

# QUEENSLAND GOVERNMENT ACTIONS TO COMPENSATE SURVIVORS OF INSTITUTIONAL ABUSE: A CRITICAL AND COMPARATIVE EVALUATION

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## 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.<sup>1</sup> 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.<sup>2</sup> In Queensland, the Forde Commission of Inquiry into Abuse of Children in

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<sup>1</sup> 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.

<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

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'<sup>6</sup> has been identified.<sup>7</sup> The psychological, educational and social effects of

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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/shea/redress/redress\\_main.asp](http://www.lcc.gc.ca/en/themes/mr/ica/shea/redress/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 Laffoy, 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](http://www.rirb.ie/documents/cac_report2002.pdf)> at 31 January 2004 (hereafter referred to as *Towards Redress And Recovery*).

<sup>3</sup> Queensland Government, *Response to Recommendations of the Commission of Inquiry into Abuse of Children in Queensland Institutions* (1999) 1-2 <[http://www.families.qld.gov.au/department/forde/publications/documents/pdf/forde\\_govtresp.pdf](http://www.families.qld.gov.au/department/forde/publications/documents/pdf/forde_govtresp.pdf)> at 31 January 2004 (hereafter referred to as *1999 Response To Recommendations*).

<sup>4</sup> *Commission of Inquiry into Abuse of Children in Queensland Institutions* (1999) iv-vi, 277-280 <[http://www.families.qld.gov.au/department/forde/publications/documents/pdf/forde\\_comminquiry.pdf](http://www.families.qld.gov.au/department/forde/publications/documents/pdf/forde_comminquiry.pdf)> at 31 January 2004 (hereafter referred to as the Forde Inquiry).

<sup>5</sup> Crime And Misconduct Commission, *Protecting Children: An Inquiry Into Abuse Of Children In Foster Care* (2004) Crime and Misconduct Commission, Brisbane <<http://www.cmc.qld.gov.au/library/CMCWEBSITE/ProtectingChildren.pdf>> at 31 January 2004.

<sup>6</sup> There are four categories of abuse and neglect: physical abuse, sexual abuse, emotional abuse, and neglect: Australian Institute of Health and Welfare, *Child protection Australia 2002-03*, Canberra, Australian Institute of Health and Welfare, 2004, 15 (hereafter referred to as AIHW).

<sup>7</sup> 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.<sup>8</sup> Government departments are empowered to receive and investigate complaints, and to take protective action in certain cases.<sup>9</sup> The incidence of child abuse and neglect is monitored.<sup>10</sup> 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.<sup>11</sup>

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

<sup>8</sup> See for example the evidence regarding abuse and neglect acknowledged by the *Forde Inquiry*, above n 4, xi-xii, 284-287; see also D Wolfe, *Child Abuse: Implications for Child Development and Psychopathology* (2<sup>nd</sup> ed, Sage, 1999); B Egeland, D Jacobovitz and A Sroufe, 'Breaking the Cycle of Abuse' (1988) 59 *Child Development* 1080; R Famulro, T Fenton and R Kinscherff, 'Psychiatric Diagnoses of Maltreated Children: Preliminary Findings' (1992) 31 *Journal of the American Academy of Child Psychiatry* 863; M Dunne and M Legosz, 'The Consequences of Childhood Sexual Abuse' in Queensland Crime Commission and Queensland Police Service, *Project AXIS – Child Sexual Abuse in Queensland: Selected Research and Papers*, 2000, Brisbane, 43, 43-50; S McLeer, E Deblinger, M Atkins, E Foa and D Ralphe, 'Post-traumatic Stress Disorder in Sexually Abused Children' (1988) 27 *Journal of the American Academy of Child and Adolescent Psychiatry* 650; S McLeer, E Deblinger, D Henry and H Orvaschel, 'Sexually Abused Children at High Risk for Post-traumatic Stress Disorder' (1992) 31 *Journal of the American Academy of Child and Adolescent Psychiatry* 875; P Mullen, 'Childhood Sexual Abuse and Mental Health in Adult Life' (1993) 163 *British Journal of Psychiatry* 721; P Ackerman, J Newton, W McPherson, J Jones and R Dykman, 'Prevalence of Post-traumatic Stress Disorder and Other Psychiatric Diagnoses in Three Groups of Abused Children (Sexual, Physical, and Both)' (1998) 22 *Child Abuse and Neglect* 759; S McLeer, J Dixon, D Henry et al, 'Psychopathology in Non-clinically Referred Sexually Abused Children' (1998) 37 *Journal of the American Academy of Child and Adolescent Psychiatry* 1326.

