REFORM OF CIVIL STATUTES OF LIMITATION FOR CHILD SEXUAL ABUSE CLAIMS: SEISMIC CHANGE AND ONGOING CHALLENGES

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Historically, civil statutes of limitation applied standard approaches to claims for injuries suffered through child sexual abuse. Due to the features of these cases, many survivors were unable to commence an action for compensation within time, and could not access the civil justice system. However, since 2015, influenced by the recommendations of state and national inquiries, every Australian state and territory has removed limitation periods for child sexual abuse claims prospectively and retrospectively, enabling commencement of a claim at any time, while retaining protections for defendants' rights to a fair trial. The reforms are a landmark socio-legal development in the common law world. However, the legal principles are complex, and inconsistencies remain in the approaches adopted by the eight states and territories. This article analyses the nature of these reforms, considers their justifiability as public policy, identifies remaining legislative inconsistencies and challenges, and makes recommendations for reform and application.

I INTRODUCTION

In the civil legal context, many survivors of child sexual abuse have historically been unable to commence proceedings to claim damages for personal injury, and to hold individual and institutional wrongdoers accountable. A prominent obstacle to justice was presented by survivors' inability to disclose their experience and seek legal advice within the short time normally prescribed by statutes of limitation for commencement of a civil claim. This inability has been related to the nature of the experience itself, and the psychological injuries normally produced. Defendants typically then relied on the expiry of time, which prevented plaintiffs accessing the court system, despite the merits of the claim. This confluence of acts, injuries, and legal principle operated to impede access to the justice system, breaking a bedrock principle of the rule of law.[1]

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1 Lord Thomas Bingham, 'The Rule of Law' (2007) 66(1) *Cambridge Law Journal* 67; Tom Bingham, *The Rule of Law* (Penguin Books, 2010) 37–47.

However, recent legislative reforms in all eight Australian states and territories have fundamentally altered these established legal principles. These seismic reforms have been underpinned by legislatures' acceptance of scientific evidence about the nature and consequences of child sexual abuse, and the policy implications of this for access to the civil justice system. The reforms are characterised by several key principles concerning: what kinds of actions may be brought without any time limit; under what circumstances a previously barred right of action may be revived; under what circumstances a previously settled right of action may be revived; and the identification of a proper defendant in cases of institutional liability involving unincorporated associations. These reforms represent landmark developments in Australian jurisprudence and public policy. However, inconsistencies in the post-reform era remain between jurisdictions, and the process of reform is incomplete. In addition, the reforms are complex, and present issues of statutory interpretation and policy consideration for the courts.

This article first provides background to the reforms, synthesising the policy rationales for statutes of limitation, and reviewing social science and medical literature to acknowledge the contextual features of child sexual abuse cases which make them a qualitatively different class of case warranting differential treatment. The article then analyses the nature of these recent reforms to statutes of limitation in every Australian state and territory, revealing areas of unity and inconsistency, challenges for statutory interpretation and judicial consideration, and aspects requiring further reform. In doing so, the article considers the implications of the reforms regarding two fundamental interests held by the legal system: to ensure plaintiffs have adequate rights to access civil justice, while preserving defendants' rights to a fair trial.

II THE BACKGROUND TO THE AUSTRALIAN REFORMS

A General Policy Rationales for Statutes of Limitation

Civil statutes of limitation give plaintiffs a nominal time period in which an action for personal injuries should be commenced. Common law jurisdictions consistently recognise that time limitation periods are animated by two broad policy considerations.[2] As recognised by the High Court of Australia in *Brisbane South Regional Health Authority v Taylor*,[3] the primary justification is to protect a defendant's right to a fair trial by ensuring that a defendant can draw on fresh and available evidence. The rationale supporting this justification is that with the passage of time, the quality and availability of evidence declines, through memories fading, documents being lost, physical evidence being destroyed, and witnesses dying or being unlocatable. A second justification is the public interest in the prompt settlement of disputes. This interest is connected with policy goals of administering an efficient court system, requiring plaintiffs not to slumber on their rights, and ensuring that defendants' lives are not encumbered by the threat of claims about long-past events.[4]

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2 See, eg, the UK House of Lords in *R v Lawrence* [1982] AC 510; the Supreme Court of the United States in *Order of Railroad Telegraphers v Railway Express Agency*, 321 US 342 (1944); and the Supreme Court of Canada in *M(H) v M(K)* [1992] 3 SCR 6. These general policy rationales have been noted in other discussions of this context: see, eg, Ben Mathews, *New International Frontiers in Child Sexual Abuse: Theory, Problems and Progress* (Springer, 2019) 147–8, 223–7 ('*New International Frontiers in Child Sexual Abuse*').

