institutional abuse.
Because of the lapse of time between the events and the claims, the claims were barred under the *Limitation of Actions Act*, apart from the claim based on breach of fiduciary duty.

The out-of-time claimant had in the last twelve months discovered a material fact of a decisive character which, for the purposes of the *Limitation of Actions Act*, may entitle him to an extension of the limitation period, and this twelve month period was about to expire. This would constitute an urgent need to commence proceedings since under the *Limitation of Actions Act*, an application to extend time must occur within twelve months of the discovery of the material fact. In this circumstance, the danger is that the s 43 application becomes a quasi-s 31 hearing. Muir J’s comments imply that this is what occurs, and subsequent judgments also indicate this.

Yet on an application under s 43, if the court commences by seeking to determine if the client’s material fact is hopeless or otherwise before deciding if there is an urgent need to file proceedings, then claimants are put at a considerable disadvantage. The reason why this approach to an application under s 43 is undesirable is that before the *Personal Injuries Proceedings Act 2002* (Qld), a claimant could file court proceedings without impediment within 12 months of a material fact, to safeguard the claim. An application under the *Limitation of Actions Act* for an extension of time, which is an extensive task involving considerable expense and resources, could then be lodged at any time up to and including the trial, with the claimant having the benefit of full investigation and disclosure from the respondent. This investigation and the respondent’s disclosure can strengthen the argument for extending time, or can yield even more persuasive evidence of a decisive material fact. By being forced to make submissions on limitation issues at the s 43 application, the claimant is denied the benefit of full disclosure from the respondent, and is compelled to advance the extension argument without a full and proper investigation.

Among other reasons, the respondent argued against the exercise of leave on the ground that the applicant had not adduced evidence to demonstrate the possibility of obtaining an extension of time under the *Limitation of Actions Act*. Although this argument was not accepted, the court’s comments suggest that the urgent need was not assessed simply by acknowledging the formal facts about expiry of time. Rather, the assessment of urgent need is undertaken by a substantive examination – albeit in less

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95 The claims under the *Trade Practices Act* were correctly deemed unsustainable.
97 The task is made all that more substantial in cases where the incident occurred many years ago.
98 The respondent argued against the exercise of leave on three bases. First, there had been no attempt to explain the delay in bringing the application; second, there was little material relied on to show the possibility of gaining an extension of time under the *Limitation of Actions Act*; and third, that because of the operation of s 77D the application was unnecessary. His Honour dismissed the lack of explanation of delay argument. The s 77D argument was also dismissed, although without detailed analysis. However, it is submitted that s 77D only extends the time in which a proceeding may be commenced for events occurring before 18 June 2002 if the period of limitation under the *Limitation of Actions Act* ends during the period between 18 June 2002 and 18 December 2003: s 77D(1)(a). Since in this case the limitation period under the *Limitation of Actions Act* ended decades before this time, s 77D appears to have no application here.
This examination aspect does not appear to be incorporated in s 43 and it is submitted that it should be the sole province of the court hearing the s 31 application to examine that application’s merits. Although the court did grant leave to start a proceeding, the proceedings would be stayed under s 43(3) and the applicant would then be forced to observe the notice of claim requirements, introducing the problems noted above and the need to apply under s 18 for further court authorisation to proceed.

V Conclusion

It is tragic that the existence of the Forde Inquiry and the CMC Inquiry should have been necessary. However, these inquiries should constitute a further advance in several senses. They have the primary function of illuminating events previously concealed, of discovering the truth about what happened. They can acknowledge survivors’ testimony and accept the veracity of their accounts. They can recognise the suffering that survivors endured and apologise for it. They also provide the opportunity for redress. Perhaps most importantly, the findings of these inquiries should inform future government action and policy so that these events are not repeated.

The Queensland government bears the onus of explaining why it has rejected the moral imperative within Recommendation 39 to compensate individuals who were assaulted, raped, psychologically abused and neglected while living in its institutions and in its care. It is no answer to say that the events that occurred then were acceptable by that time’s standards of conduct, and should not be judged on the standards of conduct of 2004. The Forde Inquiry, if it needed to, established that the acts perpetrated on individuals in State institutions lay far beyond any acceptable limits of human conduct. It is no answer to say that the State cannot afford to compensate survivors of the abuse. The amount involved would not be impossible; other States have afforded it. If the funds do not exist now – a dubious proposition - then the State should find a way to create them. Moreover, the State is not the only responsible source of funding since the religious authorities responsible are also morally obliged to contribute to the compensation fund, and should be pressured by the State to do so.

The government failed to ensure that these citizens were treated appropriately at the time they lived in its institutions and in its care. Now, it has the opportunity and the moral obligation to redress the suffering that was inflicted because of former...
negligence. By failing to do so, it is aggravating the initial abuse. By directing survivors of that abuse to take futile, costly action in the courts, when the government was opposing those individuals’ access to the courts, and when the courts were not permitting such action to proceed, further psychological and financial damage was inflicted on any survivors who took that advice. Finally, by enacting legislation without provision for how individuals in this situation are to proceed, adding new passages to the existing legislative and judicial labyrinth, the government has compounded the suffering of these people.

Governments elsewhere have acted appropriately in this context. To date, Queensland’s government has not. The lack of compensation and the legislative impediments to courts are the two hallmarks of Queensland’s response. So far, measured against the five principles that the Law Commission of Canada declared must be respected in all processes through which survivors of institutional abuse seek redress, the Queensland government has failed on all counts. Survivors of institutional abuse do not possess all information necessary to make informed choices about what course of redress to undertake. They do not have access to sufficient counselling and support. Those conducting and managing the process do not have the training necessary to enable them to understand the circumstances of survivors. Continual efforts to improve redress programs have not been made. The redress process has caused further harm to survivors.

Apart from policy formation and implementation to decrease the future incidence of child abuse and neglect, both within State institutions and beyond them, the first urgent need in this context is the delivery of redress for past wrongs. For survivors of institutional child abuse, this redress can and should be secured through a compensation scheme. On any assessment of the situation, it is difficult to produce a morally persuasive reason not to implement such a scheme. For survivors, it would be far better delivered late than never, both in pragmatic and moral terms. For the State, it would not be economically impossible. The governments of the 1990s and 2000s in Queensland are not responsible for what happened in Queensland institutions before their tenure, but contemporary governments are responsible for how they act with public trust and funds when the shortcomings of former governments are revealed. To continue denying the State’s former culpability in allowing the damage inflicted on children in its care, and to continue to withhold appropriate redress, current governments are inflicting their own damage.

The second urgent need is for legislation that recognises the unique features and consequences of child abuse, and which adjusts time-related provisions accordingly, to enable access to civil courts for survivors of child abuse.\textsuperscript{102} This has happened in other

\textsuperscript{102} This includes the victims of abuse in foster care recognised by the 2004 inquiry, above n 5, for whom there has been no mention of compensation or legislative change. The legislation already recognises some distinguishing features of sexual assault, which are relevant to cases of child sexual abuse: certain provisions of the \textit{Personal Injuries Proceedings Act 2002} (Qld) are explicitly declared not to apply to proceedings concerning personal injury if the act causing the injury is unlawful sexual assault or other unlawful sexual misconduct. Section 6(4) states that ss 40(2) and 56 do not apply to these cases. Section 40(2) limits costs in cases where a mandatory final offer of between $30 000 and $50 000 is accepted. Section 56 concerns costs in cases involving damages awards under $50 000. Section 52(2) of the \textit{Civil Liability Act 2003} (Qld) preserves the possibility of exemplary or punitive damages for personal injury cases involving this conduct as well, while sub-s (1) abolishes that head of damages generally.
jurisdictions. To say that this would benefit both past and future survivors of institutional and non-institutional abuse is incorrect; it would merely provide them with a more similar chance of gaining access to justice as all other classes of personal injury claimant. This is not a benefit, but the better provision of an entitlement. Protection for defendants must not be compromised, but this is easily achievable.

At the least, the *Limitation of Actions Act* time limit of three years from majority in which to institute proceedings should not apply to cases of childhood abuse perpetrated by persons on whom the victim was dependent. The *Personal Injuries Proceedings Act* pre-court process aimed at negotiation and speedy settlement of claims should perhaps not be made only prospective, but survivors of institutional and non-institutional abuse – especially long past survivors - should not be excluded from the civil litigation process. In the *Personal Injuries Proceedings Act*, a definition of ‘reasonable excuse’ for delay in submitting a notice of claim should expressly include cases of childhood abuse, hence allowing victims of childhood abuse to institute proceedings and comply with the pre-court process.\(^{103}\) The government has the responsibility and the power to choose what happens for these citizens. It also has the moral obligation to make a justifiable choice. It should take action now to prevent further suffering in the future.

\(^{103}\) As well, a number of insensitive questions on the notice of claim form itself, which are not of vital importance in child abuse cases, should be stipulated as not applying to cases of childhood abuse. According to the *Personal Injuries Proceedings Regulation 2002* (Qld), certain information about the incident must be provided by the claimant in Part 1 of the notice of claim: reg 3. The requirements in reg 3 are embodied in the official form which must be submitted: *Personal Injuries Proceedings Act 2002* (Qld) Form 1 Version 3: Notice of Claim (Non-Health Care Claims). This form contains a warning that s 73 requires that the information given be true, correct and complete. Among other things, the claimant must describe what the injured person was doing (Form 1 Version 3: Notice of Claim, Question 11), and must provide information about the availability of a protective device (Question 12). The claimant is also required to draw a diagram of the incident (Question 8). For survivors of child abuse, to be compelled to answer such questions is traumatic. There are enormous qualitative differences between a typical personal injury claim and one involving sexual assault. The indiscriminate modelling of the notice of claim form on the motor accident model is inappropriate. The form should be amended to make claimants in child abuse cases exempt from answering questions that cause particular distress.
ASSESSING THE SCOPE OF THE POST-IPP ‘CLOSE ASSOCIATE’ SPECIAL LIMITATION PERIOD FOR CHILD ABUSE CASES

DR BEN MATHEWS*

1 INTRODUCTION

The 2002 Ipp Review of the Law of Negligence\(^1\) recommended the enactment of a special limitation period for the commencement of personal injuries litigation in cases where a child is injured by a parent or a person who is in a ‘close relationship’ with the child’s parent. A person would be in such a relationship with a child’s parent if he or she had a relationship with the child’s parent, such that the child’s parent might be influenced not to bring an action on the child’s behalf (the first limb of the definition); or, if the person’s relationship with the child’s parent was such that the child might be unwilling to disclose the relevant acts (the second limb of the definition).\(^2\) In recommending this special limitation period, the Ipp Report appeared to acknowledge features of some classes of child abuse cases which make a standard personal injuries limitation period unjustifiable. Following this recommendation, New South Wales and Victoria enacted legislative changes which aim to give survivors of child abuse perpetrated by a parent or a person classed as a ‘close associate’ of a parent a justifiable period of time in which to institute personal injuries proceedings.

This article discusses the Ipp Report’s recommendations regarding the special limitation period and the reasons given for those recommendations, which are largely motivated by psychological evidence concerning the effects of child abuse. It then outlines the legislative provisions in New South Wales and Victoria, which embody the essence of the Ipp

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\(^2\) Hereafter referred to as the second limb.
recommendations. The article then consults evidence of the psychological effects of child sexual abuse, and studies of non-disclosure and delayed disclosure by survivors of child sexual abuse, to inform an assessment of the conceptual basis of the second limb of the close associate provision. Using the psychological evidence and empirical evidence of disclosure and non-disclosure as analytical tools, this article will argue that the second limb of the close associate provision would be better predicated not on the tortfeasor’s perceived relationship with the child’s parent, but on the nature of the acts and circumstances of abuse and their impact on the child’s willingness to disclose their abuse. The article is of particular relevance to New South Wales and Victoria, but, given the desirability and likelihood of other Australian jurisdictions enacting a special limitation period for child abuse cases, it is also relevant to the rest of Australia.

II STANDARD LIMITATION PERIOD FOR PERSONAL INJURY CASES

While enabling individuals to have access to courts to seek civil compensation for personal injuries, statutes also impose time limits on when a person can institute such proceedings. Motivating these limits are a number of policy concerns which possess theoretical and practical force when applied to most types of personal injuries actions. The best of these is that a reasonable limitation period is necessary to ensure a fair trial for the defendant by ensuring the availability of fresh evidence. Other reasons acknowledged as supporting limitation periods are that people need to be able to proceed with their lives unencumbered by the threat of an old claim, plaintiffs should not sleep on their rights, and the public has an interest in the timely resolution of disputes. Accordingly, in New South Wales, Queensland, South Australia, Tasmania, Victoria, the Australian Capital Territory and the Northern

3 Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541, 551 ff.
Territory, actions seeking damages for personal injuries must generally be commenced within three years from the date on which the cause of action arose.  

A  Extensions of time

In cases where time has expired, most limitation statutes permit plaintiffs to apply to the court for an extension of time, based on the claim that the plaintiff has only recently discovered material facts decisive to the case, such as the presence and extent of the injury, as well as its cause. However, in extension applications made by adult survivors of child sexual abuse, judicial findings about the knowledge the applicant is perceived to already have possessed, and expectations about when it was reasonable for him or her to have taken steps to ascertain the decisive facts and hence to have instituted proceedings, can deny the application for an extension of time. In addition, to grant the extension of time, the court must be satisfied that the justice of the case requires the extension. Such satisfaction will only crystallise if, among

4 Limitation Act 1969 (NSW) ss 18A(2) and 50C; Limitation of Actions Act 1974 (Qld) s 11; Limitation of Actions Act 1936 (SA) s 36; Limitation Act 1974 (Tas) s 5(1); Limitation of Actions Act 1958 (Vic) ss 5(1AA) and 27D(1)(a); Limitation Act 1985 (ACT) s 16B; Limitation Act 1981 (NT) s 12(1)(b). In New South Wales and Victoria, actions brought concerning injury sustained after the amendments in those jurisdictions have time running from the date of discoverability rather than from when the cause of action accrued: Limitation Act 1969 (NSW) s 50C; Limitation of Actions Act 1958 (Vic) s 27D. The Limitation Act 1935 (WA) s 38(1)(b) sets a time limit of four years for actions for trespass to the person, assault and battery, and s 38(1)(c)(vi) sets a period of six years for negligence. As Wilson v Horne (1999) 8 Tas R 363 held that an action exists in both negligence and trespass for the acts constituting child sexual abuse, different limitation periods can operate. An application for special leave to appeal this decision was refused: Wilson v Horne (1999) 19 Leg Rep SL4a. At the time of writing, bills proposing amendments to the legislation in Western Australia (Limitation Bill 2004) and Tasmania (Limitation Amendment Bill 2004) were being considered, so references to current provisions in those jurisdictions need to be read subject to possible amendment in the near future.

5 Limitation Act 1969 (NSW) ss 58, 60A, 60G, 62A and 62D; Limitation of Actions Act 1974 (Qld) s 31; Limitation of Actions Act 1936 (SA) s 48; Limitation Act 1974 (Tas) s 5(3); Limitation of Actions Act 1958 (Vic) ss 23A and 27K; Limitation Act 1985 (ACT) s 36; Limitation Act 1981 (NT) s 44. The current Limitation Act 1935 (WA) has no general extension provision.

other things, the court is of the view that the defendant’s right to a fair trial has not been prejudiced by the loss of evidence with which he or she could have mounted a defence. Due to factors that will be discussed in Part IV of this article, claims for damages arising from alleged child sexual abuse will more often be brought after long periods of time than will other types of claims, and so applications for extensions of time are more susceptible to defeat, whether based solely or partly on this consideration of delay. Such applications in the context of child abuse cases will be discussed further in Part IV to analyse the second limb of the close associate provision.