<sup>9</sup> For example, the *Child Protection Act 1999* (Qld).

<sup>10</sup> For example, by the Australian Institute of Health and Welfare.

<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> In Queensland in 2002-03 there were 31 068 notifications of child abuse and neglect to State authorities, involving 22 027 children.<sup>14</sup> Of these, there were 12 203 substantiated cases involving 9032 children.<sup>15</sup> In 2002-03 in Queensland, 4107 children were living under care and protection orders issued by the State.<sup>16</sup> 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.<sup>17</sup> 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

<sup>12</sup> 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.

<sup>13</sup> Queensland Crime Commission and Queensland Police Service, *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.

<sup>14</sup> AIHW, above n 6, 17 (Table 2.6).

<sup>15</sup> Ibid 17 (Table 2.6). The 12 203 substantiations in Queensland comprised 2806 of physical abuse; 610 of sexual abuse; 4135 of emotional abuse; and 4652 of neglect: AIHW 16 (Table 2.5).

<sup>16</sup> Ibid 31 (Table 3.5). These orders comprise guardianship or custody orders (3831), 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).

<sup>17</sup> 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.<sup>18</sup> 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

<sup>18</sup> 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(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); *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 27J(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 27I(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-60E (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.<sup>19</sup> 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.<sup>20</sup>

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.<sup>21</sup>

#### 1 Canada

In Canada, provincial governments have established compensation schemes in situations where children were abused and neglected in State-funded and State-operated institutions.<sup>22</sup> 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.

<sup>19</sup> The Law Commission of Canada recognised that typically, survivors seek acknowledgment of the harm done; accountability for that harm; an apology; access to therapy and education; financial compensation; memorials; a commitment to raising public awareness of institutional child abuse; and a commitment to preventing its recurrence: Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*, 2000, Executive Summary, <<http://www.lcc.gc.ca/en/themes/mr/ica/2000/pdf/execsum.pdf>> at 31 January 2004, 3.

<sup>20</sup> See generally Law Commission of Canada, *ibid*.

<sup>21</sup> *Ibid* 9-10.

<sup>22</sup> G Shea, *Redress Programs*, above n 2; see too R Bessner, *Institutional Child Abuse in Canada*, (1998) Ottawa: Law Commission of Canada <[http://www.lcc.gc.ca/en/themes/mr/ica/besrep/besrep\\_main.asp](http://www.lcc.gc.ca/en/themes/mr/ica/besrep/besrep_main.asp)> at 31 January 2004.

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.<sup>23</sup> 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.<sup>24</sup>

## 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’.<sup>25</sup> Several strategies were implemented to address the situation including the establishment of the Commission to Inquire into Child Abuse.<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup> The Residential Institutions Redress Board scheme, funded by government with contributions from responsible religious authorities,<sup>30</sup> was launched on

<sup>23</sup> Law Commission of Canada, above n 19, 8-9.

<sup>24</sup> Ibid 23.

<sup>25</sup> *Towards Redress And Recovery*, above n 2, 14.

<sup>26</sup> The function of the Laffoy Commission was to inquire into the nature and extent of abuse of children in residential institutions, to find out where and why abuse had occurred, and to determine who was responsible for it. The Laffoy Commission will report in 2005, and will make recommendations on what should be done to deal with the continuing effects of abuse and on strategies to prevent further abuse of children in these institutions: *ibid* 1-3, 15.

