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Limitation periods and child sexual abuse cases:

law, psychology, time and justice

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

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

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

1.1 Child sexual abuse

Between 1994 and 1998 in Queensland, there were 15 774 child sex offences reported to police.[2] Children who are sexually abused, particularly when by a family member or a known

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[1] Quote from psychiatric testimony in *Tiernan v Tiernan* [1993] unreported, Supreme Ct of Qld, Byrne J BC9303449.

[2] Queensland Crime Commission and Queensland Police Service, *Project AXIS – Child Sexual Abuse in Queensland: The Nature and Extent*, 2000, Brisbane, p 28 (Table 3). The incidence of child sexual

adult, are often subjected to abuse over a period of time. Statistics demonstrate that the typical child sex offender is male, a family member or relative of the child (or is otherwise known to the child), commits numerous abusive acts against the child, and conducts the acts over a period of months or years.[3] In many cases the child will make no complaint about the abuse for one or more of several reasons: being sworn to secrecy; compulsion by threats; imposed conviction of the normalness of the acts; imposed or misplaced feelings of responsibility for the acts; fear of family dissolution; fear of punishment of the wrongdoer; misplaced guilt; and self-blame.[4] The child is likely to use strategies to cope with the abuse, including repression of the acts so that conscious knowledge of them is concealed; suppression of the trauma (consciously avoiding recalling the trauma); and dissociation (absenting oneself psychologically while the abuse occurs).[5] The child's low age and vulnerability - physical, cognitive, psychological and emotional – both marks them as more susceptible targets for abuse, and explains the grave yet only nascent consequences of abuse on young individuals.

1.2 Psychological injury

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

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abuse is notoriously difficult to assess due to the low rate of reports. It is sufficient to state that the reported number of offences represents only a proportion of the actual number of incidents. Clearly, a significant number of children are affected by sexual abuse. This Project is subsequently referred to in this article as QCC and QPS, *Child Sexual Abuse in Queensland: The Nature and Extent*.

[3] Ibid at 47-55.

[4] Ibid at 83-87. See also the excellent summary by J Mosher, 'Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest' (1994) 44 *University of Toronto Law Journal* 169, at 176-181.

[5] Mosher, above n 4, at 178.

[6] 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, at 43-50.

abuse, the effects experienced in the short-term are but a prelude to the protracted consequences that will be experienced later.

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

However, the key consequence of abuse for a typical adult survivor that affects not only their psychological health and prospects for recovery, but their legal remedies, is that he or she will avoid stimuli associated with the abuse, and will avoid any situation that prompts or requires recollections of the abuse.[8] Evidence demonstrates that there are good, natural reasons for many adult survivors to adopt this self-protective position. The survivor may not be psychologically ready to confront the abuse due to a continuing connection with the family/perpetrator, lack of time to heal, lack of psychological assistance, and lack of social support or resources. It is therefore undeniably a normal and entirely reasonable response by many adult survivors of abuse to avoid any activity - including legal action - that would require detailed description of the events and confrontation of the perpetrator.

1.3 The significance of time

[7] See generally R Summit, 'The Child Sexual Abuse Accommodation Syndrome' (1983) 7 *Child Abuse and Neglect* 177; F Lindberg and L Distad, 'Post-Traumatic Stress Disorders in Women Who Experienced Childhood Incest' (1985) 9 *Child Abuse and Neglect* 329; A Browne and D Finkelhor, 'Initial and Long Term Effects: A Review of the Research' in D Finkelhor (ed) *A Sourcebook on Child Sexual Abuse*, Sage, California, 1986, 158; P Mullen, 'Childhood Sexual Abuse and Mental Health in Adult Life' (1993) 163 *British Journal of Psychiatry* 721; K Meiselman, *Resolving the Trauma of Incest: Reintegration Therapy with Survivors*, Jossey-Bass, San Francisco, 1990; J Mosher, above n 4; Queensland Law Reform Commission, *Review Of The Limitation of Actions Act 1974* (Qld), Report 53, 1998.

[8] Mosher, above n 4, at 179.

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

Evidence demonstrates this frequent requirement of time for a survivor to become able to report the abuse. In Queensland, the Project Axis survey found that of 212 adult survivors, 25 took 5-9 years to disclose it, 33 took 10-19 years, and 51 took over 20 years.[11] Where the perpetrator is a relative, it is even more likely that the delay will be long. A Criminal Justice Commission analysis of Queensland Police Service data from 1994-1998 found that of 3721 reported offences committed by relatives, 25.5% of survivors took 1-5 years to report the acts; 9.7% took 5-10 years; 18.2% took 10-20 years, and 14.2% took more than 20 years.[12]

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[9] As occurred for example in *Tiernan*, above n 1, and *Applications 861 and 864* (Unreported, Botting DCJ, District Court of Queensland, 21 June 2002), hereafter referred to as *D'Arcy*.

[10] See generally in support of these arguments A Marfording, 'Access to Justice for Survivors of Child Sexual Abuse' (1997) 5 *Torts Law Journal* 221. It should be noted that the current article is concerned with cases where survivors have always been aware of the abuse but have been unable to institute legal proceedings regarding the abuse, rather than the category of 'repressed memory' cases, which pose even more difficult problems.

[11] QCC and QPS, *Child Sexual Abuse in Queensland: The Nature and Extent*, above n 2, at 80 (Table 23).

[12] Ibid 82 (Table 25).

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

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

1.4.1 Time limits and minority

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

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[13] The qualification 'especially' acknowledges the difficulty of proving allegations of sexual abuse, since there is often little if any corroborative evidence of the abuse due to the nature of the acts and the environment in which they occur.

[14] *Limitation of Actions Act 1974* (Qld) s11; *Limitation Act 1969* (NSW) ss18A(2) and 50C; *Limitation of Actions Act 1958* (Vic) ss5(1AA) and 27D(1)(a); *Limitation of Actions Act 1936* (SA) s36; *Limitation Act 1974* (Tas) s5(1); *Limitation Act 1981* (NT) s12(1)(b). The *Limitation Act 1985* (ACT) s11(1) establishes a general time limit of six years for tortious actions. The *Limitation Act 1935* (WA) s38(1)(b) sets a time limit of four years for actions for trespass to the person, assault and battery. In *Wilson v Horne* (1999) 8 Tas R 363 the Full Court of the Supreme Court of Tasmania held unanimously that an action for the acts constituting child sexual abuse exists in both negligence and trespass. This can bring different limitation periods into play, depending on the statute of limitations in the particular jurisdiction. An application for special leave to appeal this decision was refused: *Wilson v Horne* (1999) 19 Leg Rep SL4a.

[15] Furthermore, plaintiffs who fail to act within time or to receive extensions of time will not be entitled to equitable relief for breach of fiduciary duty for two reasons. First, in this context the only relevant relationship recognised as capable of attracting fiduciary duties is the guardian/ward relationship, and the infliction of abuse in these relationships forms only a small proportion of cases. Most offenders are parents or are persons known to the child who are in a position of authority, and Australian law does not recognise parent/child relationships as attracting fiduciary obligations (*Paramasivam v Flynn* (1998) 160 ALR 203), and fiduciary claims are not possible against mere acquaintances. Second, Australian courts have consistently held that fiduciary principles protect economic interests and not personal interests (*Breen v Williams* (1996) 186 CLR 71; *Paramasivam v Flynn*).