B Effect of minority

Most jurisdictions have recognised that an injured child is impeded from bringing an action, and of being able to compel an action to be brought on his or her behalf, and so have adapted the application of the standard three year limitation period for cases of injury to children. This adaptation has worked through the device of classifying minors as being under a legal disability, and this status has been given the effect of stopping the limitation period from running until the attainment of majority. In most but not all Australian jurisdictions, this suspension of time during minority still operates. In Queensland, South Australia, the Australian Capital Territory and the Northern Territory, therefore, a survivor of child sexual abuse has three years from turning 18 to institute proceedings, and in Western Australia a survivor will have until 22 or 24 depending on the whether the action is brought in trespass or negligence. However, as will now be seen, Tasmania has a different approach, and, of particular relevance to this article, the position in New South Wales and Victoria has been changed in the wake of the Ipp Report.

7 In Queensland, Carter and Applications 861 and 864, above n 6, are good examples of this; as well, see Calder v Uzelac [2003] VSCA 175 (Unreported, Victoria Court of Appeal, Buchanan and Chernov JJA and Ashley AJA, 14 November 2003); but contrast McGuinness v Clark, above n 6.

8 Limitation of Actions Act 1974 (Qld) ss 5(2), 11, 29(2)(c); see also Limitation of Actions Act 1936 (SA) s 45; Limitation Act 1974 (Tas) ss 2(2), 26; Limitation Act 1935 (WA) s 40; Limitation Act 1985 (ACT) ss 8(3), 30; Limitation Act 1981 (NT) ss 4(1), 36.
III  IPP REPORT AND LEGISLATIVE CHANGES

A  Recommendation regarding minority and disability

The terms of reference of the Ipp Review Panel were to examine methods to reform the common law to limit liability and quantum of damages in civil proceedings.\(^9\) Among these terms, the Review Panel was required to develop and evaluate options for a uniform limitation period of three years for all persons.\(^{10}\) To this end, one of the significant recommendations of the Ipp Report was the negation of the traditional classification of a child as being under a legal disability, at least for those children who were in the custody of a parent or guardian (and could therefore have their actions brought by the parent within a standard time period). Consequently, this would abolish the suspension of time during minority. Effectively, discoverability of the child’s cause of action would be sheeted home to the child’s parent or guardian, and the parent or guardian would be expected to institute proceedings on the child’s behalf, within three years of the cause of action arising – irrespective of whether the child was still a child or not.\(^{11}\)

1  Adoption of recommendations in New South Wales and Victoria

New South Wales and Victoria adopted the substance of these recommendations. Legislative provisions enacted in 2002 and 2003 respectively abolished the classification of a child as being under a legal disability (in Victoria, termed legal incapacity) if he or she was in the custody of a capable parent or guardian.\(^{12}\) With this came the abolition of the suspension of time during minority,\(^{13}\) and the imposition on the injured child’s parent or guardian of the responsibility to bring the action. In New South Wales, the action must be brought within

\(^9\) Ipp Report, above n 1, ix.
\(^{10}\) Ibid x.
\(^{11}\) Ibid 95-97 [6.46-6.51], Recommendation 25.
\(^{12}\) Limitation Act 1969 (NSW) s 50F(2)(a); Limitation of Actions Act 1958 (Vic) s 27J(1)(a). The provisions apply to cases where injury was sustained as a result of acts occurring on or after 6 December 2002, and 21 May 2003 respectively: Limitation Act 1969 (NSW) s 50A(2); Limitation of Actions Act 1958 (Vic) s 27N.
\(^{13}\) Limitation Act 1969 (NSW) s 50F(1); Limitation of Actions Act 1958 (Vic) s 27J(2).
three years from when the action is discoverable, while in Victoria the action must be brought within six years from this date. Discoverability in these cases is sheeted home to the child’s parent or guardian, and an action will be discoverable on the first date when the parent knew or ought to have known the fact of the injury, the fact that the injury was caused by the fault of the defendant, and the fact that the injury was of sufficient seriousness to justify bringing an action. In both jurisdictions, a longstop of 12 years from the date of the wrongful acts applies. In New South Wales, but not Victoria, there is a special extension provision for cases where an adult plaintiff who was injured as a child can demonstrate that his or her parent irrationally failed to bring an action on his or her behalf.

These changes bring New South Wales and Victoria close to but beyond the position operating in Tasmania, which has possessed a unique situation in Australian jurisdictions for some time. Since 1974, Tasmania has not suspended time for minors injured while in the custody of a parent, in cases of personal injury caused through negligence, nuisance or breach of duty. As the phrase ‘breach of duty’ has been held by the Victorian Court of Appeal to include acts of intentional trespass, this exclusion of the suspension of time operates whether the action is brought in trespass or negligence. Tasmania, however, lacks the legislative detail of the New South Wales and Victorian legislation: its statute does not have definitions of discoverability, nor does it have similar extension provisions to those in the majority of the mainland jurisdictions. As well, and of even more significance given its exclusion of the suspension of time for minors, Tasmania lacks a special limitation period of the type enacted in New South Wales and Victoria.

14 Limitation Act 1969 (NSW) ss 50C(1) and 50F; Limitation of Actions Act 1958 (Vic) ss 27J and 27E.
15 Limitation Act 1969 (NSW) s 50F(3); Limitation of Actions Act 1958 (Vic) s 27J(3).
16 Limitation Act 1969 (NSW) s 50D(1); Limitation of Actions Act 1958 (Vic) s 27F(1).
17 Limitation Act 1969 (NSW) s 50C(1)(b); Limitation of Actions Act 1958 (Vic) s 27E(2)(b). For a discussion of how these provisions will operate, see B Mathews, ‘Post-Ipp special limitation periods for cases of injury to a child by a parent or close associate: new jurisdictional gulfs’ (2004) 12(3) TLJ 239.
18 Limitation Act 1969 (NSW) s 62D.
19 Limitation Act 1974 (Tas) s 26(6).
B  Recommendations regarding special limitation period for injury by a parent or someone classed as being in a ‘close relationship’ with the parent

The Ipp Panel was charged with the contraction of liability and quantum of damages, and the Ipp Report’s recommendation of the general abolition of the legal disability of minors, and the imposition on children’s parents and guardians of the responsibility to institute proceedings on their behalf within a shorter period of time, exemplify the strategic approaches used to fulfil the Panel’s policy brief. This makes the recommendations made by the Ipp Report about cases of injury to a child inflicted by the child’s parent or by a person who was in a ‘close relationship’ with the child’s parent all the more remarkable, constituting a particularly forceful endorsement for enacting special limitation provisions for certain classes of case. Instead of reverting to the standard position of suspending time during minority for cases where a child is injured by a parent or by someone having a close relationship with the parent, thus giving the child until 21 to institute proceedings, the Ipp Report made a well-informed and significant recommendation.

The Ipp Report recognised that in cases where a child is injured by a parent or a person classed as being in a close relationship with a parent, there are unjustifiable difficulties presented by a standard limitation period of majority plus three years.\(^{21}\) The Report defined a person as being in a ‘close relationship’ with the child’s parent or guardian if the relationship was such that:\(^{22}\)

(a) the parent or guardian might be influenced by the potential defendant not to bring a claim on behalf of the minor against the potential defendant; or

(b) the minor might be unwilling to disclose to the parent or guardian the nature of the actions that allegedly caused the damage.

\(^{21}\) Ipp Report, above n 1, 96-97 [6.52-6.55].

\(^{22}\) Ibid 96 [6.52].
The Ipp Report recommended that in these cases, ‘special rules’\(^{23}\) should be enacted to provide a justifiable period for plaintiffs to institute legal proceedings. First, the Report recommended that the limitation period should only begin to run from when the plaintiff turned 25 years old.\(^{24}\) Second, the limitation period should be three years.\(^{25}\) Third, since the date of discoverability may not occur until after expiry of this three year period (that is, after the plaintiff turns 28), the court should have discretion at any time to extend the limitation period to the expiry of a period three years after the date of discoverability.\(^{26}\)

1 Reasons underpinning the recommendation

The reasons for the recommendation that there be special rules for these cases are not thoroughly detailed in the Report. However, there is an explicit statement that the recommended strategy would ‘give plaintiffs a reasonable time to be free of the influence of the parent, guardian or potential defendant (as the case may be) before having to commence proceedings.’\(^{27}\) Earlier in the Report, in the context of determining when a limitation period should commence, there is also an acknowledgment that sexual and physical abuse often produces delayed psychological effects.\(^{28}\) There appears to be, therefore, three notable points in the underlying reasoning of the Panel. The first explicit point is that a child who is injured by a parent or by a person in a ‘close relationship’ with the parent requires a substantial period of time in which to become sufficiently free of the influence of the parent or person in a close relationship with the parent to be able to commence legal proceedings against the tortfeasor. The second point is that the Panel recognised that delayed psychological effects commonly occur in cases of child abuse, both sexual and physical. Third, assuming that the Panel’s reasoning about the delayed psychological effect of child sexual and physical abuse

\(^{23}\) Ipp Report, above n 1, 96 [6.53].
\(^{24}\) Ibid 96 [6.54].
\(^{25}\) Ibid.
\(^{26}\) Ibid 97 [6.55].
\(^{27}\) Ipp Report, above n 1, 96 [6.54].
\(^{28}\) Ibid 88 [6.11].
informed their conclusions about the special limitation period, the recommended special limitation period can apply not only to cases of sexual abuse but also to physical abuse of children.\textsuperscript{29}

The Ipp Panel did not invent these reasons, but implicitly endorsed a body of judicial and academic commentary about the reasons for not having a standard limitation period for cases of child abuse.\textsuperscript{30} This body of commentary is not mere opinion since it is itself driven by recognition of psychological evidence about the sequelae of child sexual abuse. This evidence will be discussed in Part IV, but it can be briefly noted here that the evidence proves that in child abuse cases, particularly when the abuse is sexual, the nature and extent of the psychological injury often takes many years to manifest, and the causal connection between abuse and injury also typically takes a long time to be realised. Moreover, the tortfeasor’s position of superiority often deters survivors from commencing litigation; and in many cases, due to feelings of shame, embarrassment, and a misplaced sense of responsibility for the acts, the victim will not even disclose the abuse, or disclosure will only occur after many years.

The adoption of a special limitation period by New South Wales and Victoria demonstrates a further endorsement of this view, and it is clear from statements in New South Wales Parliamentary Debates that the primary or even sole function of the special limitation period

\textsuperscript{29} This article focuses on the use of the second limb of the close associate provision in cases of child sexual abuse, because the evidence referred to in this article is of direct relevance to cases of child sexual abuse, and because it is anticipated that more claims will be brought for child sexual abuse than for child physical abuse. However, it may be that the special limitation period is also applicable to claims for damages brought in cases of child physical abuse.

is to make justifiable provision for the institution of civil proceedings in child abuse cases.\textsuperscript{31} The provisions enacted in these two jurisdictions will now be detailed.

## 2 Adoption of recommendations in New South Wales and Victoria: enactment of special limitation period

New South Wales and Victoria adopted the substance of the Ipp recommendations, although the provisions enacted were not identical to those modelled by the Ipp Report. The provisions state that when a child is injured by the child’s parent or guardian, or by a person who is a ‘close associate’ of the child’s parent or guardian (the legislative provisions replace the Ipp Report’s use of the ‘close relationship’ descriptor with ‘close associate’), the action is discoverable by the victim when he or she turns 25 years of age, or when the cause of action is actually discoverable, whichever is later.\textsuperscript{32} A longstop period of 12 years runs from when the victim turns 25,\textsuperscript{33} therefore ending when the victim turns 37. Before turning to the close associate provision, and in particular, the problematic second limb of that provision, it is pertinent to comment on the significance of the confinement of discoverability to actual discoverability, and to clarify the effect of the new provisions.

The stipulation of actual discoverability is significant because it rules out any possibility of an argument by a defendant based on constructive discoverability. A defendant cannot claim that a plaintiff’s time period started to run from when it could be argued that the plaintiff ought to have known of the three discoverability factors. Such arguments about what a survivor of child abuse ought to have known, and when that person ought to have known particular facts related to discoverability and hence ought to have instituted proceedings, have been

\textsuperscript{31} New South Wales, \textit{Parliamentary Debates}, Legislative Council, 19 November 2002 (Michael Egan, Treasurer, Minister of State Development and Vice-President of the Executive Council), at 6896 ff: ‘There will be very few cases that fall within this important exception. In the main, this exception will be used when a child has been the victim of abuse.’

\textsuperscript{32} Limitation Act 1969 (NSW) s 50E(1)(a); Limitation of Actions Act 1958 (Vic) s 27I(1)(a).

\textsuperscript{33} Limitation Act 1969 (NSW) s 50E(1)(b); Limitation of Actions Act 1958 (Vic) s 27I(1)(b).
successfully used to defeat applications for extensions of time.\textsuperscript{34} If the time period here ran from discoverability whether actual or constructive, rather than running only from actual discoverability, much of the benefit of the special limitation period could have been lost.

The effect of the special limitation period in New South Wales and Victoria is that in this class of case, a plaintiff who has turned 25 has three years to institute proceedings once he or she has actual knowledge of the facts of the injury, of the defendant causing that injury, and of the injury being of sufficient seriousness that it justifies legal action. Effectively then, a plaintiff here may in some cases have until turning 37 to institute proceedings. On the basis of the passage of time, a plaintiff could only be prevented from bringing an action within this 12 year period if it can be shown by the defendant that the plaintiff had actual knowledge of the three discoverability factors at a date more than three years before the plaintiff actually instituted proceedings.

This is a significant widening of time for plaintiffs in this context, effectively expanding the limitation period in cases of child abuse inflicted on a child by a parent or close associate of a parent from the old limit of 21 to the new limit of 37. It is hoped that other Australian jurisdictions will follow the example of these two States, both to enhance access to justice in these cases, and to remedy the current situation which gives people in New South Wales and Victoria a much longer period of time to institute proceedings than possessed by their counterparts elsewhere in Australia.\textsuperscript{35} While being the first Australian jurisdictions to enact a special limitation period for child abuse cases, New South Wales and Victoria are not the first to do so in the wider context. In fact, in Canada, the provinces of British Columbia, Manitoba, Newfoundland, the Northwest Territories, Nova Scotia, Nunavut, Ontario, Saskatchewan and the Yukon permit the institution at any time of civil actions based on sexual assault, having

\textsuperscript{34} See for example \textit{Carter} and \textit{Hopkins}, above n 5.

\textsuperscript{35} For detailed treatment of this point, see Mathews, ‘Post-Ipp special limitation periods’, above n 17, 256.
abolished time limits for this class of case. Furthermore, in five Canadian jurisdictions, the
importance placed on the possible impact on the plaintiff of various relationships of
dependency on the tortfeasor have motivated the extension of this abolition of time beyond
sexual assault cases to all types of assault.

3 The close associate provision

Apart from cases that will arise from injury caused by a parent or guardian, arguably the
major proportion of cases covered by the special limitation period will be cases involving a
close associate of a parent or guardian. A ‘close associate’ of a parent or guardian of the
victim is defined as:

- a person whose relationship with the parent or guardian is such that:
  - (a) the parent or guardian might be influenced by the person not to bring a
    claim on behalf of the victim against the person; or
  - (b) the victim might be unwilling to disclose to the parent or guardian the
    conduct or events in respect of which the cause of action is founded.

The definition of ‘close associate’ includes two circumstances which justify extending the
special time period beyond the situation where the parent or guardian is the tortfeasor.