<sup>27</sup> In July 2000 a group of lawyers asked the Laffoy Commission to publish an interim report recommending the implementation of an independent compensation scheme for survivors. These lawyers had noted the difficulty for them, without such a scheme, about whether to advise their clients to participate in the Laffoy inquiry. The Laffoy Commission referred this request to the government, acknowledging that in the absence of such a scheme, a significant barrier to its investigation existed: *Towards Redress And Recovery*, above n 2, 2.

<sup>28</sup> Ibid.

<sup>29</sup> Complemented by the *Residential Institutions Redress Act 2002 (Section 33) Regulations 2002*, the *Residential Institutions Redress Act 2002 (Section 17) Regulations 2002* and the *Residential Institutions Redress Act 2002 (Miscellaneous Provisions) Regulations 2002*.

<sup>30</sup> Under the *Residential Institutions Redress Act* the government funds the compensation fund, with any contributions made by religious institutions. The Irish bishops’ conference agreed to pay \$A217.62 million into the compensation fund and in return received indemnity for future claims about past child abuse claims: ‘Irish Abuse Claims Could Reach \$A1.71 Billion’, *Catholic News*, 31 October 2003. This contribution by the Church has been criticised as being too small, since the total amount disbursed under the scheme will probably be at least 1 billion euros, and possibly as

2 December 2002. The average award to date is 80 000 euros (approximately \$A137 000).<sup>31</sup>

### 3 *Tasmania*

Albeit on a vastly reduced monetary scale, the Tasmanian government has established a similar scheme<sup>32</sup> pursuant to a Protocol Agreement made between the Ombudsman and the Department of Health and Human Services.<sup>33</sup> The review of claims system was established after revelations in July 2003 of sexual abuse of a former State ward in

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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).

<sup>31</sup> 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 270000 euros (approximately \$A463 000): Residential Institutions Redress Board, *Newsletter*, 22 December 2003, <[http://www.rirb.ie/updates\\_article.asp?NID=56](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](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 150000 – 200000 euros (approximately \$A257 000 – 343 000). Band 3: 100000 – 150000 (approximately \$170 000 – 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.

<sup>32</sup> See Tasmania, *Parliamentary Debates*, Legislative Council, 28 August 2003, (Michael Aird, Leader of the Government in the Council) <<http://www.hansard.parliament.tas.gov.au/ISYSquery/IRL1DCE.tmp/1/doc>> at 31 January 2004; see also the report of Tasmania's Ombudsman Jan O'Grady, *Interim Report On Abuse Of Children In State Care*, 2004, <<http://www.justice.tas.gov.au/ombudsman/CART%20Ombudsman%20Interim%20Report%2007012004.pdf>> at 31 January 2004.

<sup>33</sup> This exists alongside a Tasmanian Anglican Church scheme offering up to \$60 000 in compensation for claimants, announced in May 2003 by Bishop of Tasmania John Harrower, with an open acknowledgment of the consequences of the abuse: 'Bishop Announces Further Responses to Past Abuse', 23 May 2003, <<http://www.anglicantas.org.au/news/mr-20030523.html>> at 31 January 2004.

foster care. While not establishing an inquiry into the abuse of children in State care,<sup>34</sup> 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.<sup>35</sup>

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[se] 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.<sup>36</sup> 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.<sup>37</sup> 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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<sup>34</sup> 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.

<sup>35</sup> Tasmania, *Parliamentary Debates*, above n 32.

<sup>36</sup> See generally the Ombudsman's *Interim Report*, above n 32; and the speech presenting the scheme to Parliament, above n 32.

<sup>37</sup> 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/Cart%20Weekly%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.<sup>38</sup> Furthermore, the court will not consider the expiry of time of its own volition.<sup>39</sup> 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.<sup>40</sup> These recommendations are motivated by recognition of the ethical, practical and theoretical circumstances precluding plaintiffs in these cases from bringing actions within time.<sup>41</sup>

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.<sup>42</sup> In Ontario, Manitoba and

<sup>38</sup> *Uniform Civil Procedure Rules 1999* (Qld) r 150(1)(c).