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

Minority has traditionally constituted a legal disability and has stopped time from running until the attainment of majority. In Queensland, for example, a survivor of child sexual abuse has three years from turning 18 to institute proceedings.[16] However, there have been recent changes in New South Wales and Victoria in this respect,[17] influenced by the recent trend in Australian tort reform to limit liability and quantum of damages for personal injuries.[18] In Victoria, an action for personal injuries that accrues to the plaintiff while the plaintiff is under a disability must be commenced within six years.[19] However, in both Victoria and New South Wales, a minor is now deemed not to be under a disability if he or she is in the custody of a capable parent or guardian.[20] The impact of these amendments in Victoria and New South Wales is that plaintiffs in those jurisdictions who sustain personal injuries have three years in which to commence proceedings through a parent or guardian, without the

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[16] *Limitation of Actions Act 1974* (Qld) ss5(2), 11, 29(2)(c); *Limitation of Actions Act 1936* (SA) s45; *Limitation Act 1974* (Tas) s26; *Limitation Act 1935* (WA) s40; *Limitation Act 1985* (ACT) s30; *Limitation Act 1981* (NT) s36. The new *Personal Injuries Proceedings Act 2002* (Qld), as amended by the *Civil Liability Act 2003* (Qld), does not substantively affect the *Limitation of Actions Act 1974*. However, the pre-court procedures prescribed by the PIPA, including the provision of a written notice of claim to the defendant (s9), and the convening of a compulsory conference (s36), would apply to cases in this context, and these procedures can adversely affect a plaintiff's time in which to identify evidence and material facts of a decisive character in the discovery process. Note that s9 stipulates the time within which a notice of claim must be given (ss(3)); but ss(5) states that if this time limit is not complied with the obligation continues and a reasonable excuse must be given for the delay. Section 9(9) declares that ss(3)(a) does not determine or affect when a cause of action arises for the purposes of the *Limitation of Actions Act*. A plaintiff who has not complied with the pre-court provisions and whose time is about to expire may apply to the court for leave to start an 'urgent proceeding' under s43, but the pre-court proceedings must still be complied with: see for example *Grimes v Synod of the Diocese of Brisbane* (unreported, S27 2003, Muir J); *Nicol v Caboolture Shire Council* [2003] QDC 033; *Lamb v State of Queensland and Ting* [2003] QDC 003.

[17] Relevantly, Victoria's *Limitation of Actions Act 1958* was amended by the *Limitation of Actions (Amendment) Act 2002* and the *Wrongs and Limitation of Actions (Insurance Reform) Act 2003*. New South Wales's *Limitation Act 1969* was amended by the *Civil Liability Amendment (Personal Responsibility) Act 2002*.

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

[19] *Limitation of Actions Act 1958* (Vic) ss27D(1)(2) and 27E.

[20] *Limitation of Actions Act 1958* (Vic) s27J(1)(a); *Limitation Act 1969* (NSW) s50F(2)(a). These changes mirror Recommendation 25(b)(i) of the *Review of the Law of Negligence* (the Ipp Report), the Commonwealth Government's commissioned principles-based review of the law of negligence, which was released on 2 October 2002.

traditional concession of time not running until the plaintiff attains legal majority. There are special provisions regarding situations where minors are injured by close relatives or close associates.[21] Here, the cause of action is deemed to be discoverable by the victim when he or she turns 25 years of age, or when the cause of action is actually discoverable, whichever is later.[22] These provisions are an improvement on the other Australian States and Territories' provisions, but still impose a tight time limit on proceeding when compared with the psychological evidence and statistics on plaintiff readiness to report abuse to police.

1.4.2 Extension provisions

Although most jurisdictions have similar provisions enabling time to be extended,[23] these provisions have proved to be very difficult to satisfy in this particular context, as exemplified by recent Queensland cases.[24] There is little case law from other jurisdictions in this respect, but Queensland decisions can be summarised to demonstrate the problems that generally confront plaintiffs in this context.

An applicant is typically eligible for an extension of time if it appears to the court that a material fact of a decisive character relating to the right of action was not within the applicant's means of knowledge until a date after the start of the third year of the limitation period (that is, after the applicant turned 20); and if there is evidence to establish the right of action. However, satisfying these conditions is insufficient; the court must still exercise its

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[21] A close associate of a parent or guardian is defined as a person whose relationship with the parent is such that the parent or guardian may be influenced not to proceed, or if the victim might be unwilling to disclose to the parent or guardian the events causing the personal injury: *Limitation Act 1969* (NSW) s50E(2); *Limitation of Actions Act 1958* (Vic) s27I(2); compare Ipp Recommendation 25(e).

[22] *Limitation Act 1969* (NSW) s50E; *Limitation of Actions Act 1958* (Vic) s27I: compare Ipp Recommendation 25(d).

[23] *Limitation of Actions Act 1974* (Qld) s31; *Limitation Act 1969* (NSW) ss62A, 62B; *Limitation of Actions Act 1958* (Vic) ss27K, 27L; *Limitation of Actions Act 1936* (SA) s48; *Limitation Act 1974* (Tas) s32 (limited to fraud or mistake); *Limitation Act 1935* (WA) s27 (limited to fraud); *Limitation Act 1985* (ACT) s36; *Limitation Act 1981* (NT) s44.

[24] In particular, the cases of *Carter* and *D'Arcy* exemplify the difficulties in this context: *Carter v Corporation of the Sisters of Mercy of the Diocese of Rockhampton* [2000] QSC 306 (White J); *Carter v Corporation of the Sisters of Mercy of the Diocese of Rockhampton* [2001] QCA 335 (McPherson JA and Muir J; Atkinson J dissenting); *D'Arcy*, above n 9.

discretion in the applicant's favour. The applicant bears the 'positive burden' of showing that the justice of the case requires the extension of time.[25] Whether the court exercises its discretion to extend time will depend on its estimation of the prejudice to the defendant's assurance of a fair trial.

'Material facts relating to a right of action' are typically defined to include the fact of the occurrence of negligence, trespass or breach of duty; the fact that the negligence, trespass or breach of duty causes personal injury; the nature and extent of the personal injury caused; and the extent to which the personal injury is caused by the negligence, trespass or breach of duty.[26] Such a material fact will be of a decisive character if a reasonable person knowing those facts and having taken appropriate advice would regard those facts as showing that an action would have a reasonable prospect of success and of resulting in an award of damages sufficient to justify bringing the action; and in their own interests and taking their own circumstances into account, the person ought to bring an action.[27] A critical provision then typically deems that a fact is outside the applicant's means of knowledge if the applicant does not know of the fact, and, as far as the fact is discoverable, the applicant has taken all reasonable steps to discover it before they actually do so.[28]

1.4.3 Common law indications

As exemplified by *Woodhead v Elbourne*,[29] a plaintiff is most likely to gain an extension of time on demonstrating three things. First, the plaintiff must show that he or she did not know of the personal injury caused (for example, post-traumatic stress disorder) or its extent, or of

[25] *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, at 551 and 554. Dawson J agreed with McHugh J; Toohey and Gummow JJ also agreed for similar reasons; Kirby J dissented.
[26] See for example *Limitation of Actions Act 1974* (Qld) s30(1)(a). These definitions of what constitute the material facts for the purpose of gaining an extension of time do not affect the principles that if the plaintiff proceeds in trespass, damage does not have to be proved, whereas if the action is in negligence, proof of damage is an essential requirement. Ignorance of the law or of the existence of a cause of action does not amount to ignorance of a material fact that empowers a court to extend the limitation period: *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234, at 244; *Berg v Kruger Enterprises* [1990] 2 Qd R 301, at 302; *Smith v Central Asbestos Co* [1973] AC 518, at 541-2.
[27] *Limitation of Actions Act 1974* (Qld) s30(1)(b).
[28] s30(1)(c).
[29] *Woodhead v Elbourne* [2000] QSC 042. Argument about whether the plaintiff had taken reasonable steps to ascertain the material facts was not advanced by the defendant in this case.

the causal connection between the acts and the personal injury, until a date after expiry of the second year of the three-year period.[30] Second, it must be shown that the plaintiff took all reasonable steps to ascertain the relevant fact before it was discovered. Third, it must be shown that the defendant would not be prejudiced by the extension.[31]

A growing body of decisions appear to hold three strong indications for future applications to extend time. First, extended delay alone will almost certainly defeat an application on the ground of prejudice to the defendant's right of fair trial.[32] Second, the current post-1990s era in which cases of child sexual abuse are known, psychological evidence concerning sequelae are known, and successful civil cases are known to have been brought, places a heavy onus on plaintiffs to satisfy the reasonableness test by taking steps through disclosure and therapy to ascertain their injury, its extent and its cause.[33] Where a plaintiff claims ignorance of a material fact but the court finds that he or she, by acting reasonably, should have ascertained these facts, the application will be defeated.

