Submission to the NSW Department of Justice Discussion Paper, *Limitation periods in civil claims for child sexual abuse*

24 March 2015

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1. Introduction

The Public Interest Advocacy Centre (**PIAC**) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues. Through its legal practice, PIAC has many years of experience in representing victims of crime, assisting them to seek compensation through the NSW Victims Compensation Scheme and to seek damages through civil litigation. All of our clients experience some form of disadvantage and vulnerability; a number have suffered historic incidents of sexual abuse. Accordingly, PIAC welcomes the opportunity to comment on the NSW Government Department of Justice's Discussion Paper, *Limitation periods in civil claims for child sexual abuse.*[1]

Overall, PIAC supports the removal of limitation periods for claims of abuse suffered by children while in the care of institutions. This important reform to civil litigation in NSW should take place regardless of any national redress scheme that PIAC hopes is set up swiftly following the conclusion of the Royal Commission into Institutional Responses to Child Sexual Abuse. The depth and scale of these horrific abuses, and the systemic aspect to their commission, necessitates a targeted, evidence-based response that will make a positive, practical impact.

In this submission, PIAC comments on those questions raised in the Discussion Paper where PIAC is able to provide advice based on its relevant casework experience.

1.1 The Public Interest Advocacy Centre

PIAC identifies public interest issues and works co-operatively with other organisations to advocate for individuals and groups affected.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from NSW Trade and Investment for its work on energy and water, and from Allens for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

1.2 PIAC's work relevant to this submission

PIAC recently made a submission to the *Redress and civil litigation* consultation paper published by the Royal Commission into Institutional Responses to Child Sexual Abuse (**the Royal Commission**).[2] In that submission, PIAC recommended a national redress scheme be

[1] NSW Government, Department of Justice, *Discussion Paper, Limitation periods in civil claims for child sexual*

[2] Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Redress and Civil Litigation*, January 2015, available at http://www.childabuseroyalcommission.gov.au/policy-and-research/redress.

established which is victim-focused and has low barriers to entry, accompanied by the provision of sufficient legal and social support enabling all applicants to access the scheme.[3] PIAC also recommended that participation in a national redress scheme should not act as a bar to civil litigation.

In both submissions, PIAC bases its recommendations on its direct experience representing vulnerable clients seeking damages for personal injury via NSW statutory compensation and redress schemes. For example, PIAC's Homeless Persons' Legal Service (**HPLS**) has provided legal advice to, and on-going representation for, victims of physical and sexual violence and abuse. A significant portion of the HPLS caseload involves representing victims in the NSW Victims Compensation Scheme.[4]

PIAC has also previously sought compensatory damages on behalf of a number of Aboriginal and Torres Strait Islander clients who were part of the 'Stolen Generations'. In 1996, PIAC and the then Public Interest Law Clearing House NSW co-ordinated legal advice and provided assistance to Aboriginal and Torres Strait Islander people making submissions to the *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their families*. PIAC subsequently provided legal representation for some members of the Stolen Generations, including one successful claim in the NSW Victims Compensation Tribunal for crimes committed against her while she was a State ward.

In addition, PIAC has experience in relation to redress schemes set up to address historic incidents of abuse of power. Specifically, PIAC was heavily involved in the Aboriginal Trust Fund Repayment Scheme (**ATFRS**), established by the NSW Government to pay back wages kept in trust for Aboriginal clients. PIAC worked with Aboriginal and Torres Strait Islander communities to advocate for the scheme to be set up and subsequently publicised its operation; provided pro bono legal assistance, representation, support and advice to a number of clients making a claim; and, on the basis of this experience, provided a number of policy submissions to the ATFRS review and the Senate Inquiry into Indigenous Stolen Wages.[5]

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3 Farthing, S and Santow, E *Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse: Redress and civil litigation*, Public Interest Advocacy Centre, 10 March 2015, available at http://www.piac.asn.au/publication/2015/03/submission-royal-commission-institutional-responses-child-sexual-abuse.

4 See Coroneo, A *Review of NSW's Victims Compensation Scheme,* Public Interest Advocacy Centre, 30 April 2012, available at http://www.piac.asn.au/sites/default/files/publications/extras/12.04.30_review_of_nsws_victims_compensation_scheme.pdf.

5 Stolen Wages Referral Scheme, *Settling accounts: the effectiveness of the Aboriginal Trust Fund Repayment Scheme in addressing stolen wages in NSW, Submission to the Hon John Watkins MP, Minister responsible for ATFRS*, Public Interest Advocacy Centre, 11 June 2008.

2. Reform of the *Limitation Act 1969* (NSW)

2.1 Question 1: Do the existing statutory exceptions to limitation periods provide sufficient access to justice for victims of child sexual abuse?