3 (1996) 186 CLR 541, 555.

4 Ibid 552–3.

1 Adaptable Rules of Procedure, not Substantive Rights

However, a plaintiff's entitlement to bring a civil suit is not automatically terminated by the expiry of a limitation period. A defendant must make an active choice to rely on the expiry of time, and thereby seek to defeat the claim. This principle about the operation of time limits was established in *Commonwealth v Verwayen*,[5] where the High Court of Australia recognised that time limits are simply procedural rules which do not automatically bar actions.[6] Further supporting this principle is the mechanism in statutes of limitation allowing a plaintiff to seek an extension of time from the Court, based on the recent discovery of previously unknown material facts related to the action.[7] These relevant or decisive facts include the nature and extent of the injury, and the connection of the injury with the actionable event. Extensions of time are particularly relevant in cases of latent injury, or where the full impact of the injury crystallises long after the event.

Further demonstrating that laws of limitation do not simply set final temporal barriers to all kinds of civil claim is the abolition of limitation periods for specified classes of injury. As an example, Australian legislatures have removed time limits for claims for injuries from latent dust-related diseases.[8] These legislative removals of limitation periods have been inspired by an acknowledgment that some classes of claim for personal injury are sufficiently qualitatively different to allow an action to be brought at any time.

B Social Science and Medical Evidence: The Special Case of Child Sexual Abuse

Social science and medical evidence have established several features of child sexual abuse which make these cases, as a whole, sufficiently qualitatively different from standard personal injuries cases to warrant differential treatment by limitations statutes.

1 The Nature of the Injuries Caused

The first feature is the nature of the injuries caused, and their longevity. Not every survivor experiences substantial or enduring injuries.[9] However, rigorous scientific studies have shown child sexual abuse often causes significant psychological injuries which persist through childhood and adulthood, with post-traumatic stress disorder,

5 (1990) 170 CLR 394, 405–6.

6 Similarly, the Supreme Court of the United States has held that limitation laws are an adaptable policy statement and do not set intractable barriers to litigation based on expiry of time. In *Chase Securities Corporation v Donaldson* 325 US 304 (1945), Mr Justice Jackson declared that statutes of limitation 'represent a public policy about the privilege to litigate. Their shelter has never been regarded as … a "fundamental" right': at 314.

7 See, eg, *Limitation of Actions Act 1974* (Qld) s 31; *Limitation Act 1969* (NSW) ss 62A, 62B; *Limitation of Actions Act 1958* (Vic) ss 27K, 27L; and *Limitation of Actions Act 1936* (SA) s 48. See further Mathews, *New International Frontiers in Child Sexual Abuse* (n 2) 6–7.

8 *Limitation of Actions Act 1974* (Qld) s 11(2); *Dust Diseases Tribunal Act 1989* (NSW) s 12A. In Canada, time limits have been removed for multiple classes of claims: see, eg, *Limitations Act*, SO 2002, c 24, sch B s 16. Indeed, many Canadian jurisdictions were the first to remove limitation periods for actions based on sexual assault: see Mathews, *New International Frontiers in Child Sexual Abuse* (n 2) 231–2. However, the Australian reforms analysed here move beyond the Canadian jurisprudence in important ways, including the approach to other associated forms of abuse; the approach to retrospectivity; the approach to reviving barred and settled claims; and the approach to the proper defendant.

9 Frank W Putnam, 'Ten-Year Research Update Review: Child Sexual Abuse' (2003) 42(3) *Journal of the American Academy of Child and Adolescent Psychiatry* 269, 269.

depression and anxiety highly prominent.[10] More severe injuries are likely where the abuse is of longer duration and greater severity,[11] or where inflicted by a family member or trusted authority figure.[12] These injuries and their behavioural consequences also compromise intellectual, academic and personal achievement, and adult economic wellbeing, adding to the survivor's loss.[13] However, it often takes years or decades for injuries to fully crystallise, and for the survivor to be able to obtain a medical diagnosis of the nature of these injuries, quantification of their extent and impact, and evaluation of their causal connection to the abuse.