In *Carter v Corporation of the Sisters of Mercy of the Diocese of Rockhampton*[34] the application to extend time was dismissed at first instance[35] and on appeal. The appellant

[30] The plaintiff said that only after reading a psychiatrist's report on 18 December 1998 did she 'first bec[o]me aware that she was suffering from Post Traumatic Stress Disorder consequent upon childhood sexual abuse…and borderline personality disorder…before this time I did not know the nature of my condition, the extent of my condition or whether my condition related to the assaults by the defendant': at 6, para [17]. White J accepted that it was only after reading this report that the plaintiff was in possession of the material facts which if properly advised would lead a reasonable person to institute proceedings. Although the plaintiff had explored the events over two years of therapy, this was deemed not to be knowledge sufficient to dismiss the application: at 8, para [22].

[31] The plaintiff was born on 25 February 1974, so had until 25 February 1995 to begin proceedings had suffered sexual assaults between July 1981 and December 1987. On 15 December 1997 the plaintiff instructed her solicitor to institute proceedings and a writ was issued on 23 December 1997. The plaintiff was entitled to bring her action as of right until 25 February 1995 so there was no great delay, and no witness, document or other evidence was lost.

[32] See *D'Arcy*, above n 9, discussed below.

[33] Contrast *Tiernan*, above n 1, where the court granted the application to extend time based on the era in which the events occurred and the era in which the plaintiff was required to take 'reasonable steps' to discover the material facts.

[34] *Carter*, above n 24.

[35] At first instance, White J focussed on the applicant's cognition of the acts and gave no consideration to psychological sequelae. Justice White thought the applicant 'was in possession of the necessary facts to commence an action…from the time the limitation period commenced to run'; that is, from when she was 18, in 1978. There was 'nothing in the material to suggest that she could

was born on 23 March 1960. When two months old she was taken into State care and in 1961 she was placed at Neerkol Orphanage, a private institution licensed to care for children run by an order of nuns. Between 1961 and 1972 the appellant suffered personal injuries from multiple incidents of cruelty from the nuns[36] and from numerous alleged incidents of sexual assault and rape by a Neerkol employee. Under limitations legislation she had until 23 March 1981 to institute proceedings. A writ of summons was issued on 27 July 1998. She claimed damages for negligence against the State of Queensland, and damages for trespass to the person against the employee. The appellant claimed recent knowledge of a psychiatric injury (depression) caused at least in part by the abuse,[37] and of the causal connection between the acts and the personal injury.

The majority of the Court of Appeal rejected the claim of a recent connection between the abuse and the injury. The crucial finding by McPherson JA was that the causal connection was a fact she could have discovered by taking the reasonable step of asking a psychiatrist or psychologist: 'In short, one would have expected her to ask what it was that caused the

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not have [commenced proceedings between 1978 and 1997]…she would have been advised, had she sought advice, that the damages would be likely to be considerable...she retained a lively awareness of the wrongs which had been done to her over the ensuing years…There is no suggestion that she was in an alcoholic stupor or suffering from depression to such an extent that she could not have sought appropriate advice': *Carter* [2000], above n 24 at 5, para [13]. White J's approach emphasised the fact that if appropriately advised, the plaintiff could have brought the action on facts already in her possession. The second factor counting against the applicant, at least with respect to the State of Queensland as defendant, was the weight given to the prejudice that would occur to the defendants should the trial proceed: at 8, paras [18]-[22]. The State of Queensland did not admit that the events occurred despite the nuns' admissions, and claimed that a number of witnesses were either dead, unable to be located, or very old. Interestingly, White J would not have barred the proceedings regarding the fourth defendant (the employee alleged to have committed the rapes) by the exercise of discretion regarding fair trial.

[36] The Court of Appeal in *Carter*, above n 24, accepted that at least some of the appellant's complaints of ill-treatment were confirmed by 'ample evidence': McPherson JA at 3, para [5]; Atkinson J at 12, para [46], and at 20, para [77]. The Neerkol Orphanage nuns had written the appellant a letter of apology and regret for their actions and omissions, and with the first defendant had agreed on a settlement of the claim.

[37] The appellant said that only after reading a psychiatrist's report dated 29 September 1998 did she appreciate there was expert evidence indicating that the abuse may have affected her from a psychiatric perspective and that it had caused the injuries suffered since leaving Neerkol. She had received psychological and psychiatric treatment over many years, but, she said, 'there was never any mention or indication of a connection between the abuse I suffered and my current condition.'

depressive states.'[38] Muir J also found that there was no evidence adduced to establish that the applicant was prevented from making the connection between the abuse and her personal injury, either by herself, or by acting reasonably to gain such knowledge.[39]

In *D'Arcy*, an applicant (S) who alleged that she had been sexually abused in the 1960s claimed recent knowledge of the material facts of the nature, extent and cause of her psychiatric injury, gained by reading a psychiatric report in early 2001. She had only first divulged the abuse to a psychiatrist in late 2000. The psychiatrist's report stated that as a result of the abuse, S had post-traumatic stress disorder, among other things. She claimed that she did not know of the connection between the abuse and her injury until reading this report. Botting DCJ held that these facts were not beyond S's means of knowledge. It was accepted that 'often child victims of sexual abuse will find it very hard, if not impossible, to tell others of their experiences [and] that when such a victim becomes an adult, it will continue to be extremely difficult for such a person to tell a doctor of the abuse'.[40] However, the critical factor was the judge's perception regarding the social context of the era. To Botting DCJ, the societal awareness in the 1990s of child sexual abuse, added to the psychological knowledge regarding the consequences of it, meant that S's injuries could have been diagnosed during that time. Since the early 1990s she had been aware of her problems and had sought medical help regarding them; she had even made a complaint on 28 September 1998 to a police officer. S had also deposed that she had heard in the last ten years of cases where people had been sued for child sexual abuse and knew that compensation had been awarded in these cases. Botting DCJ stated that 'Whilst one can understand her reluctance to raise such matters with her advisors, it seems to me that by the

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[38] *Carter*, above n 24 at 6, para [16]. Muir J and McPherson JA also identified the applicant's longstanding hatred of her abusers and her previous linking of aggressive behaviour as a young person with the physical and sexual abuse she suffered.

[39] Ibid at 9, para [32].