<sup>39</sup> *Commonwealth v Verwayen* (1990) 170 CLR 394, 498.

<sup>40</sup> Law Commission of Canada, above n 19, 20.

<sup>41</sup> 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).

<sup>42</sup> 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.<sup>43</sup> In Ireland, amending legislation in 2000 gave plaintiffs a further year in which to bring civil actions arising out of acts of sexual abuse.<sup>44</sup> In several American jurisdictions, the effect of limitations statutes on survivors of child sexual abuse is being eroded.<sup>45</sup> 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.<sup>46</sup>

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:<sup>47</sup>

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.

<sup>43</sup> 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).

<sup>44</sup> 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.

<sup>45</sup> Other states in the United States of America, including New York, New Jersey, Connecticut, Oregon, Pennsylvania and Florida have recently passed measures to extend their limitation statutes, or are considering doing so: J Caher, 'Victims of Clergy Sexual Abuse Seek Bill To Suspend Three-Year Statute of Limitations' (2003) 229 *New York Law Journal* 1; J Tu, 'Bills to Target Clergy Sex Abuse', *Seattle Times*, 17 November 2002.

<sup>46</sup> 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.

<sup>47</sup> 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.<sup>48</sup> 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,<sup>49</sup> 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.<sup>50</sup>

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.<sup>51</sup> This response was repeated in its 2001 Progress Report.<sup>52</sup> 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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<sup>48</sup> 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](http://www.aph.gov.au/senate/committee/clac_ctte/inst_care/submissions/sub159.doc)> at 31 January 2004.

<sup>49</sup> See for example the government's misleading claims in its *1999 Response To Recommendations*, above n 3, 43-44; and its *Response To Recommendations Of The Commission Of Inquiry Into Abuse Of Children In Queensland Institutions: Progress Report*, 2001, <[http://www.families.qld.gov.au/departement/forde/publications/documents/pdf/forde\\_govtresprogre ss.pdf](http://www.families.qld.gov.au/departement/forde/publications/documents/pdf/forde_govtresprogre ss.pdf)>, 8, 72, at 31 January 2004 (hereafter referred to as *2001 Progress Report*).

<sup>50</sup> This is confirmed by the Forde Implementation Monitoring Committee, *Report to the Queensland Parliament*, 2001, <[http://www.families.qld.gov.au/departement/forde/publications/documents/pdf/forde\\_parliament.p df](http://www.families.qld.gov.au/departement/forde/publications/documents/pdf/forde_parliament.p df)>, 123, at 31 January 2004.

<sup>51</sup> *1999 Report*, above n 3, 43.

<sup>52</sup> *2001 Progress Report*, above n 49, 8, 72.

compensation schemes with a view to implementing a similar scheme.<sup>53</sup> 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.<sup>54</sup>

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,<sup>55</sup> 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’.<sup>56</sup>

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.

<sup>53</sup> Forde Implementation Monitoring Committee, above n 50, 124-131.

<sup>54</sup> Ibid 131; see also Board of Advice of the Forde Foundation, above n 48, 6-9.

<sup>55</sup> 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 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.

<sup>56</sup> *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,<sup>57</sup> have been thoroughly documented.<sup>58</sup> 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;<sup>59</sup> and second, these plaintiffs will almost certainly fail to be granted an extension of time in which to proceed,<sup>60</sup> because of the passage of time and the attendant deemed prejudice to the defendant's right to a fair trial, among other reasons.<sup>61</sup> These difficulties are not remedied in Australian law by the equitable doctrine of fiduciary duties.<sup>62</sup>

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.<sup>63</sup> There are several reasons for this. Just as adult survivors of child sexual abuse typically will avoid stimuli connected with the

<sup>57</sup> Through the operation of ss 11, 29(2)(c) and 5(2).