36 Limitation Act, RSBC 1996, c 266, s 3(4)(k)(i); Limitation of Actions Act, CCSM 2002, c L150, s 2.1(2)(a) and (b); Limitations Act, RSNL 1995, c L-16.1, s 8(2); Limitation of Actions Act, RSNWT 1998, c L-8, s 2.1(2); Limitation of Actions Act, RSS 1978, c L-15, s 3(3.1)(a); Limitation of Actions Act, RSS 1978, c L-15, s 3(1)(3.1)(b)(ii).

37 In Manitoba, the Northwest Territories, Nunavut, Ontario, and Saskatchewan, the abolition of time limits extends to all actions for trespass to the person, assault or battery where at the time of the injury the person was in a relationship of financial, emotional, physical or other dependency with one of the parties who caused the injury: Limitation of Actions Act, CCSM 2002, c L150, s 2.1(2)(b)(ii); Limitation of Actions Act, RSNWT 1998, c L-8, s 2.1(1)-(2) (adopted in Nunavut: Nunavut Act, SC 1993, c 28, s 29); Limitations Act, RSO 2002, c 24, s 10(1)-(3); Limitation of Actions Act, RSS 1978, c L-15, s 3(1)(3.1)(b)(ii).

38 Limitation Act 1969 (NSW) s 50E(2); Limitation of Actions Act 1958 (Vic) s 27I(2). The New South Wales provision is reproduced here. The Victorian provision is substantially identical but uses some different terms, replacing ‘an action’ with ‘a claim’ in (a), and replacing ‘the conduct or events in respect of which the cause of action is founded’ with ‘the act or omission alleged to have resulted in the death or personal injury’ in (b).
first limb embodies the possibility that the tortfeasor’s relationship with the injured child’s parent might dissuade the child’s parent from bringing an action on behalf of the child against the tortfeasor, even if the parent possesses knowledge of the events, the child’s injury, and the seriousness of the child’s injuries. Being predicated on the parent’s inability or unwillingness to bring legal proceedings despite having sufficient knowledge of the discoverability factors, this is conceptually related to the s 62D special extension provision in New South Wales allowing an extension of time to an adult who, despite sustaining injury as a child while in the custody of a capable parent, did not have an action brought on his or her behalf by that parent. This limb of the provision clearly addresses the Ipp Panel’s concerns of ensuring that an injured child is enabled to institute proceedings, and that a plaintiff be free of the influence of the defendant before having to commence proceedings, in this instance with the defendant’s influence being exerted on the child’s parent by the tortfeasor. For the purpose of this article, there appears to be no obvious problem with this limb of the provision, and it is unnecessary to make any further comment about it.

However, the second limb of the provision presents a problem requiring examination. Unlike the first limb, where the parent has knowledge but is unwilling to bring the action because of a personal connection with the tortfeasor, the second limb has a different conceptual basis. It is concerned with situations where the injured child’s parent never gains knowledge of the child’s injury because the child is unwilling to disclose to his or her parent the relevant acts. Yet, according to the way the provision is drafted, with a principle clause overarching and applying equally to each of the two limbs, the definition’s application is limited to circumstances where the child’s unwillingness to disclose is caused by the child’s perception of the tortfeasor’s relationship with the parent.

It is the reason for the child’s unwillingness to disclose that appears contentious, and this requires analysis because of the highly significant consequence arising from the determination of a defendant being classed as a close associate or not. The consequence is that in many
cases, a plaintiff who can successfully argue that the defendant falls within the definition of ‘close associate’ will gain access to the justice system because of the special limitation period, whereas if the plaintiff cannot show this, time will have expired. In many cases of child abuse, the standard limitation period will have expired by the time the plaintiff can pursue a civil claim, as many cases will be brought after the plaintiff turns 25, and a significant number of these will be brought when the plaintiff is closer to 37. Therefore, in a case where the plaintiff does not disclose the abuse and later seeks to rely on the second limb of the close associate provision, a defendant may well try to argue that he or she does not fall within the close associate provision, to effectively bar the plaintiff’s access to court by seeking to have the standard limitation period applied. It is anticipated that in such cases, on the current drafting of the provision, defendants will argue that the child’s nondisclosure was produced not by the child’s perception of the tortfeasor’s relationship with the child’s parent, but for some other reason, thus evading classification as a close associate. If this argument is accepted, then prima facie the second limb does not appear to apply, and the special limitation period will not have been enlivened.\textsuperscript{39}

If the second limb is predicated on the child’s nondisclosure only because of the child’s perception of the tortfeasor’s relationship with the child’s parent, as seems to be the case from the drafting of the provision, then the wording of the second limb is too narrow. The reason for this is that a major cause of a child not disclosing sexual abuse, or of taking a long time to disclose the abuse, is not simply (or even necessarily) the abuser’s relationship with the child’s parent, and the child’s perception of this relationship and its effect. The reasons for nondisclosure and delayed disclosure are much more nuanced, and hinge on the nature of the acts constituting the abuse and, more importantly, the nature of any feelings about those acts that the child may have by himself or herself, or which have been imposed on the child.

\textsuperscript{39} There is obviously no judicial consideration of these provisions yet, since the provisions apply to cases of injury where the relevant alleged acts occurred on or after 6 December 2002, and 21 May 2003 respectively: \textit{Limitation Act 1969} (NSW) s 50A(2); \textit{Limitation of Actions Act 1958} (Vic) s 27N.
The special limitation provision is intended to give victims of child abuse inflicted by parents and close associates of parents a reasonable period of time within which to institute legal proceedings. The core of the second limb of the close associate provision is concerned with the child’s willingness to disclose to his or her parent the acts constituting the alleged wrongdoing. To assess the adequacy of the content of this provision, that is, to ascertain whether the abused child’s perception of the tortfeasor’s relationship with the child’s parent is the dominant factor in children’s unwillingness to disclose their abuse, evidence about disclosure and nondisclosure by child abuse victims needs to be canvassed.

IV EVIDENCE ABOUT NON-DISCLOSURE AND DELAYED DISCLOSURE

A Psychological evidence: common injuries caused by child sexual abuse

Before turning to evidence about the incidence and reasons for nondisclosure and delayed disclosure of child sexual abuse, it is first necessary to gain an understanding of the psychological impact of child sexual abuse on victims, which is inextricably linked with disclosure patterns. Detailed reviews of literature regarding the psychological injuries and effects common to victims of child sexual abuse have been recently undertaken by legal commentators in this context of child abuse and civil limitation periods, but a brief summary here is necessary. Immediate and short-term consequences for a child who is being or who has been sexually abused commonly include depression and low self-esteem, inappropriate sexualised behaviour, difficulty in peer relationships, and, particularly if the

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abuse involves penetration and or is of long duration, post-traumatic stress disorder (PTSD). In this context, PTSD is a particularly significant consequence of abuse because the avoidance symptom of PTSD entails the victim avoiding stimuli associated with the traumatic event, including stimuli that prompt or require recollection of the event. Since disclosing the abuse requires direct recollection and confrontation of it, PTSD alone is a highly significant reason behind many victims’ inability to disclose their abuse. The impact of PTSD can be seen in a number of reported cases of applications to extend the limitation period in cases of child sexual abuse, where the applicants all suffered PTSD.

Adolescents are likely to experience even higher levels of depression and anxiety than younger children because of their greater cognitive understanding of their abuse. Adolescents may also be more susceptible than younger children to self-harm and suicidal ideation and behaviour. Substance abuse and running away from home are also more frequent in adolescents than younger children.

46 Woodhead, Carter, Applications 861 and 864, and Hopkins, above n 6.
Factors of individual resiliency mean that some adults who were exposed to child sexual abuse may not develop psychopathology in later life, particularly if the abuse was of low severity and duration, and if the victim had strong social support following the abuse. Nevertheless, in the long-term, many adult survivors of child sexual abuse appear to be prone to psychopathology including PTSD, which again involves an inability to revisit the events and there is persuasive evidence that adult survivors of child sexual abuse are susceptible to other problems including depressive symptoms, and anxiety and alcohol abuse.

B Psychological evidence: non-disclosure and delayed disclosure of child sexual abuse

1 Non-disclosure and delayed disclosure: incidence

An inability to disclose the abuse is related with these common psychological sequelae. Studies consistently demonstrate that many survivors of child sexual abuse never disclose it, and that for those who do become able to disclose it, many require a long period of time before they can do so. An Australian study found that 48 per cent of the women involved in the study had never disclosed their abuse, and of those who did disclose it, almost half did not

52 Silverman, above n 51.  
53 Mullen (1993), above n 51.
do so until at least 10 years after the first abusive experience. Similarly, an American study of 288 female child rape victims, with the study participants having an average age of 44.9 years, found that only 12 per cent had ever reported their assaults to authorities, and over 25 per cent had never disclosed their assault to anyone prior to the study. In Queensland, the Project Axis survey found that of 212 adult survivors of child sexual abuse, 25 took 5-9 years to disclose it, 33 took 10-19 years, and 51 took over 20 years. Significantly for this analysis, where the perpetrator is a relative, it is even more likely that the delay will be long. A Criminal Justice Commission analysis of Queensland Police Service data from 1994-1998 found that of 3,721 reported offences committed by relatives, 25.5 per cent of survivors took 1-5 years to report the acts; 9.7 per cent took 5-10 years; 18.2 per cent took 10-20 years, and 14.2 per cent took more than 20 years. The effect on disclosure of the perpetrator’s familial connection is clearly relevant to the content of the close associate provision.

2 Reasons for non-disclosure and delayed disclosure

The typical child sex offender is male, and is a relative of the child or is otherwise known to the child. Particularly if the abuser is a family member, victims may suffer numerous abusive acts, which can occur over a period of months or years. In many cases, particularly when the abuser is known to the child - which constitutes the overwhelming majority of cases - a child will make no complaint about the abuse but will instead use strategies to cope with

57 Ibid 82 (Table 25).
58 Fergusson and Mullen, above n 50, 44.
59 Fergusson and Mullen, above n 50, 45-7; Smith, above n 55. An analysis of Queensland Police Service data over a two-year period shows that of 8,504 reported child sex offences, 3,046 were committed by relatives, 1,158 were committed by acquaintances, 979 were committed by relatives, and only 686 were committed by individuals who were unknown to the complainant: Queensland Crime Commission and Queensland Police Service, above n 56, 56.
In general, it seems that children who are abused by a family member are less likely to report the abuse than if they are abused by a stranger, and several studies have found that children are the least likely to disclose when the perpetrator is a natural parent.

However, particularly when considering all incidences of abuse by persons known to the child, studies indicate that there are a number of reasons for nondisclosure and delayed disclosure. One of the most significant factors is fear, which can take different forms. The abused child is often sworn to secrecy through threats or more subtle strategies, and can fear reprisals from the abuser, or can fear that abuse will be perpetrated on other family members. He or she may fear family disruption or dissolution in the event of disclosure, or may fear being punished for making a complaint, or may fear not being believed. As well as these fears, the abused child, especially if young, may fear that the tortfeasor, for whom he or she may well have loyalty and genuine feelings, would be punished.

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67 Berliner and Conte, above n 62; Goodman-Brown, above n 66.
Many very young child victims who lack cognitive development may not understand that the acts are abusive.\textsuperscript{71} Even when a child does know or feel that the acts are wrong and or abusive, he or she may often possess misplaced guilt and feelings of responsibility for the acts.\textsuperscript{72} Common feelings of shame and embarrassment are also prominent factors in victims’ initial and ongoing reluctance to disclose their abuse.\textsuperscript{73}

From this evidence, it can be appreciated that in a number of cases, one reason for nondisclosure or delayed disclosure may indeed involve the child’s perception of the tortfeasor’s relationship with the parent. For example, a young boy abused by his uncle might not disclose the abuse for fear of disrupting the family. This fear would be related to the boy’s understanding that the abuser has a significant relationship with the boy’s parents.

However, most of the reasons identified by the research about nondisclosure and delayed disclosure arise independently of the child’s perception of the abuser’s relationship with his or her parent. Many reasons have no connection at all with the tortfeasor’s relationship with the parent, or with the child’s perception of it. A large proportion of tortfeasors (sports coaches, teachers, clergy, and parents and relatives of friends) will not have any relationship with the child’s parent but the child may still not disclose, or may only disclose after a long delay, for the reasons identified by the psychological research. In addition, even where the child is reluctant to disclose because of the tortfeasor’s close relationship with the child’s parent, that might be only one of the reasons motivating the child’s silence. Other reasons such as shame and fear of reprisal could play a larger role in the child’s nondisclosure.

\textsuperscript{71} Berliner and Conte, above n 62.
\textsuperscript{73} D Finkelhor, A sourcebook on child sexual abuse (1986) Sage, Beverley Hills.
Throughout Australia there are very few reported cases where victims of child abuse have been able to institute proceedings against responsible parties, largely because child abuse (especially sexual abuse) has only gained medical and psychological recognition in the last 20 years or so, with public consciousness occurring later still, and because the psychological sequelae of abuse and the time limits imposed on actions for injury sustained as a child have been used by defendants to defeat claims. Yet, cases where plaintiffs have sought an extension of the limitation period to enable the institution of civil proceedings contribute to an analysis of the second limb of the close associate provision. In particular, the reasons for these plaintiffs’ delayed disclosure exemplify both psychological evidence of the consequences of child sexual abuse and the findings of empirical studies of delayed disclosure and non-disclosure, and demonstrate that a perception of the perpetrator’s relationship with the child’s parent is not a particularly relevant factor in delayed disclosure.

For example, in *Williams v Corporation of the Sisters of Mercy*,75 the plaintiff suffered abuse between the ages of seven and 11, and did not disclose it until age 20 because the abuser, a priest at the orphanage where the plaintiff resided, threatened to kill him if he told anyone what was happening. Even after this disclosure, which was made to his mother, no action was taken because the plaintiff’s mother begged him not to say anything to anyone because of the embarrassment she thought it would cause the family, and because she did not want to take action against the church. The plaintiff only disclosed the abuse in 1994, aged 58, some 47 years after the abuse ceased and 38 years after his initial disclosure.76 In *Woodhead*, the plaintiff was abused between the ages of seven and 13 by a friend of her adoptive parents, but she did not disclose the abuse until she was 13, and, due to PTSD, she was not able to thoroughly discuss the abuse until she was in her mid-twenties.77 In *Carter*, the plaintiff, who

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74 For a detailed discussion of this, see Mathews, ‘Judicial consideration of reasonable conduct by survivors of child sexual abuse’, above n 6.
76 Ibid 2-3.
77 *Woodhead v Elbourne*, above n 6, 221-24.
resided in an orphanage and who was abused in multiple ways by a number of parties including allegedly being raped by an orphanage employee from the age of seven, originally complained of this abuse aged eight but was assaulted and punished by authorities for making the complaint. In large part due to PTSD, she did not disclose her history of abuse in detail until 1997, more than 25 years after she left the orphanage.\(^\text{78}\) In the case of Applicant S, the plaintiff, who was abused by her schoolteacher when she was aged eight to 10, did not disclose the abuse until 1998, more than 30 years after the events. This delayed disclosure was caused by several factors including PTSD, shame, guilt, self-blame, and the belief that nobody would believe her if she disclosed the abuse.\(^\text{79}\) Similarly, in Calder, the plaintiff, who alleged abuse by her brother when she was aged 13, also delayed her disclosure because of feelings of intense shame, guilt, self-blame, and misplaced responsibility for the abuse. There, the plaintiff only became able to disclose and explore her experience in 2000, 28 years after they occurred.\(^\text{80}\) As a final example, the plaintiff in the case of Wilson, who was abused by her uncle when she was aged five to 12, delayed her disclosure because her uncle told her the events were secret, and she did not realise the abusive acts were wrongful. She also suffered PTSD, and these facts and consequences combined to delay her disclosure of her abuse until 1994, 14 years after the abuse ceased.\(^\text{81}\)

Therefore, the psychological and empirical evidence about disclosure of child sexual abuse, which are exemplified by the factual histories of applicants for extensions of time in child abuse cases in Australia, shows that the second limb of the close associate provision should not be limited to cases where a child does not disclose the acts because of the child’s perception of the tortfeasor’s relationship with the child’s parent. Instead, the conceptual core of the second limb - the child’s unwillingness to disclose the acts causing the injury - merits the activation of the special limitation period, unrestricted by the apparent qualifier of the


\(^{79}\) Applications 861 and 864, above n 6, 3-4, 11-12.