[40] *D'Arcy*, above n 9 at 36.

mid-1990s her failure to do so was not reasonable'; hence this material fact was within her means of knowledge.[41]

The third indication from the recent case law is that a criminal conviction can constitute a material fact of a decisive character by going to prove the tortious acts and increasing the prospect of success at civil trial.[42] However, where a defendant denies guilt in that criminal trial, even criminal convictions will not overcome a pleaded defence of delay at civil level. In *D'Arcy*, even though the defendant's convictions facilitated proof of their cases in the civil action[43] it was held that the 38 year delay between the acts and the trial would result in significant prejudice and the applicants had not demonstrated the contrary. This is an extraordinary result. Despite a finding of guilt on a higher standard of proof, the civil application failed on the ground of prejudice to the defendant's fair trial rights. Botting DCJ conceded that 'It may perhaps trouble some that in a case where a criminal trial has taken place, and convictions ensued, that our legal system should deny the complainants the right to pursue their violator for compensation by civil action.' His Honour continued:' It is not my function to seek to explain, let alone seek to resolve any such apparent incongruity. My task is to apply the law as I understand it to the facts as I find them.'[44]

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

[42] *D'Arcy*, above n 9 at 33-34. Bill D'Arcy, a former schoolteacher and Member of Parliament, was convicted on 1 November 2000 of 18 counts of sexual offences (11 counts of indecently dealing with a girl under 12, four counts of indecently dealing with a boy under 14, and three counts of rape). On 17 November 2000 he was sentenced to concurrent jail terms of between 3 and 14 years. His appeal against conviction was dismissed but appeals regarding the sentence were allowed to the extent that three of the terms of imprisonment were reduced to 10 years: *R v D'Arcy* [2001] QCA 325. It was accepted that had the applicants obtained legal advice prior to the convictions the advice would have been that it was not wise to bring an action since it was unlikely to succeed without corroborative evidence or fresh complaint, especially against a person of such good repute.

[43] *Evidence Act 1977* (Qld) s79.

[44] *D'Arcy*, above n 9, at 49. Botting DCJ added some observations regarding criminal compensation, and commented that if the defendant's convictions were sustained, most people would think it appropriate that the applicants receive compensation from the public purse for their pain and suffering and other losses (at 51). His Honour had previously alluded to the fact that at the time of the offences, there was no scheme for compensation for injury arising out of criminal conduct. The *Criminal Code Amendment Act 1968* (Qld), established in Chapter 65A of the *Criminal Code* a compensation scheme for injury arising out of indictable offences relating to the person, but s3 stated that the Act did not apply in respect of compensation for injury suffered before the commencement of the Act (the Act commenced on 1 January 1969). Justice Botting seems to imply (at 50) that the

1.5 Major legal issues

Two questions arise. Should the statutory provisions be amended so that adult survivors of child sexual abuse are not time-barred from instituting proceedings? Alternatively, should judicial interpretations and applications of the extension provisions be more cognisant of the psychological position of plaintiffs in this context? In Part 2, this article synthesises the effects of time limitation periods and their rationales. Part 3 repels those rationales in this context. In concluding, Part 4 looks to the future should the law be amended.

2. Limitation periods: effects and rationales

2.1 Effects – irrelevant unless pleaded

Plaintiffs who have endured child sexual abuse who are able to bring proceedings before they turn 21 are not especially disadvantaged by the statutory provisions. However, for adult survivors who are unable to institute proceedings before time expires, the position is different. The simplest way to neutralise the time limit is if the defendant does not plead it as a defence, as expiry of the limitation period is irrelevant unless the defendant does so. The time limit does not operate automatically to bar the plaintiff's remedy.[45] Moreover, the court will not consider the expiry of time of its own volition.[46] A defendant wishing to rely on expiry

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applicants would not be entitled to compensation because the acts themselves were committed before the commencement of Chapter 65A. However, it is arguable that at least some of the applicants' injuries, namely their psychological injuries, only arose long after the commission of the acts giving rise to the offences, and the conviction required by s663B as a precondition to an award of compensation had not been secured before commencement of Chapter 65A. If the applicants are not entitled to criminal compensation for injury appearing after commencement of Chapter 65A, regarding a conviction arising after commencement of that Chapter, but arising from acts committed before its commencement, then the basis on which His Honour is implying an entitlement to compensation is unclear. Criminal compensation of victims of indictable offences in Queensland is now available through the *Criminal Offence Victims Act 1995* (Qld). The scheme applies to acts committed after 18 December 1995, when the Act commenced. Section 46 preserves the old compensation scheme of Chapter 65A for acts committed before that date: see for example *Hendry v Llorente* [2000] QCA 377; *B v B* [2002] QDC 327; and *Whitehead v Crawford* (Unreported, Supreme Court of Queensland, 15 May 2000), where the plaintiff was awarded $97 830.

[45] *Uniform Civil Procedure Rules 1999* (Qld) r150(1)(c).

[46] *Commonwealth v Verwayen* (1990) 170 CLR 394, at 498.

of time as a defence simply has to plead it.[47] When the defence is enlivened, the only way for the plaintiff to circumvent it is to apply to the court for an extension of time.

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

2.2 Professed rationales – preserving the quality of justice

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

Bonded by this claimed concern for justice, several policy reasons are usually cited to justify limitation periods. A principal reason, and the most cogent one, is that the quality of available evidence will be lessened by the passage of time, whether by faded memory,

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[47] It can be noted that in some cases where the abuse is admitted, the defendant may not plead expiry of time as a defence because of a desire to behave honourably and acknowledge the abuse that has occurred. This happens sometimes in cases of abuse inflicted while the child was attending a school or institution, where the perpetrator was a teacher or staff member employed by the school, educational authority or institution, as occurred, for example, in settlements between plaintiffs and the Brisbane Grammar School.
[48] *Brisbane South*, above n 25, at 551, citing *R v Lawrence* [1982] AC 510, at 517.

death, or the absence of witnesses and documentation. In McHugh J's words, 'The longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose.'[49] The concern here is that the defendant should be able to mount a defence with fresh evidence to secure a fair trial. Since the civil trial system must be impartial and afford a fair trial to both parties, this evidentiary concern provides the most compelling reason for a limitation period. It is accepted that a particularly important goal of this area of law is that individuals should not be vulnerable to false or mistaken allegations about past events. For reasons discussed in Part 3, it is submitted that this goal would not sacrificed by legal reform in this context.

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

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

[49] Ibid at 551.

limitation period should therefore prevail once the defendant has proved the fact or the real possibility of significant prejudice.'[50]

Other weaker reasons, also defendant-centred, are cited for limitation periods, and these should be mentioned.[51] It is said that defendants should be able to proceed with their lives unencumbered by the threat of late claims.[52] It is also said that plaintiffs should not sleep on their rights.[53] Finally, the public interest requires that disputes be settled as quickly as possible.[54] These points are of less persuasive force, especially in this context, and they will be dealt with in Part 3.

The English case of *A'Court v Cross* is often cited for the principle that 'Long dormant claims have often more of cruelty than of justice in them' to demonstrate the central policy reason of justice supporting limitation periods.[55] However, these citations rarely read further: Best CJ continues to say that 'Christianity forbids us to attempt enforcing the payment of a debt which time and misfortune have rendered the debtor unable to discharge.'[56] Justice is the central concern. Allied with *A'Court*'s concern is the regular crutch of the Magna Carta to defend limitation periods - clause 40 promotes the citizen's right to justice without delay – and McHugh J cites this in his exposition.[57] However, the full import of clause 40 should not be lost. It states that 'To no man will we sell, or deny, or delay, right or justice.'[58] The

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[50] Ibid at 555; author's emphasis.
[51] Ibid at 552-3; see also L Bunney, 'Limitation of Actions: Effect on Child Sexual Abuse Survivors in Queensland' (1998) 18 *Queensland Lawyer* 128, at 132.
[52] *Brisbane South*, above n 25, at 552; see also Mosher, above n 4, at 186.
[53] Bunney, above n 51, at 132, citing *Pirelli General Cable Works v Oscar Faber* [1983] 2 AC 1, at 19; see also Mosher, above n 4, at 184.
[54] *Brisbane South*, above n 25, at 553.
[55] (1825) 3 Bing 329, at 332-333.
[56] Ibid at 333.
[57] *Brisbane South*, above n 25, at 552.
[58] In *Jago v District Court of New South Wales* (1989) 168 CLR 23, at 62 Toohey J cites the reproduction of the Magna Carta (25 Edward 1 (1297) contained in *Halsbury's Statutes of England*, 2nd ed (1948) vol 4, at 26: 'We will sell to no man, we will not deny or defer to any man either justice or right.'

question in this context is not simply one of delay, but of denial of justice to the plaintiff who is constitutionally unable to bring proceedings within time.[59]

In cases of adult survivors of child sexual abuse, these policy reasons have been demonstrated to be either of inferior relevance, or of outright inapplicability.[60] Of further relevance is the fact that there is no time limit regarding the State's ability to commence criminal prosecution of an indictable offence; since the acts of battery in these circumstances are also criminal acts, the State can exact retribution against perpetrators at any time after the offence. It has been argued that the appropriate conceptual approach in this context is with this criminal model, rather than a tortious one.[61] There are compelling reasons supporting this view.

