

21 September 2016

Our ref BP:MD:JC

The Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
BRISBANE QLD 4000

By post and by email: lacsc@parliament.qld.gov.au

Dear Research Director

Limitation of Actions Bills - removal of limitation periods

Thank you for the opportunity to provide comments on the *Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill 2016* (the **Government Bill**) and the *Limitation of Actions and Other Legislation (Child Abuse Civil Proceedings) Amendment Bill 2016* (the **Pyne Bill**).

This submission follows our submission of 16 September 2016 and deals solely with the issues associated with the removal of limitation periods in child sexual abuse claims. The Society's specialist Not for Profit Committee, Litigation Rules Committee and Accident Compensation / Tort Law Committee have all provided input to this submission.

The Current Position

The Society broadly supports law reform in response to recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse. In particular the Society has called for people who have suffered from institutional child abuse to have access to justice.

The Society notes that there are two proposed amendment Bills before the Queensland Parliament which seek to give effect to recommendations of the Commission in respect of the removal of limitation periods:

- a The Government Bill introduced by the Premier and Minister for Arts, the Hon. Annastacia Palaszczuk MP, on 16 August 2016, which must be considered in light of the Issues Paper released by Government to deal with further matters associated with the recommendations of the Commission. The Government Bill is accordingly more narrow in its scope; and
- b The Pyne Bill introduced on 18 August 2016 by the member for Cairns, the Hon. Mr Rob Pyne MP as a private member's bill, which is more expansive in scope.

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The Society submits that:

- the Government Bill should be passed, as a first step in the process of bringing access to justice to those who have suffered from institutional child abuse; and
- the Pyne Bill should not be passed. While elements of the Bill will be of assistance in reaching a complete package of reform, some elements need further consideration and others can not be supported.

Removing limitations and retaining court discretion

In principle the QLS cautiously supports the removal or substantial extension of limitation periods, in the knowledge that, any claim may be brought at any time during the life-time of an abuse survivor, or indeed by their legal personal representatives. We acknowledge that there are very legitimate reasons as to why it may take many years for an abuse survivor to bring a claim, which will vary significantly from case to case, and any substantially extended time period may be considered arbitrary.

The Government Issues paper (the **Issues Paper**) notes that the average length of time for a survivor to disclose abuse is 22 years.

The Explanatory Notes to the Government Bill states:

“[T]he purpose of providing limitation periods is to bring fairness and certainty to civil litigation matters by: removing the threat of open-ended liability (for both potential defendants and third parties); ensuring that a defendant is not unfairly prejudiced in proceedings through inability to access documents to defend the claim, that due to the passage of time have been lost, deteriorated or destroyed, trace witnesses or sufficiently recall events; and ensuring disputes are resolved as quickly as possible.”

The Society notes that the changes proposed in either Bill will present challenges and costs in respect of record keeping, institutional memory (particularly if a reversal of onus proposed by the Commission is ultimately adopted), insurances, and proper defendants when institutions may no longer be in existence. There, however, seems to us to be reasonable expectations on institutions with the care of children and a need for those who have suffered abuse to be able to access justice.

The Commission recommends that the removal of the limitation periods should be balanced by expressly preserving the relevant courts' existing jurisdictions and powers to stay proceedings where it would be unfair to the defendant to proceed. The Society is of the view that the explicit continuation of this power of the court is a necessary counter-balance to the removal of the limitation period in these claims, so as:

- not to fetter the discretion and jurisdiction of the court to deal with the individual factual matrix of any claim; and
- ensure that claims can appropriately meet the standard of proof required in civil law matters as a safeguard against the initiation of highly speculative claims.

The Society notes and supports proposed s11A(5) of the *Limitation of Actions Act 1974* in the Government Bill, which maintains this appropriate balance explicitly.

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The Society also notes that proposed s22A of the *Civil Proceedings Act 2011* in the Pyne Bill seeks to overbear these powers of the court in certain circumstances. The Society does not support this approach for the reasons outlined above.

The Government Bill

The Society understands that the intent of the Government Bill is the removal of the limitation period only and not any extension of when liability arises. The Society is concerned that the amendments proposed by the Government Bill do not go further than the removal of limitation periods (as opposed to the issue of when liability arises) and begin to create at least a framework around, or expectations about, the breadth of further developments and changes in the law in connection with liability. Some of these issues are the province of the Issues Paper yet to be considered.

Institution and institutional context

The definitions of 'institution' and 'institutional context' in the Government Bill are broad and include:

- institutions which no longer exist; and
- abuse which occurred in settings not directly controlled by the institution but perpetrated by an official of an institution (as defined).

The expansive definitions have the potential for unintended consequences as they are applied to individual cases but may be considered justified to properly respond to the variety of structures institutions have adopted and scenarios where abuse has occurred.