\(^{80}\) Calder v Uzelac, above n 7, 2-3.

\(^{81}\) Wilson v Horne, above n 4, 365.
‘person whose relationship with the parent’ clause. This does not make redundant the first limb of the provision, nor does it affect the merit of the special limitation period in cases of injury to a child by apparent or guardian. However, it does suggest that the second limb of the close associate provision should be redrafted to capture deserving cases where the injured child delays disclosure of his or her abuse, not because of any perception about the tortfeasor’s relationship with the child’s parent, but because of the unwillingness to disclose the abusive events, whether this is produced by fear, shame, guilt, self-blame, secrecy, failure to appreciate that the acts were wrongful, or PTSD. This approach would be more effective in securing what should be the aim of the provision, which, as referred to by the Ipp Report, is to allow the plaintiff sufficient time both to be free of the influence of the defendant, and to have overcome the psychological sequelae of the events, to the extent necessary to be able to pursue civil remedies.

V CONCLUSION

Despite being an underreported phenomenon, in Queensland in a twelve month period from 2002-03 there were 610 substantiated cases of child sexual abuse.\footnote{Australian Institute of Health and Welfare, Child protection Australia 2002-03 (2004) Australian Institute of Health and Welfare, Canberra, 16 (Table 2.5).} In that period throughout Australia, there were 4137 substantiated cases of child sexual abuse.\footnote{Ibid 16-17.} Unfortunately there is no reason to believe that the incidence of serious child abuse will decline. With society and government perhaps able to reduce child abuse, but unable to prevent it, it is important that the legal system at least enable adequate access to justice and redress for survivors of child abuse. The enactment of the special limitation period in New South Wales and Victoria is a commendable and long overdue recognition of the inadequacy of the previous limitation period applying to child abuse cases, which still operates elsewhere in Australia but will
The recognition of evidence from other disciplines made possible the Ipp Report’s recommendation about the special limitation period, and that evidence underpins the provisions enacted. Now, that same evidence, including evidence about nondisclosure and delayed disclosure, should also be acknowledged to ensure that the substance of the second limb of the close associate provision is not neutralised.

84 For reasons discussed in Mathews, ‘Post-Ipp special limitation periods’, above n 17, 256.
Limitation periods and child sexual abuse cases: Law, psychology, time and justice

Dr Ben Mathews*

As Australian society witnesses an increasing number of revelations of child sexual abuse, and as more cases come before the courts, the question of legal redress for adult survivors of abuse becomes ever more pressing. Due to the psychological sequelae of abuse, adult survivors are often unable to institute proceedings within statutory time limits, and case law demonstrates significant difficulties in obtaining an extension of time in which to proceed. The statutory time limits and the courts' application of extension provisions often operate to deny legal remedies to these plaintiffs. This article uses psychological evidence to evaluate the current Australian provisions, with a particular focus on recent Queensland case law, and examines the justifiability of the rationales for limitation periods in this context.

1. Introduction: child sexual abuse, psychological injury and the significance of time

Physical damage is always so much easier for the individual to identify and quantify. Psychological damage requires the damaged psyche to assess itself and quantify what is lacking, what is wrong.1

1.1 Child sexual abuse

Between 1994 and 1998 in Queensland, there were 15,774 child sex offences reported to police.2 Children who are sexually abused, particularly when by a family member or a known adult, are often subjected to abuse over a period of time. Statistics demonstrate that the typical child sex offender is male, a family member or relative of the child (or is otherwise known to the child), commits numerous abusive acts against the child, and conducts the acts over a period of months or years.3 In many cases the child will make no complaint

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1 Quote from psychiatric testimony in Tiernan v Tiernan (Qld SC, Byrne J, 22 April 1993, unreported, BC9303449).

2 Queensland Crime Commission and Queensland Police Service, Project AXIS — Child Sexual Abuse in Queensland: The Nature and Extent, 2000, Brisbane, p 28 (Table 3) <www.cmc.qld.gov.au/library/CMCWEBSITE/AxisV1.pdf>. The incidence of child sexual abuse is notoriously difficult to assess due to the low rate of reports. It is sufficient to state that the reported number of offences represents only a proportion of the actual number of incidents. Clearly, a significant number of children are affected by sexual abuse. This project is subsequently referred to in this article as QCC and QPS, Child Sexual Abuse in Queensland: The Nature and Extent.

about the abuse for one or more of several reasons: being sworn to secrecy; compulsion by threats; imposed conviction of the normality of the acts; imposed or misplaced feelings of responsibility for the acts; fear of family dissolution; fear of punishment of the wrongdoer; misplaced guilt; and self-blame.4 The child is likely to use strategies to cope with the abuse, including repression of the acts so that conscious knowledge of them is concealed; suppression of the trauma (consciously avoiding recalling the trauma); and dissociation (absenting oneself psychologically while the abuse occurs).5 The child’s low age and vulnerability — physical, cognitive, psychological and emotional — both marks them as more susceptible targets for abuse, and explains the grave yet only nascent consequences of abuse on young individuals.

1.2 Psychological injury

There are well-recognised immediate and short-term consequences for a child who is being or has been sexually abused. These consequences include suicidal behaviours, self-harming, self-destructive behaviours, physical health difficulties, anxiety, post-traumatic stress disorder symptoms, dissociation, depression and low self-esteem, sexual dysfunction, difficulty in interpersonal relationships, sexual victimisation, and alcohol and drug use.6 As if enough trauma had not already been inflicted, the irony is that for the survivor of child sexual abuse, the effects experienced in the short-term are but a prelude to the protracted consequences that will be experienced later.

What happens to the child who has suffered abuse as they progress through adolescence and enter adulthood? Quite apart from any physical trauma, the psychological injuries inflicted on a person who has been sexually abused as a child are severe.7 Typically, the adult survivor of sexual abuse has depression and/or post-traumatic stress disorder. Classical sequelae also include anxiety, distrust, anger, guilt and self-destructive behaviour such as alcoholism. Relationships with other adults are affected due to a negative self-concept and survivors frequently have difficulty navigating adult sexual relationships.

However, the key consequence of abuse for a typical adult survivor that affects not only their psychological health and prospects for recovery, but their

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5 Mosher, above n 4, at 178.
legal remedies, is that he or she will avoid stimuli associated with the abuse, and will avoid any situation that prompts or requires recollections of the abuse. 8 Evidence demonstrates that there are good, natural reasons for many adult survivors to adopt this self-protective position. The survivor may not be psychologically ready to confront the abuse due to a lack of time to heal, a lack of psychological assistance or lack of social support and resources. A survivor may also be dissuaded from bringing legal action because of intimidation by the perpetrator or because of a continuing connection with the perpetrator or the perpetrator’s family. It is therefore undeniably a normal and entirely reasonable response by many adult survivors of abuse to avoid any activity — including legal action — that would require detailed description of the events and confrontation of the perpetrator.

1.3 The significance of time

Such a venture into legal territory can only be undertaken when the person feels emotionally ready to do so. This readiness often crystallises only after a period of psychological treatment, which itself usually occurs a considerable time after the person attains legal majority. Because of the normal response of avoidance, a survivor will often need a significant period of time to develop the capacity to make even a disclosure of the abuse or a tentative foray into psychological counselling. 9 As a child who has silently borne the abuse, complained but been ignored, or who has had their complaint received but has still suffered the typical consequences of it, the adult survivor will rarely have experienced sufficient time and psychological intervention to be ready to pursue the perpetrator for compensation, until some time into their 20s, 30s or even 40s. As observed by the psychiatrist’s testimony that heads this section, the time required by the psyche to assess itself is considerable, and in fact many survivors will never reach the point where they are ready to confront the abuse or its effects in full. 10

Evidence demonstrates this frequent requirement of time for a survivor to become able to report the abuse. In Queensland, the Project Axis survey found that of 212 adult survivors, 25 took 5–9 years to disclose it, 33 took 10–19 years, and 51 took over 20 years. 11 Where the perpetrator is a relative, it is even more likely that the delay will be long. A Criminal Justice Commission analysis of Queensland Police Service data from 1994–1998 found that of 3721 reported offences committed by relatives, 25.5% of survivors took 1–5 years to report the acts; 9.7% took 5–10 years; 18.2% took 10–20 years,

8 Mosher, above n 4, at 179.
9 As occurred for example in Tiernan v Tiernan (Qld SC, Byrne J, 22 April 1993, unreported, BC9303449), and Applications 861 and 864 (Qld DC, Botting DCJ, 21 June 2002, unreported) (D’Arcy).
10 See, generally, in support of these arguments, A Marfording, ‘Access to Justice for Survivors of Child Sexual Abuse’ (1997) 5 TLJ 221. It should be noted that the current article is concerned with cases where survivors have always been aware of the abuse but have been unable to institute legal proceedings regarding the abuse, rather than the category of ‘repressed memory’ cases, which pose even more difficult problems.
11 QCC and QPS, Child Sexual Abuse in Queensland: The Nature and Extent, above n 2, p 80 (Table 23).
and 14.2% took more than 20 years.\textsuperscript{12}

Time is the significant feature in the legal context for adult survivors of childhood sexual abuse. Most survivors require an extended period of time in which to gain knowledge of facts which are the very same facts required by law to institute proceedings for compensation for personal injuries. These facts include the facts of personal injury having occurred, of the injuries’ nature and extent, and of the causal connection between the perpetrator’s abuse and those injuries. Were it not for legal provisions imposing time limits on when a person can bring proceedings, the adult survivor of child sexual abuse would not be in an especially difficult legal situation.\textsuperscript{13}

1.4 Australian law: time limits and minority, and extension provisions

1.4.1 Time limits and minority

However, for several reasons, law does set temporal limits on when a person can bring an action. Actions for personal injury in Queensland, New South Wales, Victoria, South Australia, Tasmania and the Northern Territory must generally be commenced within three years from the date on which the cause of action arose.\textsuperscript{14} Herein lies the difficulty. These statutory time limits place adult survivors of abuse in an invidious position, because most will simply and quite normally be incapable of bringing their action within the time set.\textsuperscript{15}

Usually ‘out of time’ due to this natural consequence of abuse, adult survivors are then forced to abandon civil action, or to apply to the court for an extension of the allowable period of time.

\textsuperscript{12} Ibid, p 82 (Table 25).

\textsuperscript{13} The qualification ‘especially’ acknowledges the difficulty of proving allegations of sexual abuse, since there is often little if any corroborative evidence of the abuse due to the nature of the acts and the environment in which they occur. See, eg, JP-A (by her Litigation Guardian DP-A) v DT (Vic CA, 12 June 1998, unreported, BC3902616).

\textsuperscript{14} Limitation of Actions Act 1974 (Qld) s 11; Limitation Act 1969 (NSW) ss 18A(2) and 50C; Limitation of Actions Act 1958 (Vic) ss 5(1AA) and 27D(1)(a); Limitation of Actions Act 1936 (SA) s 36; Limitation Act 1974 (Tas) s 5(1); Limitation Act 1981 (NT) s 12(1)(b). The Limitation Act 1985 (ACT) s 11(1) establishes a general time limit of six years for tortious actions. The Limitation Act 1935 (WA) s 38(1)(b) sets a time limit of four years for actions for trespass to the person, assault and battery. In Wilson v Horne (1999) 8 Tas R 363, the Full Court of the Supreme Court of Tasmania held unanimously that an action for the acts constituting child sexual abuse exists in both negligence and trespass. This can bring different limitation periods into play, depending on the statute of limitations in the particular jurisdiction. An application for special leave to appeal against this decision was refused: Wilson v Horne (1999) 19 Leg Rep SL4a.

\textsuperscript{15} Furthermore, plaintiffs who fail to act within time or to receive extensions of time will not be entitled to equitable relief for breach of fiduciary duty for two reasons. First, in this context the only relevant relationship recognised as capable of attracting fiduciary duties is the guardian/ward relationship, and the infliction of abuse in these relationships forms only a small proportion of cases. Most offenders are parents or are persons known to the child who are in a position of authority, and Australian law does not recognise parent/child relationships as attracting fiduciary obligations (Paramasivam v Flynn (1998) 90 FCR 489; 160 ALR 203), and fiduciary claims are not possible against mere acquaintances. Second, Australian courts have consistently held that fiduciary principles protect economic interests and not personal interests (Breen v Williams (1998) 186 CLR 71; 138 ALR 259; Paramasivam v Flynn, ibid).
Minority has traditionally constituted a legal disability and has stopped time from running until the attainment of majority. In Queensland, for example, a survivor of child sexual abuse has three years from turning 18 to institute proceedings. However, there have been recent changes in New South Wales and Victoria in this respect, influenced by the recent trend in Australian tort reform to limit liability and quantum of damages for personal injuries. In Victoria, an action for personal injuries that accrues to the plaintiff while the plaintiff is under a disability must be commenced within six years. However, in both Victoria and New South Wales, a minor is now deemed not to be under a disability if he or she is in the custody of a capable parent or guardian. The impact of these amendments in Victoria and New South Wales is that plaintiffs in those jurisdictions who sustain personal injuries have three years in which to commence proceedings through a parent or guardian, without the traditional concession of time not running until the plaintiff attains legal majority. There are special provisions regarding situations where minors are injured by close relatives or close associates. Here, the cause of action is deemed to be discoverable by the victim when he or she turns 25 years of age, or when the

16 Limitation of Actions Act 1974 (Qld) ss 5(2), 11, 29(2)(c); Limitation of Actions Act 1936 (SA) s 45; Limitation Act 1974 (Tas) s 26; Limitation Act 1935 (WA) s 40; Limitation Act 1985 (ACT) s 30; Limitation Act 1981 (NT) s 36. The new Personal Injuries Proceedings Act 2002 (Qld), as amended by the Civil Liability Act 2003 (Qld), does not substantively affect the Limitation of Actions Act 1974. However, the pre-court procedures prescribed by the PIPA, including the provision of a written notice of claim to the defendant (s 9), and the convening of a compulsory conference (s 36), would apply to cases in this context, and these procedures can adversely affect a plaintiff’s time in which to identify evidence and material facts of a decisive character in the discovery process. Note that s 9 stipulates the time within which a notice of claim must be given (subs (3)); but subs (5) states that if this time limit is not complied with the obligation continues and a reasonable excuse must be given for the delay. Section 9(9) declares that subs (3)(a) does not determine or affect when a cause of action arises for the purposes of the Limitation of Actions Act. A plaintiff who has not complied with the pre-court provisions and whose time is about to expire may apply to the court for leave to start an ‘urgent proceeding’ under s 43, but the pre-court proceedings must still be complied with: see, for example, Grimes v Synod of the Diocese of Brisbane (Muir J, S27 2003, unreported); Nicol v Caboolture Shire Council [2003] QDC 033 (Robin DCJ, 16 April 2003, unreported); Lamb v Queensland and Ting [2003] QDC 003 (McGill DCJ, 31 January 2003, unreported).