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

Two features of these cases distinguish them from the principles that inform the rationales for limitation periods: the nature of the injury and the nature of the acts.[62] Some comparative jurisdictions have recognised these distinguishing features. Statutes in British Columbia, Saskatchewan, Prince Edward Island, Manitoba, Ontario, Newfoundland, the Northwest Territories and Nunavut have abolished time limits for civil actions based on sexual assault, giving adult survivors of abuse unlimited time in which to institute proceedings.[63] In some

[59] In *Carter*, above n 24, at 29, para [100], Atkinson J in dissent refused to accept that public policy reasons justified the operation of the delay defence, thinking it 'plainly unjust' not to exercise discretion in the applicant's favour.
[60] See for example L Bunney, above n 51, at 132-133; J Mosher, above n 4, at 181-197; see also A Marfording, above n 10; 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.
[61] Mosher, above n 4, at 189.
[62] See generally also Marfording, above n 10.
[63] See British Columbia's *Limitation Act*, RSBC 1996, c 266, s4(k)(i); Saskatchewan's *Limitation of Actions Act*, RSS 1978, c L-15, s3(1)(3.1)(a); Ontario's *Limitations Act*, RSO 2002, c 24, s10(1)-(3); Manitoba's *Limitation of Actions Act*, CCSM 2002, c L150, s2.1(2)(a) and (b); Newfoundland's *Limitations Act*, RSNL 1995, c L-16.1, s8(2); Nunavut and the Northwest Territories' *Limitation of*

American jurisdictions, including California, the effect of limitations statutes on survivors of child sexual abuse is being eroded.[64] In California, legislative amendments in 2002 have revived certain classes of expired claims to allow civil proceedings against the Roman Catholic Church for sexual abuse allegedly committed by priests, and have enabled those claims to be launched in the year 2003.[65] 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.[66] The situation in the United Kingdom is less inspiring, although a recent decision offers some hope for plaintiffs in this context.[67]

Actions Act, RSNWT 1998, c L-8, s2.1(2); and Nova Scotia's *Limitation of Actions Act*, RSNS 1989, c 258, s2(5)(a) and (b). Prince Edward Island's *Statute of Limitations*, RSPEI 1974, c S-7 does not yet amend the previous situation; amending legislation has not yet been proclaimed, despite existing since 1992: 1992 cl.63 – not proclaimed 1 January 2003. The proposed amendments amended s2(1)(d) and added a new subsection, s2(3). Alberta's *Limitations Act*, RSA 2000, c L-12 merely suspends the limitation period while the plaintiff is a minor (s5); although fraudulent concealment also suspends the running of time until discovery of the fraud. Canadian jurisdictions that have not amended legislation are New Brunswick, the Yukon and Quebec.

[64] 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' *New York Law Journal*, vol 229 at p1, 21 May 2003; J Tu, 'Bills to target clergy sex abuse' *Seattle Times*, 17 November 2002.

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

[66] See also the South African case of *Moise v Transitional Local Council of Greater Germiston* CCT54/00 [2001] ZACC 10 (4 July 2001), where the Constitutional Court of South Africa affirmed the Witwatersrand High Court's decision that a limitation provision was unconstitutional. The decision was based on the human right of access to courts, enshrined in s34 of the South African Constitution. That right could not be justifiably limited under s36 on the grounds of the utility of limitation periods. Untrammelled access to the courts was declared 'a fundamental right of every individual in an open and democratic society based on human dignity, equality and freedom' (at para [23]). Although not a case involving sexual abuse of a child, *Moise* did involve an 8 year old girl's father proceeding on her behalf against a government department for personal injuries.

[67] The *Limitation Act 1980* s2 sets six years from the date on which the cause of action accrued in which proceedings may be brought for actions in tort. Section 11 then sets a time limit for actions in tort for damages in respect of personal injuries for negligence, nuisance or breach of duty. The time limit under s11(4) gives the applicant three years from the date on which the cause of action accrued, or from the date of attainment of relevant knowledge (of the significance of the injury, of the injury occurring due to the act or omission constituting the negligence, nuisance or breach of duty, or of the defendant's identity). In personal injuries actions in negligence, nuisance or breach of duty, s33 empowers the court to exclude the time limit if it appears equitable to do so. Under s28 the limit is suspended until majority. The House of Lords in *Stubbings v Webb* [1993] AC 498 held that in an action for deliberate sexual abuse in childhood, the proceedings are in tort, so enlivening the six year time limit under s2, therefore not attracting s11 or the extension power in s33. The plaintiff, born on 29 January 1957, alleged she had been sexually abused by her adoptive father between the ages of 2

3.1 The nature of the injury

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

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and 14, and that her stepbrother had raped her when she was 12 and he was 17. She further claimed that she only became aware of the causal connection between the abuse and her psychiatric and psychological problems in September 1984. At first instance, the plaintiff's claim was struck out for being out of time on the basis that it was an action under s11. On appeal, the judge accepted that the plaintiff's knowledge under ss11 and 14 only accrued in September 1984 after psychiatric therapy led to her understanding that the abuse caused her psychiatric disorders and other injuries. That decision was upheld in the Court of Appeal. The House of Lords allowed the appellant's appeals and held that the plaintiff's proceedings were barred by statute. Contrast *KR & Ors v Bryn Alyn Community (Holdings) Ltd* [2003] EWCA Civ 85, where former residents of a children's home were able to recover damages in negligence against the defendant company for sexual abuse committed in its institutions some eight to 20 years previously, with the actions being brought under s11 and therefore enlivening s33. At first instance Connell J found the claims were out of time, and that knowledge of the significant injuries under s14 had materialised before the plaintiffs left the home, but disapplied the limitation period under s33 in a general finding without addressing individual plaintiffs' cases. The Court of Appeal held, inter alia, that apart from the immediate damage inflicted by the acts, the actions concerned significant long-term psychiatric injury for the purposes of s14; that knowledge of this would not necessarily have been present before expiry of time; and that each case had to be assessed on its merits in this regard. In the Court of Appeal, plaintiffs generally succeeded because of the date of knowledge of significant injury, namely the psychiatric injury, rather than by having time extended under s33 (in several cases the Court stated that it would have found it difficult to extend time given the length of delay on grounds of prejudice to the defendant: see eg paras [144]-[146]; [157]-[159]; [168]-[171]). However, the Court did disapply the limitation period under s33 in relation to some plaintiffs where the lapse of time was not so long: see eg paras [183] and [192]. It is worth noting generally that obiter indicates an evidence-based approach sensitive to the circumstances of abuse victims (see for example paras [39]-[47]), in contrast to *Stubbings v Webb*. In *Mason v Mason* [1997] 1 VR 325, the Victorian Court of Appeal interpreted similar provisions and did not follow *Stubbings v Webb*, instead finding that actions for personal injuries arising out of an intentional assault did constitute actions for damages for negligence, nuisance or breach of duty, thus attracting a six year limitation period. It can finally be noted that the plaintiff in *Stubbings v Webb* lodged an application to the European Court of Human Rights, which found by majority that there was no breach of the right to a court, as embodied in the *European Convention for the Protection of Human Rights and Fundamental Freedoms* art 6: *Stubbings v United Kingdom* (1996) Eur Ct HR Applications 22083/93; 22095/93. However, Foighel and Macdonald JJ dissented, and even the majority conceded that in light of the developing awareness of the range of problems caused by child abuse and its psychological effects on victims, the limitation rules in European member States 'may have to be amended to make special provision for this group of claimants': para [56].