<sup>58</sup> See Mathews, above n 18; see also L Bunney, 'Limitation of Actions: Effect on Child Sexual Abuse Survivors in Queensland' (1998) 18 *Queensland Lawyer* 128; A Marfording, 'Access to Justice for Survivors of Child Sexual Abuse' (1997) 5 *Torts Law Journal* 221; and see generally A Mullis, 'Compounding The Abuse? The House Of Lords, Childhood Sexual Abuse And Limitation Periods', (1997) 5 *Medical Law Review* 22; J Manning, 'The Reasonable Sexual Abuse Victim: "A Grotesque Invention of the Law"?' (2000) 8 *Torts Law Journal* 1; A Beck, 'Limitation: Time For Change' (2000) *New Zealand Law Journal* 109; and A Beck, 'Limitation Of Sexual Abuse Claims' (1999) *New Zealand Law Journal* 329.

<sup>59</sup> Mathews, above n 18, 219-221.

<sup>60</sup> Which is available under s 31(2).

<sup>61</sup> See Mathews, above n 18, 223-227; and see *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541; *Carter v Corporation of the Sisters of Mercy of the Diocese of Rockhampton* [2000] QSC 306 (Unreported, Supreme Court of Queensland, White J, 8 September 2000); *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); *Applications 861 and 864* (Unreported, District Court of Queensland, Botting DCJ, 21 June 2002); contrast *Woodhead v Elbourne* [2001] 1 Qd R 220, and *Tiernan v Tiernan* (Unreported, Supreme Court of Queensland, Byrne J, 22 April 1993).

<sup>62</sup> 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*.

<sup>63</sup> See the comments made above, n 41.

abuse until psychologically able to confront it,<sup>64</sup> so too may survivors of physical and emotional abuse in this context.<sup>65</sup> 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,<sup>66</sup> so too will the injuries caused by physical and emotional abuse.<sup>67</sup> Just as adult survivors of child sexual abuse commonly are precluded from commencing litigation within the time set by statutory provisions,<sup>68</sup> 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<sup>69</sup> - 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.<sup>70</sup> In *Carter*, the government pleaded the expiry of the limitation period as a defence, and the plaintiff was denied a civil trial.<sup>71</sup> 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.<sup>72</sup> She had severe speech impediments and was teased cruelly about these, and she endured regular severe physical assault including being beaten, burned

<sup>64</sup> 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, *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).

<sup>65</sup> See Forde Inquiry, above n 4, 284-287.

<sup>66</sup> See for example Dunne and Legosz, above n 8.

<sup>67</sup> See Forde Inquiry, above n 4, 284-287.

<sup>68</sup> For judicial acknowledgment of this fact, see for example Atkinson J's judgment in *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 *Applications 861 and 864* (Unreported, District Court of Queensland, 21 June 2002) 36; see also Wilcox J in *R v Lane* (Unreported, Federal Court, 19 June 1995) 2.

<sup>69</sup> Queensland Crime Commission and Queensland Police Service, *Child Sexual Abuse in Queensland: The Nature and Extent*, above n 13, 47-55, 83-87.

<sup>70</sup> See also *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.

<sup>71</sup> 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).

<sup>72</sup> 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).

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.

### B *Post-2002: The Personal Injuries Proceedings Act 2002*

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)<sup>73</sup> 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.<sup>74</sup> The Act's explicit purpose is to assist the ongoing affordability of insurance through appropriate and sustainable awards of damages for personal injury.<sup>75</sup> 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

<sup>73</sup> Hereafter referred to as the Act.

<sup>74</sup> 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.