2 Non-disclosure and Delayed Disclosure

The second feature is the typical delay between the abusive events and when the plaintiff can tell anyone about them. A substantial body of evidence shows that many survivors will not ever tell anyone about their experience, or will only do so years or decades later.[14] A comprehensive review of studies found that 60–70% of adult survivors said they did not disclose their abuse during childhood.[15] A body of rigorous

10 Laura P Chen et al, 'Sexual Abuse and Lifetime Diagnosis of Psychiatric Disorders: Systematic Review and Meta-analysis' (2010) 85(7) *Mayo Clinic Proceedings* 618; Penelope K Trickett, Jennie G Noll and Frank W Putnam, 'The Impact of Sexual Abuse on Female Development: Lessons From a Multigenerational, Longitudinal Research Study' (2011) 23(2) *Development and Psychopathology* 453. These studies and the context of the nature of the injuries caused are further discussed in Mathews, *New International Frontiers in Child Sexual Abuse* (n 2) 19–20.

11 The concept of severity often is used to connote the nature of the abuse and its circumstances, including whether it involved penetration; but it can also involve its frequency and the relational connection between the wrongdoer and the child. Child sexual abuse is relatively widespread and affects both girls and boys. A national study found approximately 12% of women and 4% of men reported penetrative abuse as a child aged under 16, and 33.6% of women and 15.9% of men reported non-penetrative abuse: Michael P Dunne et al, 'Is Child Sexual Abuse Declining? Evidence from a Population-Based Survey of Men and Women in Australia' (2003) 27(2) *Child Abuse and Neglect* 141, 141. A more recent study in Victoria found overall rates of 17% for girls and 6.6% for boys, with rates of contact sexual abuse of 14% and 4.6% for girls and boys respectively: Elya E Moore et al, 'The Prevalence of Childhood Sexual Abuse and Adolescent Unwanted Sexual Contact among Boys and Girls Living in Victoria, Australia' (2010) 34(5) *Child Abuse and Neglect* 379, 382. Boys have been found to be more frequently abused than girls in some religious contexts: John Jay College of Criminal Justice of the City University of New York, 'The Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States 1950-2002' (Research Report, United States Conference of Catholic Bishops, February 2004); Patrick Parkinson, Kim Oates and Amanda Jayakody, 'Breaking the Long Silence: Reports of Child Sexual Abuse in the Anglican Church of Australia' (2010) 6(2) *Ecclesiology* 183.

12 Chen et al (n 10); Trickett, Noll and Putnam (n 10).

13 Janet Currie and Cathy Spatz Widom, 'Long-Term Consequences of Child Abuse and Neglect on Adult Economic Well-Being' (2010) 15(2) *Child Maltreatment* 111; Cynthia M Perez and Cathy Spatz Widom, 'Childhood Victimization and Long-Term Intellectual and Academic Outcomes' (1994) 18(8) *Child Abuse and Neglect* 617.

14 The nature and reasons for non-disclosure and delayed disclosure are treated extensively in Mathews, *New International Frontiers in Child Sexual Abuse* (n 2) 21–5. Key authorities for the findings referred to in this article are: Ramona Alaggia, Delphine Collin-Vézina and Rusan Lateef, 'Facilitators and Barriers to Child Sexual Abuse (CSA) Disclosures: A Research Update (2000–2016)' (2019) 20(2) *Trauma, Violence and Abuse* 260; Scott D Easton, 'Masculine Norms, Disclosure, and Childhood Adversities Predict Long-Term Mental Distress among Men with Histories of Child Sexual Abuse' (2014) 38(2) *Child Abuse and Neglect* 243; Scott D Easton, Leia Y Saltzman and Danny G Willis, '"Would You Tell under Circumstances Like That?": Barriers to Disclosure of Child Sexual Abuse for Men' (2014) 15(4) *Psychology of Men and Masculinity* 460; Scott D Easton, 'Disclosure of Child Sexual Abuse among Adult Male Survivors' (2013) 41(4) *Clinical Social Work Journal* 344; Daniel W Smith et al, 'Delay in Disclosure of Childhood Rape: Results from a National Survey' (2000) 24(2) *Child Abuse and Neglect* 273.