18 See, for example, Civil Liability Act 2003 (Qld); Civil Liability Act 2002 (NSW); Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002 (Vic); Wrongs (Liability and Damages for Personal Injuries) Amendment Act 2002 (SA); Civil Liability Act 2002 (WA); Civil Law (Wrongs) Act 2002 (ACT); Civil Liability Act 2002 (Tas); Personal Injuries (Liabilities and Damages) Act 2003 (NT).

19 Limitation of Actions Act 1958 (Vic) ss 27D(1)(2) and 27E.


21 A close associate of a parent or guardian is defined as a person whose relationship with the parent is such that the parent or guardian may be influenced not to proceed, or if the victim might be unwilling to disclose to the parent or guardian the events causing the personal
cause of action is actually discoverable, whichever is later. These provisions are an improvement on the other Australian States and Territories’ provisions, but still impose a tight time limit on proceeding when compared with the psychological evidence and statistics on plaintiff readiness to report abuse to police.

1.4.2 Extension provisions

Although most jurisdictions have similar provisions enabling time to be extended, these provisions have proved to be very difficult to satisfy in this particular context, as exemplified by recent Queensland cases. There is little case law from other jurisdictions in this respect, but Queensland decisions can be summarised to demonstrate the problems that generally confront plaintiffs in this context.

An applicant is typically eligible for an extension of time if it appears to the court that a material fact of a decisive character relating to the right of action was not within the applicant’s means of knowledge until a date after the start of the third year of the limitation period (that is, after the applicant turned 20); and if there is evidence to establish the right of action. However, satisfying these conditions is insufficient; the court must still exercise its discretion in the applicant’s favour. The applicant bears the ‘positive burden’ of showing that the justice of the case requires the extension of time. Whether the court exercises its discretion to extend time will depend on its estimation of the prejudice to the defendant’s assurance of a fair trial.

‘Material facts relating to a right of action’ are typically defined to include the fact of the occurrence of negligence, trespass or breach of duty; the fact that the negligence, trespass or breach of duty causes personal injury; the nature and extent of the personal injury caused; and the extent to which the personal injury is caused by the negligence, trespass or breach of duty. Such a material fact will be of a decisive character if a reasonable person knowing

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22 Limitation Act 1969 (NSW) s 50E; Limitation of Actions Act 1958 (Vic) s 27I(2); compare Ipp Report, ibid, Recommendation 25(e).
23 Limitation of Actions Act 1974 (Qld) s 31; Limitation Act 1969 (NSW) ss 62A, 62B; Limitation of Actions Act 1958 (Vic) ss 27K, 27L; Limitation of Actions Act 1936 (SA) s 48; Limitation Act 1974 (Tas) s 32 (limited to fraud or mistake); Limitation Act 1935 (WA) s 27 (limited to fraud); Limitation Act 1985 (ACT) s 36; Limitation Act 1981 (NT) s 44.
25 Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541 at 551 and 554; 139 ALR 1 at 7–8 and 10 per McHugh J; Dawson J agreed with McHugh J; Toohey and Gummow JJ also agreed for similar reasons; Kirby J dissented.
26 See, for example, Limitation of Actions Act 1974 (Qld) s 30(1)(a). These definitions of what constitute the material facts for the purpose of gaining an extension of time do not affect the principles that if the plaintiff proceeds in trespass, damage does not have to be proved, whereas if the action is in negligence, proof of damage is an essential requirement. Ignorance of the law or of the existence of a cause of action does not amount to ignorance of a material fact that empowers a court to extend the limitation period: Do Carmo v Ford
those facts and having taken appropriate advice would regard those facts as showing that an action would have a reasonable prospect of success and of resulting in an award of damages sufficient to justify bringing the action; and in their own interests and taking their own circumstances into account, the person ought to bring an action. A critical provision then typically deems that a fact is outside the applicant’s means of knowledge if the applicant does not know of the fact, and, as far as the fact is discoverable, the applicant has taken all reasonable steps to discover it before they actually do so.

1.4.3 Common law indications

As exemplified by Woodhead v Elbourne, a plaintiff is most likely to gain an extension of time on demonstrating three things. First, the plaintiff must show that he or she did not know of the personal injury caused (for example, post-traumatic stress disorder) or its extent, or of the causal connection between the acts and the personal injury, until a date after expiry of the second year of the three-year period. Second, it must be shown that the plaintiff took all reasonable steps to ascertain the relevant fact before it was discovered. Third, it must be shown that the defendant would not be prejudiced by the extension.

A growing body of decisions appears to hold three strong indications for future applications to extend time. First, extended delay alone will almost certainly defeat an application on the ground of prejudice to the defendant’s right of fair trial. Second, the current post-1990s era in which cases of child sexual abuse are known, psychological evidence concerning sequelae are known, and successful civil cases are known to have been brought, places a heavy onus on plaintiffs to satisfy the reasonableness test by taking steps through disclosure and therapy to ascertain their injury, its extent and its cause. Where a plaintiff claims ignorance of a material fact but the court


27 Limitation of Actions Act 1974 (Qld) s 30(1)(b).
28 Ibid, s 30(1)(c).
29 [2001] 1 Qd R 220. Argument about whether the plaintiff had taken reasonable steps to ascertain the material facts was not advanced by the defendant in this case.
30 The plaintiff said that only after reading a psychiatrist’s report on 18 December 1998 did she ‘first be[come] aware that she was suffering from Post Traumatic Stress Disorder consequent upon childhood sexual abuse . . . and borderline personality disorder . . . before this time I did not know the nature of my condition, the extent of my condition or whether my condition related to the assaults by the defendant’: at [17]. White J accepted that it was only after reading this report that the plaintiff was in possession of the material facts which if properly advised would lead a reasonable person to institute proceedings. Although the plaintiff had explored the events over two years of therapy, this was deemed not to be knowledge sufficient to dismiss the application: at [22].
31 The plaintiff, who was born on 25 February 1974, had suffered sexual assaults between July 1981 and December 1987. On 15 December 1997 the plaintiff instructed her solicitor to institute proceedings and a writ was issued on 23 December 1997. Since the plaintiff was entitled to bring her action as of right until 25 February 1995, there was no great delay, and no witness, document or other evidence was lost.
32 See D’Arcy (Qld DC, Botting DCJ, 21 June 2002, unreported) discussed below.
33 Contrast Tiernan v Tiernan (Qld SC, Byrne J, 22 April 1993, unreported, BC9303449),
finds that he or she, by acting reasonably, should have ascertained these facts, the application will be defeated.

In *Carter v Corporation of the Sisters of Mercy of the Diocese of Rockhampton*, the application to extend time was dismissed at first instance and on appeal. The appellant was born on 23 March 1960. When two months old she was taken into State care and in 1961 she was placed at Neerkol Orphanage, a private institution licensed to care for children run by an order of nuns. Between 1961 and 1972 the appellant suffered personal injuries from multiple incidents of cruelty from the nuns and from numerous alleged incidents of sexual assault and rape by a Neerkol employee. Under limitations legislation she had until 23 March 1981 to institute proceedings. A writ of summons was issued on 27 July 1998. She claimed damages for negligence against the State of Queensland, and damages for trespass to the person against the employee. The appellant claimed recent knowledge of a psychiatric injury (depression) caused at least in part by the abuse, and of the causal connection between the acts and the personal injury.

The majority of the Court of Appeal rejected the claim of a recent

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34 *Carter*, above n 24.

35 At first instance, White J focused on the applicant’s cognition of the acts and gave no consideration to psychological sequelae. Her Honour thought the applicant ‘was in possession of the necessary facts to commence an action . . . from the time the limitation period commenced to run’; that is, from when she was 18, in 1978. There was:

nothing in the material to suggest that she could not have [commenced proceedings between 1978 and 1997] . . . she would have been advised, had she sought advice, that the damages would be likely to be considerable . . . she retained a lively awareness of the wrongs which had been done to her over the ensuing years . . . There is no suggestion that she was in an alcoholic stupor or suffering from depression to such an extent that she could not have sought appropriate advice. (*Carter v Corporation of the Sisters of Mercy of the Diocese of Rockhampton* [2000] QSC 306 (White J, 8 September 2000, unreported, BC200005394) at [13].)

White J’s approach emphasised the fact that if appropriately advised, the plaintiff could have brought the action on facts already in her possession. The second factor counting against the applicant, at least with respect to the State of Queensland as defendant, was the weight given to the prejudice that would occur to the defendants should the trial proceed: at [18]–[22]. The State of Queensland did not admit that the events occurred despite the nuns’ admissions, and claimed that a number of witnesses were either dead, unable to be located, or very old. Interestingly, White J would not have barred the proceedings regarding the fourth defendant (the employee alleged to have committed the rapes) by the exercise of discretion regarding fair trial.

36 The Court of Appeal in *Carter v Corporation of the Sisters of Mercy of the Diocese of Rockhampton* [2001] QCA 335 (24 August 2001, unreported, BC200104983), accepted that at least some of the appellant’s complaints of ill-treatment were confirmed by ‘ample evidence’: at [5] per McPherson JA; at [46] and [77] per Atkinson J. The Neerkol Orphanage nuns had written the appellant a letter of apology and regret for their actions and omissions, and with the first defendant had agreed on a settlement of the claim.

37 The appellant said that only after reading a psychiatrist’s report dated 29 September 1998 did she appreciate there was expert evidence indicating that the abuse may have affected her from a psychiatric perspective and that it had caused the injuries suffered since leaving Neerkol. She had received psychological and psychiatric treatment over many years, but, she said, ‘there was never any mention or indication of a connection between the abuse I suffered and my current condition’.
connection between the abuse and the injury. The crucial finding by McPherson JA was that the causal connection was a fact she could have discovered by taking the reasonable step of asking a psychiatrist or psychologist: ‘In short, one would have expected her to ask what it was that caused the depressive states.’

Muir J also found that there was no evidence adduced to establish that the applicant was prevented from making the connection between the abuse and her personal injury, either by herself, or by acting reasonably to gain such knowledge.

In D’Arcy, an applicant (S) who alleged that she had been sexually abused in the 1960s claimed recent knowledge of the material facts of the nature, extent and cause of her psychiatric injury, gained by reading a psychiatric report in early 2001. She had only first divulged the abuse to a psychiatrist in late 2000. The psychiatrist’s report stated that as a result of the abuse, S had post-traumatic stress disorder, among other things. She claimed that she did not know of the connection between the abuse and her injury until reading this report. Botting DCJ held that these facts were not beyond S’s means of knowledge. It was accepted that ‘often child victims of sexual abuse will find it very hard, if not impossible, to tell others of their experiences [and] that when such a victim becomes an adult, it will continue to be extremely difficult for such a person to tell a doctor of the abuse’. However, the critical factor was the judge’s perception regarding the social context of the era. To Botting DCJ, the societal awareness in the 1990s of child sexual abuse, added to the psychological knowledge regarding the consequences of it, meant that S’s injuries could have been diagnosed during that time. Since the early 1990s, she had been aware of her problems and had sought medical help regarding them; she had even made a complaint on 28 September 1998 to a police officer. S had also deposed that she had heard in the last 10 years of cases where people had been sued for child sexual abuse and knew that compensation had been awarded in these cases. Botting DCJ stated that, ‘Whilst one can understand her reluctance to raise such matters with her advisors, it seems to me that by the mid-1990s her failure to do so was not reasonable’; hence, this material fact was within her means of knowledge.

The third indication from the recent case law is that a criminal conviction can constitute a material fact of a decisive character by going to prove the tortious acts and increasing the prospect of success at civil trial. However,

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38 Carter v Corporation of the Sisters of Mercy of the Diocese of Rockhampton [2001] QCA 335 (24 August 2001, unreported, BC200104983) at [16]. Muir J and McPherson JA also identified the applicant’s longstanding hatred of her abusers and her previous linking of aggressive behaviour as a young person with the physical and sexual abuse she suffered.

39 Ibid, at [32].

40 D’Arcy (Qld DC, Botting DCJ, 21 June 2002, unreported) at 36.

41 Applicant R claimed that the psychiatric report was the first evidence supporting a worthwhile cause of action regarding quantum and that her reading of this report was a material fact. Neither argument was accepted.

42 D’Arcy (Qld DC, Botting DCJ, 21 June 2002, unreported) at 33–4. Bill D’Arcy, a former schoolteacher and Member of Parliament, was convicted on 1 November 2000 of 18 counts of sexual offences (11 counts of indecently dealing with a boy under 14, four counts of indecently dealing with a boy under 14, and three counts of rape). On 17 November 2000 he was sentenced to concurrent jail terms of between three and 14 years. His appeal against conviction was dismissed but appeals regarding the sentence were allowed to the extent that
where a defendant denies guilt in that criminal trial, even criminal convictions will not overcome a pleaded defence of delay at civil level. In *D’Arcy*, even though the defendant’s convictions facilitated proof of their cases in the civil action,\(^{43}\) it was held that the 38-year delay between the acts and the trial would result in significant prejudice and the applicants had not demonstrated the contrary. This is an extraordinary result. Despite a finding of guilt on a higher standard of proof, the civil application failed on the ground of prejudice to the defendant’s fair trial rights. Botting DCJ conceded that, ‘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.’ His Honour continued: ‘It is not my function to seek to explain, let alone seek to resolve any such apparent incongruity. My task is to apply the law as I understand it to the facts as I find them.’\(^{44}\)

1.5 Major legal issues
Two questions arise. Should the statutory provisions be amended so that adult survivors of child sexual abuse are not time-barred from instituting proceedings? Alternatively, should judicial interpretations and applications of the extension provisions be more cognisant of the psychological position of plaintiffs in this context? In Part 2, this article synthesises the effects of time

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43 Evidence Act 1977 (Qld) s 79.
44 *D’Arcy* (Qld DC, Botting DCJ, 21 June 2002, unreported) at 49. Botting DCJ added some observations regarding criminal compensation, and commented that if the defendant’s convictions were sustained, most people would think it appropriate that the applicants receive compensation from the public purse for their pain and suffering and other losses (at 51). His Honour had previously alluded to the fact that at the time of the offences, there was no scheme for compensation for injury arising out of criminal conduct. The Criminal Code Amendment Act 1968 (Qld) established in Ch 65A of the Criminal Code a compensation scheme for injury arising out of indictable offences relating to the person, but s 3 stated that the Act did not apply in respect of compensation for injury suffered before the commencement of the Act (the Act commenced on 1 January 1969). Judge Botting seems to imply (at 50) that the applicants would not be entitled to compensation because the acts themselves were committed before the commencement of Ch 65A. However, it is arguable that at least some of the applicants’ injuries, namely their psychological injuries, only arose long after the commission of the acts giving rise to the offences, and the conviction required by s 663B as a precondition to an award of compensation had not been secured before commencement of Ch 65A. If the applicants are not entitled to criminal compensation for injury appearing after commencement of Ch 65A, regarding a conviction arising after commencement of that Chapter, but arising from acts committed before its commencement, then the basis on which his Honour is implying an entitlement to compensation is unclear.

Criminal compensation of victims of indictable offences in Queensland is now available through the Criminal Offence Victims Act 1995 (Qld). The scheme applies to acts committed after 18 December 1995, when the Act commenced. Section 46 preserves the old compensation scheme of Ch 65A for acts committed before that date: see, for example, *Hendry v Llorente* [2001] 2 Qd R 415; *B v B* [2002] QDC 327 (O’Sullivan DCJ, 10 December 2002, unreported); and *Whitehead v Crawford* [2000] QSC 422 (Jones J, 15 May 2000, unreported, BC200007238), where the plaintiff was awarded $97,830.
limitation periods and their rationales. Part 3 repels those rationales in this
case. In concluding, Part 4 looks to the future should the law be amended.