successful therapeutic intervention, which itself usually begins some years after the onset of the most insidious psychological consequences. The plaintiff in this context is qualitatively different from a typical plaintiff because of the psychological sequelae peculiar to this situation.[68] Dissenting in *Carter*, Atkinson J referred to the psychological evidence to inform the conclusion that:[69]

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

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

When considering issues surrounding expiry of time and whether a plaintiff has taken reasonable steps to discover material facts, it is not justifiable to demand the same standard of reasonable behaviour of adult survivors of child sexual abuse as is expected of other plaintiffs. Rather than being informed by the psychological evidence, the judgments in *D'Arcy* and *Carter* deny it. A distinction needs to be made between the objective issue of

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[68] Bunney, above n 51, at 132.
[69] *Carter*, above n 24, at 23-24, paras [86] and [88].
[70] Ibid at 22, para [85].

whether it is factually possible to ascertain the nature, extent and cause of an injury, and whether a person in the plaintiff's position could reasonably be expected to take steps to ascertain those facts. It should be remembered that the relevant test in deciding whether a fact is within the means of the plaintiff's knowledge has both objective and subjective elements: in *Carter*, Muir J says that the test 'is an objective one applied to a person with the background and circumstances of the applicant.'[71]

The psychological evidence should decide this issue in favour of the plaintiff. To take reasonable steps to ascertain these facts requires readiness to divulge and relive details of the abuse, to confront the damage inflicted, and to acknowledge the person responsible. As the psychological evidence demonstrates, the adult survivor of sexual abuse frequently will avoid any situation that requires exactly such fortitude. The pain that reliving the abuse produces is an experience the survivor becomes ready to withstand only when ready. By requiring such scarification of someone who undoubtedly knows the acts happened, the courts are demanding the plaintiff experience psychological torture. Cognitive knowledge of the acts' occurrence is something quite different to the affective ability to confront the details of the abuse. Botting DCJ's conclusion therefore does not follow from his premise. The premise is only partial in its recognition of the psychological sequelae; it first acknowledges the general difficulty in reporting the abuse, but then regresses to a vision of a typical plaintiff incurring an injury to vertebrae. The finer points of why it is so difficult to report the abuse at all, let alone engage in a thorough exploration of the events, are not recognised in the conclusion that the applicant had not taken all reasonable steps to ascertain the facts. It is one thing to make a simple report of abuse to a police officer; it is quite another to relive the full details of the events.

[71] Ibid at 7, para [32]. We are concerned with what is expected of the plaintiff to take reasonable steps to ascertain the facts. It has been argued in this article that a plaintiff may quite well not directly know of their injury or its causation: contrast Lord Griffiths in the House of Lords stating that 'I have the greatest difficulty in accepting that a woman who knows that she has been raped does not know that she has suffered a significant injury': *Stubbings v Webb*, above n 67, at 506.

From the traditional acceptance of the actionability of physical damage, law has advanced, recognising medical knowledge, to accept that damage to one's psychological state also merits redress.[72] Indeed, judicial and extra-judicial opinions acknowledge the potential for greater damage to be caused by psychiatric or psychological injury rather than physical injury.[73] It is not asking too much of legislatures to recognise the debilitating effects on survivors of child sexual abuse, which so gravely impedes their ability to bring legal action.

3.2 The nature of the acts

The nature of the acts also distinguishes these cases and pierces the shield of time that traditionally protects the defendant in tort. The acts, which also constitute criminal acts, are particularly abhorrent and cause longstanding damage. The severity of the acts and society's placement of them at the extremity of unacceptable conduct is demonstrated by the availability of exemplary damages.[74] The acts involve a clear abuse of power. Physical and psychological coercion is required to perpetrate the abuse. The acts are nearly always accompanied by deception regarding their nature and by threats regarding future events.[75] These cases usually involve a series of acts continuing over an extended period, producing immediate trauma that then intensifies. This is not to say that a person cannot be just as seriously injured even in the rarer cases where the cause of action arises out of one incident.

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

[73] *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, at 493 (Lord Steyn: 'But nowadays we must accept the medial reality that psychiatric harm may be more serious than physical harm.'), referred to in D Butler, 'An assessment of competing policy considerations in cases of psychiatric injury resulting from negligence' (2002) 10 *Torts Law Journal* 13, at 18.

[74] J Fleming, *The Law of Torts*, 9th ed, Law Book Company, Sydney, 1998, at 271-272. Exemplary damages of $400 000 were awarded in the Toowoomba Preparatory School case: *S v Corporation of the Synod of the Diocese of Brisbane* [2001] QSC 473. Despite the incursions made into liability and quantum by recent legislation throughout Australia, statutes have maintained courts' ability to award exemplary damages for personal injury claims involving unlawful sexual acts: see for example *Civil Liability Act 2003* (Qld) s52.

[75] Although there is provision in the *Limitation of Actions Act* to stay the running of time in cases where the cause of action is concealed by fraud (s38(1)(b)) it is unlikely that any argument in this context as to the fraudulent explanation about the nature of the acts would succeed; although it is submitted that such an argument could be justified in some cases (compare the Canadian Supreme Court decision in *M (K) v M (H)* [1992] 3 SCR 6).

Tort law has long protected the principle of bodily inviolability,[76] and the acts of childhood sexual abuse constitute a most serious breach of this principle.

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

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

The acts done in this context inherently bring into play the prejudice to the defendant argument because they will always have occurred many years ago. The passing of time in these cases will rarely mean that a defendant is less equipped with evidence due to its

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[76] *Cole v Turner* (1704) 6 Mod 149. See also *Collins v Wilcock* [1984] 1 WLR 1172, at 1177; W Blackstone, *Commentaries* (1830) 17th ed, vol 3, at 120.
[77] See for judicial embodiment of this argument *M (K) v M (H)*, above n 75, at 29; and Atkinson J in *Carter*, above n 24, at 28.
[78] These are detailed in Part 3.3.2.

destruction.[79] Any evidence that did exist is likely to already be stale, given the fact that the abuse is likely to have ended at least five years earlier at best.[80]

The rationale does not accommodate the possibility that a plaintiff may be proceeding for injuries concerning acts inflicted on them as a child unaccompanied by any other adult.[81] Nor is the rationale informed by the possibility that the acts occurred in private. Beyond the memories of the parties and of any other people who came to know of the factual circumstances, there will rarely be any physical or documentary evidence, save perhaps for some medical and school records. If anything, the lapse of time will create greater disadvantage to the plaintiff, who has to discharge the civil burden of proving on the balance of probabilities that the acts occurred.[82] Memory is often the only evidence and the veracity of this can easily be questioned.

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

3.2.1 Protection of the defendant

The question is whether mere delay, even when accompanied by some deterioration in evidence, should override the plaintiff's interest in bringing proceedings in cases of child sexual abuse. Nobody would reject the right of a person to a fair trial, and safeguards must

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[79] A good example of when prejudice will be clearly established is *Lambert v Bannerman* [2001] QSC 345. Not only had 27 years elapsed, but the school records for the year in question had been destroyed, the defendant was unable to be located and it was not known if he was alive.

[80] I agree with Bunney on this point: Bunney, above n 51, at 132. Contrast *Brisbane South*, above n 25, at 548-549 (Toohey and Gummow JJ); it is submitted that their Honours' approach in this context, where the damage was inflicted on a child, is unjust.

[81] Most cases of child sexual abuse involve acts inflicted on children aged between 5 and 14: QCC and QPS, *Child Sexual Abuse in Queensland: The Nature and Extent*, above n 2, at 35-6.