In PIAC's experience, the narrowly-defined exceptions to the limitation periods set out in the *Limitation Act 1969* (NSW) (the **Limitation Act**) are insufficient to secure access to justice for all survivors of institutionalised child abuse.

Simply having to argue whether a statutory exception should be applied or the limitation period extended can be a sufficient deterrent to survivor litigants. Those survivors who attempt to seek compensation through civil litigation will likely face a rigorous legal defence from the outset under the Limitation Act. Evidence from practitioners provided to the Victorian Parliament's Family and Community Development Committee inquiry into incidents of child sex abuse showed that some organisations have 'aggressively pursued the limitation defence' in child sex abuse cases. The Committee concluded that having to argue or apply the limitation 'creates an imbalance that can work against claimants' both in initial stages of a civil claim and in any settlement negotiations.[6]

It should also be borne in mind that civil litigation is often taken up by applicants only after a lengthy struggle to be believed following disclosure and to have that complaint investigated and addressed. The following case study is indicative of the significant challenges faced by survivors attempting to pursue redress and how difficult it can be to make a case, let alone argue that one of the exceptions under the Limitation Act is applicable.

Case study 1

Andrew is a 42-year-old man who now lives in Melbourne. Andrew was sexually assaulted in 1988 by a Minister at St John's Anglican Church in Darlinghurst. He was 16 and homeless at the time. Andrew was taken to the perpetrator's house by another man and the perpetrator let him stay for the night in his house next door to the church. Andrew stayed there for one night, during which time the perpetrator masturbated him without his consent. In 1989, Andrew was assaulted again by the same perpetrator in similar circumstances.

Andrew reported the incident to the Victorian police in 1996, who advised him they could do nothing about it because of the length of time that had passed and because the perpetrator was now living in England. In 2002, when the Hollingworth matter was in the newspapers, Andrew again made a police report, this time to the Wagga Wagga Police. Andrew was also prompted to report the assaults to the Church. He then made a complaint to the Professional Standards Unit

[6] Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry intot he handling of child abuse by religious and other non-government organisations*, November 2013, p 537. Available at http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Report/Part_H.pdf.

of the Anglican Church (**PSU**); however, the matter was not investigated, despite Andrew being in contact with the PSU for more than two years. Andrew also applied to the NSW Victims Compensation Tribunal; however, his application was dismissed on the basis that 'the first report was some 6-7 years after the incident and [there is] no evidence which supports the allegations', despite Andrew's statutory declaration and signed statements to the Victorian police and NSW police.

Andrew came to see HPLS seeking advice on what the Church and police were required to do after a report of sexual abuse. PIAC advised Andrew on the differences between the Anglican Church's Diocese of Sydney Pastoral Care and Assistance Scheme, a criminal prosecution and a civil law claim and the process and quantum of damages. We provided Andrew with some general information about limitation periods but did not advise on this as this fell outside the scope of our engagement. Andrew also wanted to know whether he would still be able to give evidence in the Royal Commission if he was successful under the scheme and there was a confidentiality clause in the deed of consent.

PIAC's involvement with Andrew ceased after we completed the advices for him.

2.2 Questions 2 & 3: removal of the limitation periods in claims for child sexual abuse (Option A)[7]

PIAC supports Option A as set out in the Consultation Paper: the total removal of limitation periods as they apply to institutional child abuse. PIAC's experience with Stolen Generations litigation has shown us that limitation periods, and the costs implications of an adverse decision regarding limitation periods, are a significant disincentive to people advancing otherwise meritorious claims. This is demonstrated in the case study below.

Case study 2

In the 1990s, PIAC represented two non-Indigenous women who made claims against the NSW Government for the forced relinquishment of their babies in the 1960s. One of the potential plaintiffs decided to withdraw from proceedings due to the likelihood that the matter would not progress past an application that the matter was out of time.

The other plaintiff, Ms 'W', was unsuccessful in overcoming the limitations hurdle. The Court found that the defendant, the State of NSW, would suffer prejudice if the limitations period were extended. The Court's finding was on the basis that key witnesses were either deceased or had no recollection of the events giving rise to the action and, as such, there would be prejudice to the defendant in trying to defend a claim dealing with events that took place 28 years earlier in the

[7] This section answers Question 2, 'Do the advantages of Option A outweigh any disadvantages?' and Question 3, 'If Option A were adopted, would it be sufficient to rely on existing civil procedures (such as applications to strike out, dismiss or stay proceedings) to protect the proper administration of justice, including in cases where a fair hearing of a matter may not be possible?'.

face of uncorroborated statements from Ms W. A subsequent appeal of the decision by PIAC was also unsuccessful. In dismissing the claim, the court ordered that PIAC's client pay the legal costs of the defendant, which amounted to nearly $30,000.