<sup>75</sup> Section 4(1).

medical indemnity insurance.<sup>76</sup> 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.<sup>77</sup>

Despite the fundamental legislative principle that legislation should not retrospectively adversely affect rights and liberties, or impose obligations,<sup>78</sup> 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.<sup>79</sup> Therefore, the Act now applies to all personal injury claims<sup>80</sup> regardless of when the incident producing the injury occurred. It therefore applies to all possible claimants covered by the Forde Inquiry.<sup>81</sup> 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.<sup>82</sup> 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.<sup>83</sup> If the claimant is a child, a parent or guardian may give the notice,<sup>84</sup> but the pre-court requirements are suspended until majority.<sup>85</sup> Therefore, if the plaintiff is proceeding for

<sup>76</sup> See for example Queensland, *Parliamentary Debates*, Legislative Assembly, 18 June 2002, 1848-1850 (R Welford, Attorney-General and Minister for Justice); Queensland, *Parliamentary Debates*, Legislative Assembly, 30 July 2002, 2292 (R Welford, Attorney-General and Minister for Justice); see also Personal Injuries Proceedings Bill 2002, Explanatory Notes, 1. The Act was designed and passed in the fraught context within which the *Review of the Law of Negligence* (the Ipp Report), the Commonwealth government's commissioned principles-based review of the law of negligence, was released on 2 October 2002.

<sup>77</sup> Section 2(a)-(f).

<sup>78</sup> *Legislative Standards Act 1992* (Qld) s 4(3)(g).

<sup>79</sup> 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.

<sup>80</sup> 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 from the injury is regulated by Chapter 5 of that Act: s 6(2)(b).

<sup>81</sup> 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).

<sup>82</sup> Section 9(1).

<sup>83</sup> Section 9(3).

<sup>84</sup> Section 9(4).

<sup>85</sup> 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.<sup>86</sup>

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.<sup>87</sup> 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.<sup>88</sup> 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.<sup>89</sup>

### 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.<sup>90</sup>

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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<sup>86</sup> Sections 19(1) and (2).

<sup>87</sup> Section 9(5).

<sup>88</sup> Section 12(2)(b).

<sup>89</sup> 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.

<sup>90</sup> 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.<sup>91</sup> 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.<sup>92</sup> If a claimant in this situation is successful in gaining this leave to proceed, the proceeding is stayed,<sup>93</sup> 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*<sup>94</sup> 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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<sup>91</sup> *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).

<sup>92</sup> Under s 43.

<sup>93</sup> According to s 43(3).

<sup>94</sup> *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.

1974 (Cth).<sup>95</sup> 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.<sup>96</sup>

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,<sup>97</sup> 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,<sup>98</sup> 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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<sup>95</sup> The claims under the *Trade Practices Act* were correctly deemed unsustainable.

<sup>96</sup> See for example *SG v State of Queensland* [2004] QCA 215 (Unreported, Queensland Court of Appeal, Williams and Jerrard JJA and Muir J, 10 May 2004) [4] (Williams JA) and [24] (Jerrard JA).

<sup>97</sup> The task is made all that more substantial in cases where the incident occurred many years ago.

<sup>98</sup> 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.

than full degree – of the merits of the s 31 application.<sup>99</sup> 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.<sup>100</sup> 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.<sup>101</sup> 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

<sup>99</sup> Muir J expressed concern with the 'vague way in which the applicant's material treats the basis on which an application under s 31 can be made': *Grimes v Synod of the Diocese of Brisbane* (Unreported, Supreme Court of Queensland, Muir J, 8 January 2003) 3. Muir J stated that for the discretion to give leave to proceed under s 43 to be positively exercised, the court must be satisfied that there is an urgent need to start the proceeding, and said that 'There can be no urgency and no need if the proceeding does not have the faintest prospects of success': at 4. Along with the testing of the material fact of a decisive character, his Honour seemed to be partly persuaded to grant leave because of the presence of a fiduciary claim not limited by time, which, according to the transcript, 'greatly improved' the applicant's position: 'because of that, I think I ought to look less stringently at the rather modest attempts to lay the foundation for a claim under section 31': at 4.

<sup>100</sup> An allusion to such an argument is made in the reasoning of Muir J in the Queensland Court of Appeal when deciding the issues presented by the *Limitation of Actions Act 1974* (Qld) s 30(1)(b) in *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) [36-37].

<sup>101</sup> Forde Inquiry, above n 4, ii.

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.<sup>102</sup> This has happened in other

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<sup>102</sup> 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 *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 *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.<sup>103</sup> 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.

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<sup>103</sup> 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.