[82] Atkinson J recognises the disadvantage to the plaintiff as well as the defendant in an evidentiary sense in *Carter*, above n 24, at 11.

exist to prevent malicious claims. Yet it is arguable that the legal system possesses adequate means to deal with this possibility through the usual procedures of the civil pretrial and trial process, costs awards and suppression orders. The plaintiff retains the onus of proving on the balance of probabilities that the events occurred. Moreover, it is courts' duty to make judgments based on the credibility of witnesses and the import of any other evidence, and courts perform these judgments on a daily basis. Although, as some commentators have pointed out, plaintiffs will nearly always present as credible, compelling witnesses,[83] implying that the odds are stacked in their favour, they should not be disadvantaged by the situation in which they have been placed. It is the legal system's duty to provide access to the justice system to deserving plaintiffs. It is most unlikely that a fraudulent plaintiff could withstand the rigours of the normal testing of evidence. Apart from denying the claims and demonstrating their impossibility, the strategy commonly adopted by a defendant is to identify collateral issues and to show that regarding those issues the plaintiff is an unreliable witness.[84] If further protection is thought necessary for blameless defendants in this context, methods of deterring fraudulent and mistaken claims, such as costs orders, could be strengthened; but the valid claims of many should not be neutralised by a merely potential few spurious claims.

3.3 Analogy with criminal law

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

3.3.1 Theoretical and practical senses

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[83] P Lewis and A Mullis, 'Delayed Criminal Prosecutions For Childhood Sexual Abuse: Ensuring A Fair Trial' (1999) 115 *Law Quarterly Review*, 265, at 294. Although made in the context of delayed criminal prosecutions, this observation is relevant in the civil context.

[84] See for example *D'Arcy*, above n 9. There, the ability of the defendant to identify such collateral issues and to repel the plaintiff's testimony regarding them was claimed to be diminished. Muir J in *Carter*, above n 24, also refers to the strategy of testing the plaintiff's evidence by referring to such collateral events and issues.

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

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

Cases of delayed criminal prosecution for child sexual abuse are an instructive counterpoint to the civil law. Judicial comment, particularly when considering the reasons for the delay,

[85] See for example *Criminal Code* (Qld) ss349 (rape), 208 (unlawful sodomy), 210 (indecent treatment of a child under 16), 215 (carnal knowledge with or of a child under 16), 222 (incest), 229B (maintaining a sexual relationship with a child).
[86] *Criminal Code* (Qld) s552F.
[87] R Kenny, *An Introduction to Criminal Law in Queensland and Western Australia*, Butterworths, 2000, 5th ed, p 39. For simple offences, the Crown must proceed within 12 months from the time of the matter of complaint: *Justices Act 1886* (Qld) s52.
[88] *Jago*, above n 58, at 33 (Mason CJ); at 44 (Brennan J); at 58 (Deane J); at 70 (Toohey J); and at 78 (Gaudron J).
[89] Examples include *Gill* (1992) 64 A Crim R 82 and *R v Davis* (1995) 57 FCR 152. In *Davis*, a case of sexual assaults, the reason for the stay of proceedings was that the delay was accompanied by the defendant's loss of medical records, and the unavailability of strategies the court could use to overcome that unfairness: 521.
[90] *Jago*, above n 58, (Deane J), at 60-61, cited and lucidly discussed by S Henchliffe, 'Abuse of process and delay in criminal prosecutions – Current law and practice' (2002) 22 *Australian Bar Review* 1, at 3-20.

illuminates a marked difference in theoretical and practical approach. Most significantly, there is abundant explicit recognition that survivors of child sexual abuse frequently and for good reasons take a long period of time to report it.[91] In the Federal Court in 1995, Wilcox J stated that in the courts' experience:[92]

> It is commonplace for there to be a substantial delay in the reporting of alleged sexual assaults, especially where the complainant is a child…it seems that many sexual assault victims are unable to voice their experience for a very long time. To adopt a rule that delay simpliciter justifies a stay of criminal proceedings would be to exclude many offences, particularly offences against children, from the sanctions of the criminal law.

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

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

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[91] See for example *R v Austin* (1995) 14 WAR 484, at 493, where Owen J states 'It is not at all uncommon for there to be a delay in the institution of proceedings for sexual offences'; and the Federal Court in *R v Davis* (1995) 57 FCR 512, at 515 (Wilcox, Burchett and Hill JJ), which approves the quote from *R v Lane*, below.

[92] *R v Lane* (Unreported, Federal Court, 19 June 1995, 2), quoted in Henchliffe, above n 90, at 6.

[93] *R v Birdsall* (Unreported, NSW Court of Criminal Appeal, 3 March 1997, Cole JA, Grove and Simpson JJ, BC9701099), involving acts allegedly committed between 1961 and 1967, with the report occurring in 1995; *R v Dodds and Harris* (Unreported, Queensland Court of Appeal, 18 October 1996, Fitzgerald P, Pincus JA and Lee J, BC9605152), involving acts allegedly committed between 1984 and 1986, with proceedings instituted in 1994.

[94] *R v Birdsall*, above n 93.

[95] *R v Lane*, above n 92; *R v Wagner* (1993) 66 A Crim R 583.

3.3.2 Moral sense: whether delay diminishes the quality of justice

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

On this basis, the central moral question becomes: Is society best served by barring this type of action? For several reasons, the answer must be no. To begin with, there are many significant public interests at play. One public interest resides in ensuring that perpetrators are not permitted to avoid civil consequences for their acts. Another is that the public has an interest in making civil redress available to adult survivors of abuse. Broader public interests lie in reducing the incidence of child abuse, in publicising the incidence of abuse, in encouraging more survivors to report abuse, and in maintaining public confidence in the legal system. These interests mirror many of those which justify the criminal analogy, and there is recent explicit judicial recognition of some of these interests in a civil setting.[97]

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[96] See above, Part 2.

[97] In *D'Arcy*, in light of the defendant's criminal convictions in which the applicants gave evidence, Botting DCJ said: 'it has to be said that each of these applicants rendered an important service to the community in coming forward, with others, to give evidence …It was very apparent to me during the brief evidence that each of them gave that it must have taken extraordinary courage to do so, and each has paid a very high price for having done so': above n 9, at 50.

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

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

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[98] See below, n 111.

[99] [2003] HCA 4 (6 February 2003), McHugh J dissenting. This decision indicates that the State will not be liable via breach of non-delegable duty in situations where a teacher sexually assaults a student. It does not seem likely that the State would be vicariously liable, although this possibility remains.

[100] *Brisbane South*, above n 25, at 553, citing *Sola Optical Australia Pty Ltd v Mills* (1987) 163 CLR 628, at 635.

the plaintiff to show that his or her case 'is a justifiable exception to the rule that the welfare of the State is best served by the limitation period in question…[the plaintiff] has the positive burden of demonstrating that the justice of the case requires that extension.'[101]

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

Cases of child sexual abuse and their psychological sequelae were little known (or acknowledged), much less envisaged, when limitation rationales were formulated and when limitation statutes were designed.[103] Statutory time principles are, for the most part, predicated on the plaintiff suffering physical, not psychological damage; on immediate, not

[101] *Brisbane South*, above n 25, at 553-554.