This case highlights the difficulties of seeking redress through traditional legal avenues for people affected by forced adoption practices. Moreover, the risk of an adverse costs order serves as a significant disincentive to bringing any court action as unsuccessful litigants could be exposed to a court order requiring them to pay the legal costs of the other party. In PIAC's experience with these kinds of cases in NSW, it is very difficult to obtain a grant of legal aid because the challenges of overcoming the limitations hurdle significantly reduce the prospects of success and legal aid commissions are generally reluctant to grant aid in cases with low prospects. Furthermore, in other states in Australia, a grant of legal aid would not necessarily protect the client against an adverse costs order.

PIAC believes adopting Option A is imperative to assure access to justice and ensure equality between litigants where an application for compensation for childhood injury has been made. Without removing limitation periods, judicial consideration of the claims of survivors will be limited and finding some measure of justice for past wrongs will remain elusive. PIAC accepts that limitation periods can be beneficial in providing legal certainty in the general context of civil litigation. However, the circumstances of child abuse victims should be viewed as exceptional. As has been now well established in various inquiries, the personal injury suffered as a result of child abuse frequently results in significantly delayed disclosure. Compounding this is the struggle to have claims accepted by police and institutions from the earliest stages of disclosure. In such circumstances the requirement to also prove a Limitation Act exception applies is just one of many hurdles faced by applicants which frequently proves insurmountable.

The Discussion Paper identifies the disadvantages of Option A as making it easier to bring claims based on historic abuse, which poses challenges for the presentation of evidence and adjudication of that evidence.[8] PIAC believes the advantages in choosing this option clearly outweigh this problem. In any event, PIAC believes the range of litigation options available to defendants, such as the ability to apply for proceedings to be struck out or dismissed at the early stages of proceedings, will sufficiently meet these concerns.

Recommendation 1

PIAC recommends that Option A, the removal of all limitation periods, be adopted in the case of civil litigation for child abuse.

2.2.1 Question 10: Should the 2002 amendments relating to minors be retained as is or amended in light of the issues raised above?

In PIAC's experience, and drawing on the experience of its partner law firms, the limitation periods for child abuse under the Act, even with the 2002 extensions, are also proving

[8] Discussion Paper, above note 1, at p 11.

problematic for victims of child abuse by a family member, close associate or otherwise. The delays caused in reporting child abuse are specific to the injury, rather than the characterisation of the perpetrator. Accordingly PIAC recommends the removal of limitation periods for all victims of child abuse to take into account the specific issues around delayed reporting that are a feature of this category of personal injury.

As noted in this submission, the limitation period only addresses one barrier faced by survivor litigants. Even with this early hurdle removed, applicants will still bear a heavy evidentiary burden. Removing this initial hurdle will enable better access to justice, but the challenging task of proving each element of the tort remains.

2.2.2 Question 11: How should the type(s) of actions to which any amendments apply be defined?

Any reform to address institutional abuse should encompass not only sex abuse but also physical and emotional abuse suffered by children when in institutional care. This has been contemplated by the Royal Commission in its Consultation Paper regarding a possible national redress scheme for survivors of child abuse.[9] As also noted in this Discussion Paper, all three forms of abuse may be inextricably linked and it is clear that each can cause serious personal and psychological injury.[10]

PIAC opposes any undue limit on the definition of physical and psychological abuse for the purpose of removing the limitation period so as to restrict the number claims that can be made. It should be remembered that even if a limitation period does not apply, an applicant still must prove the elements of the cause of action, causally linking the injury, on the balance of probabilities, to a breach of a duty owed by the defendant.

To create divisions in what type of abuse falls within the exception would be to create a hierarchy of victims. Different levels of harm and injury are best taken into account in the calculation of damages on a case-by-case basis. It should also be remembered that psychological injury can have serious consequences. The Discussion Paper notes, for example, that a broad definition of physical assault might mean a wide range of conduct, such as bullying, may not be time limited.[11] PIAC would not consider this necessarily to be inappropriate. As has been tragically demonstrated, bullying behaviour may cause significant injury and can lead to death.[12]

The Consultation Paper refers to the provision in the Victorian exposure draft bill restricting the non-application of the limitation period to claims arising from 'criminal child abuse'. Following consultation, this restriction has, however, been removed. In the Bill currently being considered

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9 Royal Commission Consultation Paper, above note 2, at pp 161 to 163.