2. Limitation periods: effects and rationales

2.1 Effects — irrelevant unless pleaded

Plaintiffs who have endured child sexual abuse who are able to bring
proceedings before they turn 21 are not especially disadvantaged by the
statutory provisions. However, for adult survivors who are unable to institute
proceedings before time expires, the position is different. The simplest way to
neutralise the time limit is if the defendant does not plead it as a defence, as
expiry of the limitation period is irrelevant unless the defendant does so. The
time limit does not operate automatically to bar the plaintiff’s remedy.\(^{45}\)
Moreover, the court will not consider the expiry of time of its own volition.\(^{46}\)
A defendant wishing to rely on expiry of time as a defence simply has to plead
it.\(^{47}\) When the defence is enlivened, the only way for the plaintiff to
circumvent it is to apply to the court for an extension of time.

Any assessment of a legal position, particularly one that promotes a
particular outcome, must take care not to be uncritical of its own preferences.
It would be unfair to promote one argument without acknowledging opposing
perspectives, even if motivated by a determination to secure justice. Any
argument against the effect of a statutory time limit in a particular context
must address the opposing arguments for their retention, and this is done in
Part 3. It is therefore necessary to canvas the rationales for having limitation
periods at all, before evaluating their justifiability in this context.

2.2 Professed rationales — preserving the quality of
justice

In \textit{Brisbane South Regional Health Authority v Taylor}, McHugh J discussed
the policy reasons underpinning limitation periods at some length. It is
significant that the exploration of the justifying forces behind statutory time
limits proceeds from the pivotal idea that where there is delay, ‘the whole
quality of justice deteriorates’.\(^{48}\) It is apposite that in this context both the
prima facie time limit and the interpretation and application of the extension
provisions are arguably producing this very deterioration of justice that
McHugh J identifies the rationales as professing to protect. This overriding
point about the quality of justice will be expanded on in Part 3.3.2.

Bonded by this claimed concern for justice, several policy reasons are
usually cited to justify limitation periods. A principal reason, and the most

\(^{45}\) Uniform Civil Procedure Rules 1999 (Qld) r 150(1)(c).
\(^{46}\) \textit{Commonwealth v Verwayen} (1990) 170 CLR 394 at 498; 95 ALR 321 at 395.
\(^{47}\) It can be noted that in some cases where the abuse is admitted, the defendant may not plead
expiry of time as a defence because of a desire to behave honourably and acknowledge the
abuse that has occurred. This happens sometimes in cases of abuse inflicted while the child
was attending a school or institution, where the perpetrator was a teacher or staff member
employed by the school, educational authority or institution, as occurred, for example, in
settlements between plaintiffs and the Brisbane Grammar School.
\(^{48}\) \textit{Brisbane South Regional Health Authority v Taylor} (1996) 186 CLR 541 at 551; 139 ALR
1, citing \textit{R v Lawrence} [1982] AC 510 at 517; [1981] 1 All ER 974 at 975.
cogent one, is that the quality of available evidence will be lessened by the passage of time, whether by faded memory, death, or the absence of witnesses and documentation. In McHugh J’s words, ‘[t]he longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose.’ The concern here is that the defendant should be able to mount a defence with fresh evidence to secure a fair trial. Since the civil trial system must be impartial and afford a fair trial to both parties, this evidentiary concern provides the most compelling reason for a limitation period. It is accepted that a particularly important goal of this area of law is that individuals should not be vulnerable to false or mistaken allegations about past events. For reasons discussed in Part 3, it is submitted that this goal would not be sacrificed by legal reform in this context.

The weight given to this primary motivation for time limits is substantial. Forming a considerable impediment to plaintiffs who are out of time generally, but particularly to adult survivors, the consideration of the prejudice to the defendant through deterioration of evidence is given pre-eminence over the plaintiff’s claims to justice. McHugh J states:

Legislatures enact limitation periods because they make a judgment, inter alia, that the chance of an unfair trial occurring after the limitation period has expired is sufficiently great to require the termination of the plaintiff’s right of action at the end of that period. When a defendant is able to prove that he or she will not now be able to fairly defend him or herself or that there is a significant chance that this is so, the case is no longer one of presumptive prejudice. The defendant has then proved what the legislature merely presumed would be the case. Even on the hypothesis of presumptive prejudice, the legislature perceives that society is best served by barring the plaintiff’s action. When actual prejudice of a significant kind is shown, it is hard to conclude that the legislature intended that the extension provision should trump the limitation period. The general rule that actions must be commenced within the limitation period should therefore prevail once the defendant has proved the fact or the real possibility of significant prejudice.

Other weaker reasons, also defendant-centred, are cited for limitation periods, and these should be mentioned. It is said that defendants should be able to proceed with their lives unencumbered by the threat of late claims. It is also said that plaintiffs should not sleep on their rights. Finally, the public interest requires that disputes be settled as quickly as possible. These points are of less persuasive force, especially in this context, and they will be dealt with in Part 3.

The English case of A’Court v Cross is often cited for the principle that ‘[l]ong dormant claims have often more of cruelty than of justice in them’ to

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49 Ibid, at CLR 551.
50 Ibid, at CLR 555 (emphasis added).
52 Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541 at 552; 139 ALR 1; see also Mosher, above n 4, at 186.
53 Bunney, above n 51, at 132, citing Pirelli General Cable Works Ltd v Oscar Faber and Partners [1983] 2 AC 1 at 19; [1983] 1 All ER 65 at 72; see also Mosher, above n 4, at 184.
54 Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541 at 553; 139 ALR 1.
demonstrate the central policy reason of justice supporting limitation periods. However, these citations rarely read further: Best CJ continues to say that, 'Christianity forbids us to attempt enforcing the payment of a debt which time and misfortune have rendered the debtor unable to discharge.' Justice is the central concern. Allied with A’Court’s concern is the regular crutch of the Magna Carta to defend limitation periods — cl 40 promotes the citizen’s right to justice without delay — and McHugh J cites this in his exposition. However, the full import of cl 40 should not be lost. It states that: ‘To no man will we sell, or deny, or delay, right or justice.’ The question in this context is not simply one of delay, but of denial of justice to the plaintiff who is constitutionally unable to bring proceedings within time.

In cases of adult survivors of child sexual abuse, these policy reasons have been demonstrated to be either of inferior relevance, or of outright inapplicability. Of further relevance is the fact that there is no time limit regarding the State’s ability to commence criminal prosecution of an indictable offence; since the acts of battery in these circumstances are also criminal acts, the State can exact retribution against perpetrators at any time after the offence. It has been argued that the appropriate conceptual approach in this context is with this criminal model, rather than a tortious one. There are compelling reasons supporting this view.

3. Repelling the rationales: why child sexual abuse cases are a special category

Two features of these cases distinguish them from the principles that inform the rationales for limitation periods: the nature of the injury and the nature of the acts. Some comparative jurisdictions have recognised these distinguishing features. Statutes in British Columbia, Saskatchewan, Prince Edward Island, Manitoba, Ontario, Newfoundland, the Northwest Territories and Nunavut have abolished time limits for civil actions based on sexual assault, giving adult survivors of abuse unlimited time in which to institute

55 (1825) 3 Bing 329 at 332–3.
56 Ibid, at 333.
57 Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541 at 552; 139 ALR 1.
58 In Jago v District Court of New South Wales (1989) 168 CLR 23 at 62; 87 ALR 577 at 605, Toohey J cites the reproduction of the Magna Carta 25 Edward 1 (1297) contained in Halsbury’s Statutes of England, 2nd ed, Butterworths, London, 1948, vol 4, at 26: ‘We will sell to no man, we will not deny or defer to any man either justice or right.’
59 In Carter v Corporation of the Sisters of Mercy of the Diocese of Rockhampton [2001] QCA 335 (24 August 2001, unreported, BC200104983) at [100], Atkinson J in dissent refused to accept that public policy reasons justified the operation of the delay defence, thinking it ‘plainly unjust’ not to exercise discretion in the applicant’s favour.
61 Mosher, above n 4, at 189.
62 See generally also Marfording, above n 10.
proceedings. In some US jurisdictions, including California, the effect of limitations statutes on survivors of child sexual abuse is being eroded. In California, legislative amendments in 2002 have revived certain classes of expired claims to allow civil proceedings against the Roman Catholic Church for sexual abuse allegedly committed by priests, and have enabled those claims to be launched in the year 2003. The actions revived included actions against persons or entities who owed a duty of care to the plaintiff, who knew or had notice of any unlawful sexual conduct by an employee, and failed to take reasonable steps and to implement reasonable safeguards to avoid future acts of unlawful sexual conduct. The situation in the United Kingdom is less inspiring, although a recent decision offers some hope for plaintiffs in this context.

63 See British Columbia’s Limitation Act, RSBC 1996, c 266, s 4(k)(i); Saskatchewan’s Limitation of Actions Act, RSS 1978, c L-15, s 3(1)(3.1)(a); Ontario’s Limitations Act, RSO 2002, c 24, s 10(1)-(3); Manitoba’s Limitation of Actions Act, CCSM 2002, c L150, s 2.1(2)(a) and (b); Newfoundland’s Limitations Act, RSNL 1995, c L-16.1, s 8(2); Nunavut and the Northwest Territories’ Limitation of Actions Act, RSNWT 1998, c L-8, s 2.1(2); and Nova Scotia’s Limitation of Actions Act, RSNS 1989, c 258, s 2(5)(a) and (b). Prince Edward Island’s Statute of Limitations, RSPEI 1974, cl 63 — not proclaimed 1 January 2003. The proposed amendments amended s 2(1)(d) and added a new subsection, s 2(3). Alberta’s Limitations Act, RSA 2000, c L-12 merely suspends the limitation period while the plaintiff is a minor (s 5); although fraudulent concealment also suspends the running of time until discovery of the fraud. Canadian jurisdictions that have not amended legislation are New Brunswick, the Yukon and Quebec.


65 Senate Bill No 1779, Ch 149, 2002, amending s 340.1 of the California Code of Civil Procedure. Plaintiffs in California generally have eight years from attainment of the age of majority to institute proceedings, or three years from discovery of the injury, whichever occurs later.

66 See also the South African case of Moise v Transitional Local Council of Greater Germiston CCT54/00 [2001] ZACC 10 (Somyalo AJ, 4 July 2001, unreported), where the Constitutional Court of South Africa affirmed the Witwatersrand High Court’s decision that a limitation provision was unconstitutional. The decision was based on the human right of access to courts, enshrined in s 34 of the South African Constitution. That right could not be justifiably limited under s 36 on the grounds of the utility of limitation periods. Untrammelled access to the courts was declared ‘a fundamental right of every individual in an open and democratic society based on human dignity, equality and freedom’ (at [23]). Although not a case involving sexual abuse of a child, Moise did involve an eight-year-old girl’s father proceeding on her behalf against a government department for personal injuries.

67 The Limitation Act 1980 (UK) s 2 sets six years from the date on which the cause of action accrued in which proceedings may be brought for actions in tort. Section 11 then sets a time limit for actions in tort for damages in respect of personal injuries for negligence, nuisance or breach of duty. The time limit under s 11(4) gives the applicant three years from the date on which the cause of action accrued, or from the date of attainment of relevant knowledge (of the significance of the injury, of the injury occurring due to the act or omission constituting the negligence, nuisance or breach of duty, or of the defendant’s identity). In personal injuries actions in negligence, nuisance or breach of duty, s 33 empowers the court to exclude the time limit if it appears equitable to do so. Under s 28 the limit is suspended until majority. The House of Lords in Stubbings v Webb [1993] AC 498; [1993] 1 All ER 322 held that in an action for deliberate sexual abuse in childhood, the proceedings are in tort,
3.1 The nature of the injury

The first major distinguishing factor making the traditional rationales redundant in this context is the nature of the injury and the impact on the survivor. The impact on the survivor means that the plaintiff here has not slept on their rights. As demonstrated, in most cases the plaintiff will neither know of, nor be reasonably able to know of, their rights until well after the expiry of the limitation period, if at all. The acts, the situation and the coping strategies adopted mean that survivors often will not know of the nature and the extent of the psychological injury experienced, or of the causal link between the acts perpetrated and those problems; and they will avoid ascertainment of these facts until they are psychologically able to do so.

So enlivening the six-year time limit under s 2, but not for ‘negligence, nuisance or breach of duty’, therefore not attracting s 11 or the extension power in s 33. The plaintiff, born on 29 January 1957, alleged she had been sexually abused by her adoptive father between the ages of 2 and 14, and that her stepbrother had raped her when she was 12 and he was 17. She further claimed that she only became aware of the causal connection between the abuse and her psychiatric and psychological problems in September 1984. At first instance, the plaintiff’s claim was struck out for being out of time on the basis that it was an action under s 11. On appeal, the judge accepted that the plaintiff’s knowledge under ss 11 and 14 only accrued in September 1984 after psychiatric therapy led to her understanding that the abuse caused her psychiatric disorders and other injuries. That decision was upheld in the Court of Appeal. The House of Lords allowed the appellant’s appeals and held that the plaintiff’s proceedings were barred by statute. Contrast _KR v Bryn Alyn Community (Holdings) Ltd_ [2003] EWCA Civ 85; [2003] 3 WLR 107, where former residents of a children’s home were able to recover damages in negligence against the defendant company for sexual abuse committed in its institutions some eight to 20 years previously, with the actions being brought under s 11 and therefore enlivening s 33. At first instance, Connell J found the claims were out of time, and that knowledge of the significant injuries under s 14 had materialised before the plaintiffs left the home, but disapplied the limitation period under s 33 in a general finding without addressing individual plaintiffs’ cases. The Court of Appeal held, inter alia, that apart from the immediate damage inflicted by the acts, the actions concerned significant long-term psychiatric injury for the purposes of s 14; that knowledge of this would not necessarily have been present before expiry of time; and that each case had to be assessed on its merits in this regard. In the Court of Appeal, plaintiffs generally succeeded because of the date of knowledge of significant injury, namely the psychiatric injury, rather than by having time extended under s 33 (in several cases the court stated that it would have found it difficult to extend time given the length of delay on grounds of prejudice to the defendant: see, eg, at [144]–[146]; [157]–[159]; [168]–[171]). However, the court did disapply the limitation period under s 33 in relation to some plaintiffs where the lapse of time was not so long: see, eg, at [183] and [192]. It is worth noting generally that obiter dicta indicate an evidence-based approach sensitive to the circumstances of abuse victims (see, eg, at [39]–[47]), in contrast to _Stubbings v Webb_. In _Mason v Mason_ [1997] 1 VR 325, the Victorian Court of Appeal interpreted similar provisions and did not follow _Stubbings v Webb_, instead finding that actions for personal injuries arising out of an intentional assault did constitute actions for damages for negligence, nuisance or breach of duty, thus attracting a limitation period based on discovery of a disease or disorder and also the possibility of extension. It can finally be noted that the plaintiff in _Stubbings v Webb_ lodged an application to the European Court of Human Rights, which found by majority that there was no breach of the right to a court, as embodied in the European Convention for the Protection of Human Rights and Fundamental Freedoms Art 6: _Stubbings v United Kingdom_ (1996) Eur Ct HR Applications 22083/93; 22095/93. However, Foighel and Macdonald JJ dissented, and even the majority conceded that in light of the developing awareness of the range of problems caused by child abuse and its psychological effects on victims, the limitation rules in European member States ‘may have to be amended to make special provision for this group of claimants’: at [56].
Typically, knowledge of these factors coalesces only after successful therapeutic intervention, which itself usually begins some years after the onset of the most insidious psychological consequences. The plaintiff in this context is qualitatively different from a typical plaintiff because of the psychological sequelae peculiar to this situation.\textsuperscript{68} Dissenting in \textit{Carter}, Atkinson J referred to the psychological evidence to inform the conclusion that:

While a reasonably well-adjusted, ordinarily self-confident person might be able to make the requisite link and be prepared and able to take civil action for the wrongs done to them, typically adults who have survived such abuse are lacking in self-esteem and remain powerless . . . Apart from the initial effects, childhood sexual abuse is now believed to have severe long-term consequences. The resultant inability of a victim of childhood sexual abuse to recognise the true nature of the abuse and the damage caused by it is well-documented, as is the difficulty for the victim in complaining of the abuse.\textsuperscript{69}

Apart from the finding of the recent discovery of material facts,\textsuperscript{70} Atkinson J’s dissent was primarily motivated by the acceptance of psychological evidence and its impact on the conduct required of the applicant as a reasonable plaintiff. This acceptance of the psychological evidence produced the conclusion that the standard of ‘reasonable’ conduct required of adult survivors of child sexual abuse is different from that required of people who have not been so abused.