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

[103] Cases of child sex abuse were not unknown, however. According to Dorothy Scott and Shurlee Swain's *Confronting Cruelty*, between 1891 and 1907 there were 177 reported cases of child sexual abuse, and the *Argus* newspaper stated 'We cannot believe such a state of things exists in this community': cited in R Yallop, 'Too hard to cope with' *The Australian*, 27 May 2003, p 9.

insidious injury; on a plaintiff who knows of their damage, not one who is ignorant of it; on an adult plaintiff, not a child; on a plaintiff psychologically unimpeded from bringing proceedings, not one who is so affected by the psychological sequelae that to confront it is their worst fear. The heightened general awareness of child sexual abuse and the emergence of a body of evidence concerning the psychological sequelae of child sexual abuse are relatively recent developments.[104] Legal advances traditionally take some time to catch up with changes in societal conditions and with evidence from relevant disciplines. Unreasonable demands should not be imposed on legislators. This legal issue may only recently have ripened as one recognised as being in need of redesign; the first judicially decided case of an application for an extension of time in Queensland in this context occurred in 1993; similarly, the first case of its type in England was finally determined that same year.[105] Now, however, with the knowledge that a greater number of people are in this position than was previously realised, the legislature is more fully-informed of the prevalence of child sexual abuse and its consequences. It is therefore now able to act, and can be fairly expected to act.[106]

4. Conclusion

4.1 Past and present

By the nominal standards of 21st century liberal democracies, the historical legal and societal treatment of children and the individual acts inflicted on them have been abhorrent. The historian Lloyd De Mause declared that ‘The history of childhood is a nightmare from which we have only recently begun to awaken. The further back in history one goes, the lower the

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[104] See for example the psychiatric testimony of Dr Kippax in *Tiernan*, above n 1, and of Dr Grant in *D’Arcy*, above n 9, at 23.

[105] In Queensland, *Tiernan v Tiernan*, above n 1; in the UK, *Stubbings v Webb*, above n 67. Contrast Canada, where the Supreme Court decision in *M (K) v M (H)*, above n 75, motivated more speedy legislative change over the next several years.

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

level of child care, and the more likely children are to be killed, abandoned, beaten, terrorised, and sexually abused.'[107] Much of the maltreatment of children, including sexual abuse, has occurred in the home, and this has not changed. The home remains a hostile and damaging place for many children.

Despite judicial and psychiatric statements about the recent emergence of public evidence of child sexual abuse, statistical records of it have existed for at least a century.[108] Up until now, notwithstanding a growing nominal recognition of children's rights,[109] little has been done to increase preventative safeguards against abuse, particularly in the home. Regarding abuse occurring within families, the liberal State's traditional reluctance to intervene in the private sphere hinders effective prevention and intervention. In the last several years, some reforms in the public sphere have occurred, such as checks on employment of individuals placed in a position of authority over children.[110]

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[107] L de Mause, 'The Evolution Of Childhood', in L de Mause (ed) *The History Of Childhood*, Bellew, London, 1974, p 1. During the Dark and Middle Ages, childhood was a period of life not marked by protective policies based on an understanding of childhood as a qualitatively different stage of life from adulthood, but by brutality and exploitation. Indeed, children were seen more as possessions with possible economic worth either as objects of sale or as labour. There were no laws protecting children, and few even recognising them. The absence of laws regarding children is explained by the instinctive and universally accepted subordination of them to their parents, particularly to the father. Children's complete lack of legal rights was embodied in the concept of patria potestas, which gave a father complete dominion over his children (and his wife). Such was the extent of this power, and such was the nonchalance with which children were regarded, that in early Roman law the father had the right to expose infants to the elements if he chose to reject their existence: A Borkowski, *Textbook on Roman Law*, Blackstone Press, London, 1994, p 103; J Gardner, *Women in Roman Law and Society*, Routledge, London, 1986, p 155. The father also had the right to punish his children, which could include imposing a penalty of death: Gardner, at 6-7. Further rights included the sale of children; from at least the seventh century a father could legally sell his children aged under seven: P Thane, 'Childhood in History', in M King (ed) *Childhood, Welfare & Justice*, Batsford, London, 1981, p 12.

[108] Yallop, citing Scott and Swain, above, n 103.

[109] Best epitomised in the *United Nations Convention on the Rights of the Child 1989*. Article 34 requires States to undertake to protect children from all forms of sexual exploitation and abuse. Australia has ratified the UNCRC but it has not been incorporated into domestic legislation, as is required for it to constitute law in Australia: *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

[110] See for example the *Child Care Act 1991* (Qld). There are also some encouraging signs that the prevalence of abuse within church institutions will be reduced, in the aftermath of the various inquiries and reports taking place in the late 1990s and early 2000s.

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

4.2 Future

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

What would happen if the time limit was abolished in these cases? There would not be a flood of unjustified claims.[111] In the short-term, justified claims may increase, especially

[111] Case law suggests that the amount of damages available is generally not high enough to encourage malicious claimants seeking windfall gains. In *Paten v Bale* (Unreported, Supreme Court of Queensland, 19 October 1999) the plaintiff was awarded $183 282. In *Bird v Bool* (Unreported, Supreme Court of Queensland, 16 October 1997) the plaintiff was awarded $69 750. See also *W v W; R and G* (1994) FLC 92-475 where two girls were awarded damages from their stepfather who had sexually abused them in the sums of $90 000 and $80 000 respectively. These three cases involved serious sexual assaults. The Toowoomba Preparatory School jury award of $834 800 is exceptional, particularly since it included exemplary damages in the amount of $400 000: *S v Corporation of the Synod of the Diocese of Brisbane* [2001] QSC 473. There are few cases where civil damages have been awarded by the courts, demonstrating the rarity with which survivors can institute proceedings within time, at least in cases where the abuse is not occurring within an institution: in *Paten v Bale*, Wilson J acknowledges the paucity of claims throughout Australia: ibid at para [13]. Cases settled out of court have been done so reasonably economically for defendants. Since 1996 the Melbourne Catholic archdiocese has used an independent commissioner to investigate sexual abuse complaints. About 200 victims' complaints have been dealt with, involving about 25 offending priests. This resolution process allows for compensation payouts of up to $55 000 to victims: G Hughes, 'Church abuse: the full picture', *The Age*, 25 May 2003.

against religious institutions.[112] Many of these would be settled and would not cause an intolerable increase in courts' caseload. Many survivors would gain recognition and vindication and a sense of truth that would end some of the more pernicious sequelae such as self-blame and responsibility. A significant proportion of adult survivors would still not bring legal action, in some cases because the perpetrator may be dead, unable to be located, or impecunious, and in others because the survivor may remain intimidated by the perpetrator, wish to keep the family intact, or remain psychologically unable to bring an action.

It is quite possible that the major consequence of legal change would be social progress. The time is ripe for this enhancement of justice and social welfare. Assisted by an unprecedented public awareness of sexual abuse, at least within religious and educational institutions, the facilitation of complaints through the courts could only assist the accompanying institutional change within churches and schools aimed at preventing further incidents of abuse. It is likely that events such as the resignation of the Governor-General[113] and the Report on Sexual Abuse in the Anglican Church in Brisbane would, in time, decrease long-delayed complaints regarding abuse within churches and schools. This decrease would be produced by these institutions developing more secure control over staff selection and supervision, and more sophisticated complaints mechanisms, thus decreasing the incidence of abuse within them. Different and courageous measures would be

[112] See QCC and QPS, *Child Sexual Abuse in Queensland: The Nature and Extent*, above n 2. Recent reports (see for example Hughes, above n 111) indicate the extent of abuse within churches. The *Sunday Age* compiled the first national figures after conducting its own audit of sexual abuse complaints by individually contacting every Catholic and Anglican diocese in Australia. Combined, Australia's Catholic and Anglican churches have received more than 1640 complaints of sexual abuse; 1200 in the Catholic Church and 440 in the Anglican Church. The Catholic Church figures show about 1000 complaints have been received through its Towards Healing system of dealing with abuse, which is used everywhere except in the Melbourne archdiocese. Of those 1000 complaints, about 650 involved allegations of sexual abuse of children.

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

necessary to address, from both preventative and responsive perspectives, the persistent problem of sexual abuse committed by family members and acquaintances. However, in implementing legal reform in this overall context, providing a mechanism for civil redress to all deserving plaintiffs would be a good start.