The Society queries the extent to which the proposed s11A(2) may effectively be extending either the scope, or at least the expectation, of the boundaries of non-delegable duty. That is, does the definition or the boundaries of "institutional context" also inform how the law may develop around when and how breach of non-delegable duty (or indeed vicarious liability) may see liability awarded? To this end it would seem to us prudent to expressly state that these amendments are not intended to articulate the boundaries of liability; rather, the removal of limitation periods only. This is perhaps also made necessary by the civil liability protection for volunteers in section 39 (and following) of the *Civil Liability Act 2003* (Qld).

Retrospectivity

Proposed s48 applies the new section 11A retrospectively. The Society is conscious that retrospective application of legislation can be problematic and is highly susceptible to unintended consequences. This is especially so for retrospective change to limitation periods.

The Society has generally spoken out against retrospective operation of legislation unless it inures a benefit to individuals. In this case, there is a significant benefit to a group of individuals and an acknowledgement that there is a need for an appropriate form of redress in the civil system for the issue of past child abuse in institutions. In the context of the Government Bill, the desired policy outcome can not be achieved without the Bill's operating retrospectively.

Previous judgements and actions

Proposed s48 extends the operation of the limitation abolition to previous claims, dismissals and judgements based on the expiry of the limitation period.

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The Government Bill does not specifically address claims previously settled outside limitation periods with a settlement deed between parties, but these may now potentially become actionable. It may be that the liability attaching to claims arising from these changes is effectively uninsurable, particularly if an insurer was part of a settlement between the parties or achieved a judgement or case dismissal based on time limitations. This may leave the assets of institutions at some risk or in the case of unincorporated associations the assets of members and/or its leaders. The Society recommends that this issue be considered closely if any extension of liability is to be implemented in further legislation.

The Pyne Bill

The Pyne Bill is more expansive in scope than the Government Bill; however, the Society recognises that the Government Bill forms only the first part of consideration of the many facets of the issues associated with the Commission's recommendations.

Generally, the Society does not support the Pyne Bill at this stage, as more careful consideration of the many unintended consequences that could flow needs to be undertaken before extending the scope of the present proposed limitation changes in the Government Bill.

Jury Trials

The Society does not support the proposed introduction of new section 73 of the *Civil Liability Act 2003* to institute jury trials for personal injury resulting from child abuse. The Society has complete confidence in the Queensland judiciary to apply the law and find facts to the highest standard.

Furthermore, the removal of limitation periods is likely to affect the nature of evidence which can be produced to the court and will require careful consideration of the legal weight to be attached to many and varied materials.

Court's discretion to stay or dismiss proceedings

The Society does not support the proposed introduction of new section 22A of the *Civil Proceedings Act 2011* to fetter the discretion of the court as outlined above.

Definition of child abuse

The Pyne Bill responds to child abuse which includes sexual abuse, serious physical abuse and connected abuse. The Society is aware that there is little consistency between jurisdictions about the types of abuse for which liability will form a part of their limitation exclusion schemes. The Government Issues Paper seeks feedback on the issue of whether and how much wider than child sexual abuse the scheme should be framed.

The broader definition in the Pyne Bill is instructive, albeit the distinction between physical abuse and serious physical abuse is not defined.

Individuals

The Pyne Bill is not confined to institutions or institutional contexts and would potentially facilitate civil claims against individuals for intentional torts to the person, including assault, battery and trespass to the person.

The decision to extend the scheme so broadly should not be taken lightly and there are many consequences to be considered. The mischief to be addressed by the Commission was

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institutional and systemic problems of child sexual abuse. The extension of civil actions, without limitation, against individuals is not responsive to that issue and must be considered in light of the difficulty for an individual to mount a proper defence in the absence of civil legal aid funding.

Settlement agreements

The Pyne Bill proposes section 51 of the *Limitation of Actions Act 1974*, which voids a prior settlement agreement and collateral agreements upon commencement of a new action.

As previously stated, institutions may find that any such claim is uninsurable, if the insurer were a party to the original settlement arrangement. It may also bring associated problems for unincorporated associations.

However, the amendment is instructive in the case of settlement agreements formed on the basis of the operation of a limitation period having been expired. In this situation the enforcement of such a settlement agreement may prove to be a de facto limitation on actions and may reasonably be an agreement that the victim would not have executed but for the operation of the limitation at the time. In this context, it would be preferable if the court could consider and decide whether to set aside the settlement agreement in the totality of the circumstances rather than the agreement being deemed void per proposed s51(3).

If you have any queries regarding the contents of this letter, please do not hesitate to contact [REDACTED], Government Relations Principal Advisor, on [REDACTED] or via email [REDACTED]

Yours faithfully

[REDACTED]

Bill Potts
President