When considering issues surrounding expiry of time and whether a plaintiff has taken reasonable steps to discover material facts, it is not justifiable to demand the same standard of reasonable behaviour of adult survivors of child sexual abuse as is expected of other plaintiffs. Rather than being informed by the psychological evidence, the judgments in \textit{D’Arcy} and \textit{Carter} deny it. A distinction needs to be made between the objective issue of whether it is factually possible to ascertain the nature, extent and cause of an injury, and whether a person in the plaintiff’s position could reasonably be expected to take steps to ascertain those facts. It should be remembered that the relevant test in deciding whether a fact is within the means of the plaintiff’s knowledge has both objective and subjective elements: in \textit{Carter}, Muir J says that the test ‘is an objective one applied to a person with the background and circumstances of the applicant’.\textsuperscript{71}

The psychological evidence should decide this issue in favour of the plaintiff. To take reasonable steps to ascertain these facts requires readiness to divulge and relive details of the abuse, to confront the damage inflicted, and to acknowledge the person responsible. As the psychological evidence demonstrates, the adult survivor of sexual abuse frequently will avoid any

\begin{footnotes}
\item \textsuperscript{68} Bunney, above n 51, at 132.
\item \textsuperscript{69} \textit{Carter v Corporation of the Sisters of Mercy of the Diocese of Rockhampton} [2001] QCA 335 (24 August 2001, unreported, BC2001104983) at [86] and [88].
\item \textsuperscript{70} Ibid, at [85].
\item \textsuperscript{71} Ibid, at [32]. We are concerned with what is expected of the plaintiff to take reasonable steps to ascertain the facts. It has been argued in this article that a plaintiff may quite well not directly know of their injury or its causation: contrast Lord Griffiths in the House of Lords stating that, ‘I have the greatest difficulty in accepting that a woman who knows that she has been raped does not know that she has suffered a significant injury’: \textit{Stubbings v Webb} [1993] AC 498 at 506; [1993] 1 All ER 322.
\end{footnotes}
situation that requires exactly such fortitude. The pain that reliving the abuse produces is an experience the survivor becomes ready to withstand only when ready. By requiring such scarification of someone who undoubtedly knows the acts happened, the courts are demanding the plaintiff experience psychological torture. Cognitive knowledge of the acts’ occurrence is something quite different from the affective ability to confront the details of the abuse. In D’Arcy, Botting DCJ’s conclusion that it was not reasonable for the applicant not to have raised the abuse before she actually did, does not follow from his premise. The reasoning is only partial in its recognition of the psychological sequelae; it first acknowledges the general difficulty in reporting the abuse, but then regresses to a vision of a typical plaintiff incurring an injury to vertebrae. The finer points of why it is so difficult to report the abuse at all, let alone engage in a thorough exploration of the events, are not recognised in the conclusion that the applicant had not taken all reasonable steps to ascertain the facts. It is one thing to make a simple report of abuse to a police officer; it is quite another to relive the full details of the events.

From the traditional acceptance of the actionability of physical damage, law has advanced, recognising medical knowledge, to accept that damage to one’s psychological state also merits redress. Indeed, judicial and extra-judicial opinions acknowledge the potential for greater damage to be caused by psychiatric or psychological injury than by physical injury. It is not asking too much of legislatures to recognise the debilitating effects on survivors of child sexual abuse, which so gravely impedes their ability to bring legal action.

3.2 The nature of the acts

The nature of the acts also distinguishes these cases and pierces the shield of time that traditionally protects the defendant in tort. The acts, which also constitute criminal acts, are particularly abhorrent and cause longstanding damage. The severity of the acts and society’s placement of them at the extremity of unacceptable conduct is demonstrated by the availability of exemplary damages. The acts involve a clear abuse of power. Physical and psychological coercion is required to perpetrate the abuse. The acts are nearly always accompanied by deception regarding their nature and by threats...

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72 Witness, for example, the availability of damages for ‘nervous shock’, and for the intentional infliction of mental distress.

73 White v Chief Constable of South Yorkshire Police [1999] 2 AC 455 at 493 per Lord Steyn; [1999] 1 All ER 1 at 32: ‘But nowadays we must accept the medical reality that psychiatric harm may be more serious than physical harm’, referred to in D Butler, ‘An assessment of competing policy considerations in cases of psychiatric injury resulting from negligence’ (2002) 10 TLJ 13 at 18.

74 J Fleming, The Law of Torts. 9th ed. Law Book Company, Sydney, 1998, pp 271–2. Exemplary damages of $400,000 were awarded in the Toowoomba Preparatory School case: S v Corporation of the Synod of the Diocese of Brisbane [2001] QSC 473 (Wilson J, 6 December 2001, unreported, BC200108976). Despite the incursions made into liability and quantum by recent legislation throughout Australia, statutes have maintained courts’ ability to award exemplary damages for personal injury claims involving unlawful sexual acts: see, for example, Civil Liability Act 2003 (Qld) s 52.
regarding future events.75 These cases usually involve a series of acts continuing over an extended period, producing immediate trauma that then intensifies. This is not to say that a person cannot be just as seriously injured even in the rarer cases where the cause of action arises out of one incident. Tort law has long protected the principle of bodily inviolability,76 and the acts of childhood sexual abuse constitute a most serious breach of this principle.

This nature of the acts rebuts any claim that the time limit is a justifiable guard of repose. At a moral level, a perpetrator of child abuse does not deserve the protection of time to escape civil trial. The survivor has had to bear the consequences of the abuse ever since the events. The perpetrator has done nothing to deserve the freedom to carry on with his or her life without having to face consequences for their acts. For the same reasons, the public interest argument is also irrelevant. There is no public interest in permitting the evasion by child abusers of civil legal consequences.77 Indeed, there are far more persuasive reasons in the public interest that warrant the ability to bring these actions unimpeded by the effluxion of time.78

Even the best reason for time limits is not sustainable as a general rule in this context due to the nature of the acts. Delay can sometimes affect the evidence needed for the defendant to have a fair trial and as a general rule, expiry of time does tend to affect the quality of the evidence. However, this mere possibility should not enable the defendant to hide behind the assumption of a lack of fair trial.

The acts done in this context inherently bring into play the prejudice to the defendant argument because they will always have occurred many years ago. The passing of time in these cases will rarely mean that a defendant is less equipped with evidence due to its destruction.79 Any evidence that did exist is likely to already be stale, given the fact that the abuse is likely to have ended at least five years earlier at best.80

The rationale does not accommodate the possibility that a plaintiff may be proceeding for injuries concerning acts inflicted on them as a child.

75 Although there is provision in the Limitation of Actions Act to stay the running of time in cases where the cause of action is concealed by fraud (s 38(1)(b)), it is unlikely that any argument in this context as to the fraudulent explanation about the nature of the acts would succeed. However, such an argument could be justified in some cases (cf. the Canadian Supreme Court decision in M (K) v M (H) [1992] 3 SCR 6; (1992) 96 DLR (4th) 289).
78 These are detailed in Part 3.3.2.
79 A good example of when prejudice will be clearly established is Lambert v Bannerman [2001] QSC 345 (Dutney J, 21 September 2001, unreported, BC200108965). Not only had 27 years elapsed, but the school records for the year in question had been destroyed, the defendant was unable to be located and it was not known if he was alive.
80 I agree with Bunney on this point: Bunney, above n 51, at 132. Contrast Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541 at 548–9; 139 ALR 1 per Toohey and Gummow J; it is submitted that their Honours’ approach in this context, where the damage was inflicted on a child, is unjust.
unaccompanied by any other adult. Nor is the rationale informed by the possibility that the acts occurred in private. Beyond the memories of the parties and of any other people who came to know of the factual circumstances, there will rarely be any physical or documentary evidence, save perhaps for some medical and school records. If anything, the lapse of time will create greater disadvantage to the plaintiff, who has to discharge the civil burden of proving on the balance of probabilities that the acts occurred. Memory is often the only evidence and the veracity of this can easily be questioned.

Sometimes, even in these cases, delay will not affect the quality of evidence at all, or it will do so only marginally. Together with recent discovery of material facts, in personal injuries cases this possibility partly justifies the court’s discretion to extend time and allow a matter to proceed. The defendant should not possess the benefit of ‘presumptive prejudice’ in these cases because it provides those who are liable with an automatic escape.

3.2.1 Protection of the defendant

The question is whether mere delay, even when accompanied by some deterioration in evidence, should override the plaintiff’s interest in bringing proceedings in cases of child sexual abuse. Nobody would reject the right of a person to a fair trial, and safeguards must exist to prevent malicious claims. Yet it is arguable that the legal system possesses adequate means to deal with this possibility through the usual procedures of the civil pre-trial and trial process, costs awards and suppression orders. The plaintiff retains the onus of proving on the balance of probabilities that the events occurred. Moreover, it is the courts’ duty to make judgments based on the credibility of witnesses and the import of any other evidence, and courts perform these judgments on a daily basis. Although, as some commentators have pointed out, plaintiffs will nearly always present as credible, compelling witnesses, implying that the odds are stacked in their favour, they should not be disadvantaged by the situation in which they have been placed. It is the legal system’s duty to provide access to the justice system to deserving plaintiffs. It is most unlikely that a fraudulent plaintiff could withstand the rigours of the normal testing of evidence. Apart from denying the claims and demonstrating their impossibility, the strategy commonly adopted by a defendant is to identify collateral issues and to show that regarding those issues the plaintiff is an unreliable witness. If further protection is thought necessary for blameless defendants in this context, methods of deterring fraudulent and mistaken

83 P Lewis and A Mullis, ‘Delayed Criminal Prosecutions for Childhood Sexual Abuse: Ensuring a Fair Trial’ (1999) 115 LQR 265 at 294. Although made in the context of delayed criminal prosecutions, this observation is relevant in the civil context.
84 See, for example, D’Arcy (Qld DC, Botting DCJ, 21 June 2002, unreported). There, the ability of the defendant to identify such collateral issues and to repel the plaintiff’s testimony regarding them was claimed to be diminished. Muir J in Carter v Corporation of the Sisters
claims, such as costs orders, could be strengthened; but the valid claims of
many should not be neutralised by a merely potential few spurious claims.

3.3 Analogy with criminal law

When considering principles of time and delay in this context, in theoretical,
practical and moral senses the most justifiable analogy is with criminal
conduct, not tortious conduct.

3.3.1 Theoretical and practical senses

The acts committed in cases of child sexual abuse are criminal offences.85
Time does not run against the State in its prosecution of criminal offences. In
Queensland this applies expressly for indictable offences heard summarily,86
and for indictable offences not heard summarily, the absence of a time limit
simply embodies the maxim *nullum tempus occurrit regi* — time does not run
against the Crown.87 The acts constituting child sexual abuse will always
constitute indictable offences, so prima facie the State is never limited by time
in prosecuting individuals who have committed child abuse.

The High Court has determined that individuals who are accused of
committing criminal acts have no right to a speedy trial, or even to trial within
a reasonable time.88 A slight concession to the possible effect of delay
remains, with some recognition that delay can impede a fair trial and, though
rare, courts have stayed proceedings on occasion.89 This will only happen if
the effect of the delay makes the trial of the accused unfair or oppressive. To
decide this, the following factors are considered: the length of the delay,
reasons for the delay, the accused’s responsibility for the delay and past
attitude to it, prejudice to the accused, and the public interest in trying charges
of serious offences and the conviction of guilty parties.90

Cases of delayed criminal prosecution for child sexual abuse are an
instructive counterpoint to the civil law. Judicial comment, particularly when
considering the reasons for the delay, illuminates a marked difference in
theoretical and practical approach. Most significantly, there is abundant
explicit recognition that survivors of child sexual abuse frequently and for

85 See, for example, Criminal Code (Qld) ss 349 (rape), 208 (unlawful sodomy), 210 (indecent
treatment of a child under 16), 215 (carnal knowledge with or of a child under 16), 222
(incest), 229B (maintaining a sexual relationship with a child).

86 Criminal Code (Qld) s 552F.

87 R Kenny, *An Introduction to Criminal Law in Queensland and Western Australia*, 5th ed,
Butterworths, 2000, p 39. For simple offences, the Crown must proceed within 12 months
from the time of the matter of complaint: Justices Act 1886 (Qld) s 52.

88 *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 33 per Mason CJ, 44 per
Brennan J, 56 per Deane J, 70 per Toohey J, and 78 per Gaudron J; 87 ALR 577.

89 Examples include *Gill v DPP* (1992) 64 A Crim R 82 and *R v Davis* (1995) 57 FCR 512. In
*Davis*, a case of sexual assaults, the reason for the stay of proceedings was that the delay was
accompanied by the defendant’s loss of medical records and the unavailability of strategies
the court could use to overcome that unfairness: at 521.

90 *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 60–1; 87 ALR 577 at 603
per Deane J, cited and lucidly discussed by S Henchcliffe, ‘Abuse of process and delay in
good reasons take a long period of time to report it.\textsuperscript{91} In the Federal Court in 1995, Wilcox J stated that in the courts’ experience:

> 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.\textsuperscript{92}

In cases of child sexual abuse where the report has been delayed, applications for a stay of proceedings have been denied, even where the delay has been extremely long.\textsuperscript{93} On a practical level, the reasons for this are that it is still logistically possible to prosecute the accused since the most relevant testimonial evidence will still exist, and no unfairness or oppression is caused.\textsuperscript{94} The accused must prove that specific prejudice would result to such an extent that the trial would be unfair, and that this prejudice could not be nullified by judicial action.\textsuperscript{95}

The deeper and more compelling reasons for these positions involve moral arguments that entail grounds of public policy as well as considerations of individual justice.

### 3.3.2 Moral sense: whether delay diminishes the quality of justice

It is necessary at this point to recall that in articulating the policy reasons for civil time limits, McHugh J accurately reported that time limits are enacted because the legislature makes a judgment, among other things, that the chance of an unfair trial occurring after the limitation period has expired is sufficiently great to justify the termination of the plaintiff’s right of action at the end of that period. The legislature presumes that after the selected period of time there will be a significant chance that the defendant would not be able to fairly defend himself or herself, and that on this risk assessment ‘the legislature perceives that society is best served by barring the plaintiff’s action’. Further, when a defendant shows actual prejudice of a significant kind, it is difficult to conclude that the legislature intended that the extension provision should trump the limitation period. The general rule that actions must be commenced within the limitation period should therefore prevail once the defendant has proved the fact or the real possibility of significant prejudice.\textsuperscript{96}

On this basis, the central moral question becomes: Is society best served by

\textsuperscript{91} See, for example, \textit{R v Austin} (1995) 14 W AR 484 at 493, where Owen J states: ‘It is not at all uncommon for there to be a delay in the institution of proceedings for sexual offences’; and the Federal Court in \textit{R v Davis} (1995) 57 FCR 512 at 515 per Wilcox, Burchett and Hill JJ, which approves the quote from \textit{R v Lane}, below.