10 Consultation Paper, above note 1, at page 17.

11 Consultation Paper, above note 1, at page 17.

12 The suicide of Brodie Panlock in Victoria, for example, lead to amendments to the *Crimes Act 1958* (Vic) to criminalise serious bullying with a maximum penalty of 10 years' imprisonment.

by the Victorian Parliament, the limitation period will be removed in respect of a cause of action that is

> founded on the death or personal injury of a person resulting from
> (i) an act or omission in relation to the person when the person is a minor that is physical abuse or sexual abuse; and
> (ii) psychological abuse (if any) that arises out of that act or omission.[13]

This provision still restricts the removal of the limitation period for psychological abuse that is linked to the physical or sexual abuse. PIAC believes that the limitation period should be removed on an equal footing for physical, sexual or psychological abuse, but in the alternative would accept this as an appropriate restriction.

Recommendation 2

1. *PIAC recommends that the limitation period be removed for any claims based on sexual, physical or emotional/psychological abuse suffered while the applicant was a child in the care of an institution.*
2. *In the alternative, PIAC recommends a restriction of psychological abuse linked to the physical or sexual abuse suffered while the applicant was a child in the care of an institution.*

2.2.3 Question 12: Should any legislative amendments be retrospective?

Legislative amendment to allow for the removal of the limitation period for child abuse claims should apply retrospectively. Without retrospective application, given the scale of historic abuse that has been uncovered, there would be significant injustice for many victims of child abuse who wish to conduct civil litigation to seek compensation.

The reform should also apply, as a matter of logic and fairness, to any claims that have not been able to be considered substantively due to findings at the initial stage of litigation that the limitation period under the Act applied.

It is also worth noting that the most common rationale against retrospective application generally is that it does not allow a person to determine how to act with full knowledge of the lawfulness or otherwise of their proposed conduct. However, that rationale does not apply in the context of the Limitation Act: the extent of any limitation period could not reasonably have informed a person in their consideration whether to engage in a tortious act.

Recommendation 3

PIAC recommends that any legislative amendment to the Limitation Act 1969 *(NSW) be applied retrospectively.*

[13] Limitation of Actions Amendment (Child Abuse) Bill 2015, cl 4.

2.2.4 Question 14: Is it likely that changes to the application of limitation periods to child sexual abuse cases would lead to a significant increase in the number of cases commenced?

It is difficult to predict the impact of any legislative change with any degree of precision. However, limitation periods are simply one barrier to accessing justice. In PIAC's experience of civil litigation, removing the limitation periods will no doubt be beneficial and open the door to more claimants; however, it could not be definitively stated that there will be a consequent flood of applications.

From PIAC's experience, there are successive barriers to accessing justice for vulnerable applicants, such as:

- the cost of litigation, compounded by reduced access to legal aid and forthcoming funding cuts for the community legal sector;
- the risk of an adverse costs order and difficulties in obtaining protective costs orders;
- the re-traumatisation associated with civil litigation for survivor applicants and delays associated with litigation;
- the inability to identify a defendant; and
- impecunious defendants.

Accordingly, even where the limitation issue is overcome, there remain significant disincentives to litigation. The Victorian parliamentary inquiry into child abuse found that because of the difficulties associated with civil litigation survivor applicants invariably discontinue proceedings or settle out of court.[14]

It must be said, however, that even if there were a significant increase in the number of cases commenced, this must be accepted as a consequence of the need to provide every survivor the opportunity to pursue adjudication of their claim and, where proven, compensation for the injuries inflicted upon them.

2.3 Other amendments

If institutionalised child sexual abuse is to be properly addressed, there are other reforms of the civil litigation process that should be considered.

First, PIAC supports statutory clarification of the responsibility of institutions for institutional child abuse. The current scope of the legal responsibility is unclear and it is foreseeable that this uncertainty deters meritorious claims. PIAC supports the option posited by the Royal Commission that institutions should be made liable for child sex abuse committed by their employees or agents unless the institution proves that it took reasonable precautions to prevent this abuse, with 'reasonable precautions' being judged as at the time the abuse occurred.[15]

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[14] At page 519.

[15] Royal Commission Consultation Paper, above note 2, at page 219.

Secondly, PIAC also supports the statutory clarification of the legal identity of defendants, so that an institution (or its legal successor or trust) can be named as a defendant for the purposes of legal proceedings arising out of institutional child sex abuse, regardless of its formal legal structure. Where the institution no longer exists, it is appropriate that a nominal defendant be appointed unless there is an appropriate legal successor who can be named as a defendant. In circumstances where the survivor was a ward of the State and at the time the abuse occurred the State had a legal duty of care towards them, it is appropriate that the State be appointed as the nominal defendant in the place of the institution.

Recommendation 4

PIAC recommends that the law be reformed so that an institution (or its legal successor or trust) can be named as the defendant in any institutional child sexual abuse claim.