\textsuperscript{92} \textit{R v Lane} (Fed Ct of A, Wilcox J, 19 June 1995, unreported) at 2, quoted in Henchliffe, above n 90, at 6.


\textsuperscript{94} \textit{R v Birdsall}, ibid.

\textsuperscript{95} \textit{R v Lane} (Fed Ct of A, Wilcox J, 19 June 1995, unreported); \textit{R v Wagner} (1993) 66 A Crim R 583.

\textsuperscript{96} See above Part 2.
barring this type of action? For several reasons, the answer must be no. To begin with, there are many significant public interests at play. One public interest resides in ensuring that perpetrators are not permitted to avoid civil consequences for their acts. Another is that the public has an interest in making civil redress available to adult survivors of abuse. Broader public interests lie in reducing the incidence of child abuse, in publicising the incidence of abuse, in encouraging more survivors to report abuse, and in maintaining public confidence in the legal system. These interests mirror many of those which justify the criminal analogy, and there is recent explicit judicial recognition of some of these interests in a civil setting.97

In evaluating the legal principles affecting plaintiffs in this context, these interests outweigh any argument regarding the defendant’s right to a fair trial, which, as argued above, can be sufficiently protected despite delay. As well, they outweigh an argument based on economic interests. Quantum of damages is generally low,98 and is likely to be lower still after recent tort reform. Plaintiffs in these cases are often seeking recognition rather than the full extent of compensation that could be sought. The impact on the insurance industry is unlikely to be significant, and similarly, the impact on the State would be minimal. Since the High Court decision in New South Wales v Lepore; Samin v Queensland; Rich v Queensland,99 it is unlikely that if the time limit was abolished, the State would be made party to many newly launched actions regarding long-past events, hence, exposing it to liability for the acts committed in its institutions and by its employees. An associated advantage of abolition is that the State would be prompted to design and implement effective safeguards in its institutions to minimise the risk of child abuse occurring. While involving some short-term cost, this would produce economic and social benefits downstream, as the lower the incidence of child sexual abuse, the lower the number of people requiring subsequent health services and social support, and the less time and productivity wasted by people coming to terms with the consequences of their abuse.

The extension provision embodies parliament’s acceptance that the general rule expressed by the limitation period of what justice requires in particular categories of cases can be ‘overridden by the facts of an individual case’; it is enacted ‘to eliminate the injustice a prospective plaintiff might suffer by reason of the imposition of a rigid time limit’.100 Whether injustice has occurred (therefore allowing exercise of discretion to extend time) must be

97 In D’Arcy (Qld DC, Botting DCJ, 21 June 2002, unreported) at 50, in light of the defendant’s criminal convictions in which the applicants gave evidence, Botting DCJ said: ‘it has to be said that each of these applicants rendered an important service to the community in coming forward, with others, to give evidence . . . It was very apparent to me during the brief evidence that each of them gave that it must have taken extraordinary courage to do so, and each has paid a very high price for having done so.’

98 See below n 111.

99 (2003) 195 ALR 412, McHugh J dissenting. This decision indicates that the State will not be liable via breach of non-delegable duty in situations where a teacher sexually assaults a student. It does not seem likely that the State would be vicariously liable, although this possibility remains.

100 Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541 at 553; 139 ALR 1, citing Sola Optical Australia Pty Ltd v Mills (1987) 163 CLR 628 at 635; 75 ALR 513 at 518.
evaluated against the rationales of the limitation period. The discretion to extend requires the plaintiff to show that his or her case ‘is a justifiable exception to the rule that the welfare of the State is best served by the limitation period in question . . . [the plaintiff] has the positive burden of demonstrating that the justice of the case requires that extension’.  

Here, it is argued that the injustice suffered by the plaintiff by rigid enforcement of the time limit outweighs any possible argument that the welfare of the State requires it. Were plaintiffs in these cases to be allowed the benefit of an extension, the welfare of the State would not be adversely affected. All an extension of time does is to give the matter passage to trial; it is not conclusive. Protection exists against malicious prosecution in the threshold qualification that there must be evidence to establish the right of action. It is not the welfare of the State that is relevant here; it is a question of providing access to justice to a class of plaintiffs who are qualitatively different from plaintiffs in general.102 Botting DCJ’s obvious discomfort at the incongruity of the outcome in D’Arcy — criminal findings of guilt requiring the conclusion that the acts occurred not being sufficient to overcome a civil argument of delay — indicates the problem. The courts have to date followed the policy preference of caution against any spectre of unfairness to the defendant at trial. This preference has not been overcome by the competing policy preference expressing psychological evidence and, arguably, community opinion.

Cases of child sexual abuse and their psychological sequelae were little known (or acknowledged), much less envisaged, when limitation rationales were formulated and when limitation statutes were designed.103 Statutory time principles are, for the most part, predicated on the plaintiff suffering physical, not psychological damage; on immediate, not insidious injury; on a plaintiff who knows of their damage, not one who is ignorant of it; on an adult plaintiff, not a child; on a plaintiff psychologically unimpeded from bringing proceedings, not one who is so affected by the psychological sequelae that to confront it is their worst fear. The heightened general awareness of child sexual abuse and the emergence of a body of evidence concerning the psychological sequelae of child sexual abuse are relatively recent developments.104 Legal advances traditionally take some time to catch up with changes in societal conditions and with evidence from relevant disciplines.

101 Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541 at 553–4; 139 ALR 1.

102 Furthermore, extension provisions are remedial legislation and are therefore to be interpreted beneficially if ambiguous: Bull v Attorney-General (NSW) (1913) 17 CLR 370. This does not mean that the true meaning of the provision should be exceeded, but, in the words of Isaacs J, it does mean that the language ‘should be construed so as to give the fullest relief which the fair meaning of its language will allow’: at 384.

103 Cases of child sex abuse were not unknown, however. According to D Scott and S Swain’s Confronting Cruelty, Melbourne University Press, Carlton, Vic, 2002, between 1891 and 1907 there were 177 reported cases of child sexual abuse, and the Argus newspaper stated: ‘We cannot believe such a state of things exists in this community’: cited in R Yallop, ‘Too hard to cope with’, The Australian, 27 May 2003, p 9.

104 See, for example, the psychiatric testimony of Dr Kippax in Tiernan v Tiernan (Qld SC, Byrne J, 22 April 1993, unreported, BC9303449) and of Dr Grant in D’Arcy (Qld DC, Botting DCJ, 21 June 2002, unreported) at 23.
Unreasonable demands should not be imposed on legislators. This legal issue may only recently have ripened as one recognised as being in need of redesign; the first judicially decided case of an application for an extension of time in Queensland in this context occurred in 1993; similarly, the first case of its type in England was finally determined that same year.\textsuperscript{105} Now, however, with the knowledge that a greater number of people are in this position than was previously realised, the legislature is more fully-informed of the prevalence of child sexual abuse and its consequences. It is therefore now able to act and can be fairly expected to act.\textsuperscript{106}

4. Conclusion
4.1 Past and present

By the nominal standards of twenty-first century liberal democracies, the historical legal and societal treatment of children and the individual acts inflicted on them have been abhorrent. The historian Lloyd de Mause declared that:

\begin{quote}
The history of childhood is a nightmare from which we have only recently begun to awaken. The further back in history one goes, the lower the level of child care, and the more likely children are to be killed, abandoned, beaten, terrorised, and sexually abused.\textsuperscript{107}
\end{quote}

Much of the maltreatment of children, including sexual abuse, has occurred in the home, and this has not changed. The home remains a hostile and damaging place for many children.

\textsuperscript{105} In Queensland, 	extit{Tiernan v Tiernan} (Qld SC, Byrne J, 22 April 1993, unreported, BC9303449); in the United Kingdom, 	extit{Stubbings v Webb} [1993] AC 498; [1993] 1 All ER 322. Contrast Canada, where the Supreme Court decision in 	extit{M (K) v M (H)} [1992] 3 SCR 6; (1992) 96 DLR (4th) 289 motivated more speedy legislative change over the next several years.

\textsuperscript{106} As well as more developed acceptance of the psychological evidence, and the recognition of it, there is also recently acquired information about prevalence, as demonstrated for example in the 	extit{Forde Commission of Inquiry into Abuse of Children in Queensland Institutions}, 1999, Brisbane, and the QCC and QPS’s 	extit{Project Axis}, above n 2.

\textsuperscript{107} L de Mause, ‘The Evolution Of Childhood’ in L de Mause (Ed), 	extit{The History Of Childhood}, Bellaw, London, 1974, p 1. During the Dark and Middle Ages, childhood was a period of life not marked by protective policies based on an understanding of childhood as a qualitatively different stage of life from adulthood, but by brutality and exploitation. Indeed, children were seen more as possessions with possible economic worth either as objects of sale or as labour. There were no laws protecting children and few even recognising them. The absence of laws regarding children is explained by the instinctive and universally accepted subordination of them to their parents, particularly to the father. Children’s complete lack of legal rights was embodied in the concept of \textit{patria potestas}, which gave a father complete dominion over his children (and his wife). Such was the extent of this power, and such was the nonchalance with which children were regarded, that in early Roman law the father had the right to expose infants to the elements if he chose to reject their existence: A Borkowski, \textit{Textbook on Roman Law}, Blackstone Press, London, 1994, p 103; J Gardner, \textit{Women in Roman Law and Society}, Routledge, London, 1986, p 155. The father also had the right to punish his children, which could include imposing a penalty of death: Gardner, ibid, pp 6–7. Further rights included the sale of children; from at least the seventh century a father could legally sell his children aged under seven: P Thane, ‘Childhood in History’ in M King (Ed), \textit{Childhood, Welfare & Justice}, Batsford, London, 1981, p 12.
Despite judicial and psychiatric statements about the recent emergence of public evidence of child sexual abuse, statistical records of it have existed for at least a century.\textsuperscript{108} Up until now, notwithstanding a growing nominal recognition of children’s rights,\textsuperscript{109} little has been done to increase preventative safeguards against abuse, particularly in the home. Regarding abuse occurring within families, the liberal State’s traditional reluctance to intervene in the private sphere hinders effective prevention and intervention. In the last several years, some reforms in the public sphere have occurred, such as checks on employment of individuals placed in a position of authority over children.\textsuperscript{110}

These developments in the public sphere are most encouraging. However, more could be done to prevent the incidence of abuse in the private sphere and more could be done for survivors of abuse as a whole. It is reprehensible enough that child sexual abuse continues to be perpetrated in our society. It is also morally troublesome that there remain major deficiencies in our responses to child abuse. For the legal system to deny redress to those individuals while they are children, and to continue that denial once they become adults fully aware of their history, is an unjustifiable exacerbation of the abuse.

4.2 Future

This is not an issue having inherent appeal to political parties’ reform agendas. Apart from its inherent sensitivity, it lacks hard political currency since it is unlikely to be decisive in an election. Yet, this is a significant legal and moral issue on which a responsible and informed government would act. It is also a legal position that can be easily amended. Government action on such matters demonstrates its concern for social justice and its desire to enhance justice where it can, not only when it is politically profitable to do so.

What would happen if the time limit was abolished in these cases? There would not be a flood of unjustified claims.\textsuperscript{111} In the short-term, justified claims

\begin{footnotes}
\item[108] Yallop, citing Scott and Swan, above n 103.
\item[109] Best epitomised in the \textit{United Nations Convention on the Rights of the Child} 1989. Article 34 requires States to undertake to protect children from all forms of sexual exploitation and abuse. Australia has ratified the UNCRC but it has not been incorporated into domestic legislation, as is required for it to constitute law in Australia: \textit{Koowarta v Bjelke-Petersen} (1982) 153 CLR 168; 39 ALR 417; \textit{Minister for Immigration and Ethnic Affairs v Teoh} (1995) 183 CLR 273; 128 ALR 353.
\item[110] See, for example, the \textit{Child Care Act 1991} (Qld). There are also some encouraging signs that the prevalence of abuse within church institutions will be reduced, in the aftermath of the various inquiries and reports taking place in the late 1990s and early 2000s.
\item[111] Case law suggests that the amount of damages available is generally not high enough to encourage malicious claimants seeking windfall gains. In \textit{Paten v Bale} (Qld SC, Wilson J, 19 October 1999, unreported, BC9906872) the plaintiff was awarded $183,282. In \textit{Bird v Bool} (Qld SC, Derrington J, 16 October 1997, unreported) the plaintiff was awarded $69,750. See also \textit{W v W; R and G} (1994) FLC 92-475, where two girls were awarded damages from their stepfather who had sexually abused them in the sums of $90,000 and $80,000 respectively. These three cases involved serious sexual assaults. The Toowoomba Preparatory School jury award of $834,800 is exceptional, particularly since it included exemplary damages in the amount of $400,000: \textit{S v Corporation of the Synod of the Diocese of Brisbane} [2001] QSC 473 (Wilson J, 6 December 2001, unreported, BC200108976). There are few cases where civil damages have been awarded by the courts, demonstrating the rarity with which survivors can institute proceedings within time, at least in cases where the abuse is not occurring within an institution: in \textit{Paten v Bale}, Wilson J acknowledges the
\end{footnotes}
may increase, especially against religious institutions. Many of these would be settled and would not cause an intolerable increase in courts’ caseload. Many survivors would gain recognition and vindication and a sense of truth that would end some of the more pernicious sequelae such as self-blame and responsibility. A significant proportion of adult survivors would still not bring legal action, in some cases because the perpetrator may be dead, unable to be located, or impecunious, and in others because the survivor may remain intimidated by the perpetrator, wish to keep the family intact, or remain psychologically unable to bring an action.

It is quite possible that the major consequence of legal change would be social progress. The time is ripe for this enhancement of justice and social welfare. Assisted by an unprecedented public awareness of sexual abuse, at least within religious and educational institutions, the facilitation of complaints through the courts could only assist the accompanying institutional change within churches and schools aimed at preventing further incidents of abuse. It is likely that events such as the resignation of the Governor-General and the Report on Sexual Abuse in the Anglican Church in Brisbane would, in time, decrease long-delayed complaints regarding abuse within churches and schools. This decrease would be produced by these institutions developing more secure control over staff selection and supervision and more sophisticated complaints mechanisms, thus decreasing the incidence of abuse within them. Different and courageous measures would be necessary to address, from both preventative and responsive perspectives, the persistent problem of sexual abuse committed by family members and acquaintances. However, in implementing legal reform in this overall context, providing a mechanism for civil redress to all deserving plaintiffs would be a good start.

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113 Australia’s Governor-General, Dr Peter Hollingworth, resigned on 26 May 2003 as a result of public and political pressure produced by several unfavourable reports and incidents concerning his handling of complaints of child sexual abuse. In particular, the *Report of the Board of Inquiry into Past Handling of Complaints of Sexual Abuse in the Anglican Church Diocese of Brisbane*, 2003, found that one of Dr Hollingworth’s decisions while Archbishop of the Brisbane Diocese had been untenable (p 418). As well, an accusation of rape embroiled Dr Hollingworth in an eventually discontinued application to extend time in which to bring civil proceedings (the applicant committed suicide).