15 Kamala London et al, 'Disclosure of Child Sexual Abuse: A Review of the Contemporary Empirical Literature' in Margaret-Ellen Pipe et al (eds), *Child Sexual Abuse: Disclosure, Delay, and Denial* (Routledge, 2007) 11, 18–19.

research has illuminated a range of factors influencing non-disclosure and delayed disclosure, with these factors related to the child, to the offender, and to society.[16] Some instances of abuse can be particularly difficult to disclose. Abuse by relatives, trusted authority figures, and institutional authorities produce especially powerful silencing effects due to the impact of individual, organisational and spiritual authority. Exemplifying this, the Australian Government Royal Commission into Institutional Responses to Child Sexual Abuse found that, for those survivors who were able to disclose their experience to the Commission, it took an average of 22 years from the events to do so.[17] As well, even where disclosure occurs, it typically involves a trusted confidante such as a parent, a friend or sibling, rather than to a criminal or civil law enforcement agency. Disclosure to police or to plaintiff lawyers involves an amplified level of forensic analysis of every aspect of the events. The power differential involved in these cases also constitutes a massive deterrent to proceeding, until the plaintiff feels psychologically and emotionally ready to do so. So, for example, the Royal Commission's analysis of internal claims made to the Catholic Church found the average time between the first alleged incident date and the date the claim was received was 33 years.[18]

3 Post-traumatic Stress Disorder and Avoidance

The third key feature presenting qualitative differences in this category of case is that the injuries commonly caused by sexual abuse also inherently inhibit engagement with the civil justice system. In particular, the common injury of post-traumatic stress disorder ('PTSD') impedes compliance with statutory time limits, and often prevents any engagement with the legal system. The symptoms of PTSD, and especially the symptom of avoidance, mean that the survivor will avoid thoughts, memories, conversations, activities, people and places related to their abusive experience.[19] In avoiding these trauma-related stimuli, a survivor with PTSD will be unable to engage cognitive functions, withstand psychological trauma, and perform physical acts,

16 Factors related to the child include the child being pre-verbal, induced to believe the acts are normal, inhibited by shame or internalised blame, and lacking a trusted person they can tell. Factors related to the offender are derived from threats, and the power imbalance produced by the offender's superior psychological, cognitive, age-based, emotional, social, and physical status as parent, caregiver, family member, trusted acquaintance, institutional authority, or older youth. Factors related to the societal and cultural factors include the taboo around sex, and the stigma of being a survivor: see, eg, Delphine Collin-Vézina et al, 'A Preliminary Mapping of Individual, Relational and Social Factors That Impede Disclosure of Childhood Sexual Abuse' (2015) 43 *Child Abuse and Neglect* 123; Lisa Aronson Fontes and Carol Plummer, 'Cultural Issues in Disclosures of Child Sexual Abuse' (2010) 19(5) *Journal of Child Sexual Abuse* 491.

17 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Interim Report, June 2014) vol 1, 6 ('*Royal Commission*').

18 *Royal Commission into Institutional Responses to Child Sexual Abuse: Analysis of Claims of Child Sexual Abuse Made With Respect To Catholic Church Institutions in Australia* (Report, June 2017) 14, 27. The Commission analysed data from 201 Catholic Church authorities and found that 4444 claimants made allegations regarding child sexual abuse to these authorities in a 35 year period (1 January 1980 – 28 February 2015), regarding abuse from 1950 to 2010: at 13. The analysis found that '[t]he gap between the first alleged incident of child sexual abuse and the date the claim was received was more than 30 years in 59[%] of the claims, and more than 20 years in 81[%] of claims. The average time between the first alleged incident date and the date the claim was received was 33 years': at 14.

19 As recognised by the *Diagnostic and Statistical Manual 5*, PTSD is a trauma- or stress-related disorder, triggered by 'exposure to actual or threatened death, serious injury, or sexual viol[ation]': American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5* (5th ed, 2013) 271. The nature and significance of PTSD is further discussed in the context of personal injury claims arising from child sexual abuse in Mathews, *New International Frontiers in Child Sexual Abuse* (n 2) 20, 226–7.

required to pursue a civil claim. These acts include the instruction of counsel; the revisiting and relation of the abusive events; interacting with people and places associated with the events; obtaining medical evidence of the nature of psychological injury, its extent, and its connection with the events; and testifying in court.

C Standard Limitation Periods for Child Sexual Abuse Claims

All eight Australian jurisdictions historically adopted traditional approaches to limitation periods and provided short time periods of three years in which a plaintiff was nominally required to begin a civil claim for personal injuries. In cases of injury to a child, time was generally suspended during minority, usually allowing three years after attaining majority (age 18) and hence requiring commencement by age 21.[20] Until recently, civil claims for injuries caused by child sexual abuse had been treated in the same way, so that where a child suffered injuries from sexual abuse, the plaintiff had until age 21 to commence a civil suit against an individual or institutional wrongdoer, regardless of the specific cause of action on which she or he relied.[21] It is important to

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20 For example, in Queensland, through the combined operation of the *Limitation of Actions Act 1974* s 5(2) (which includes an infant as a person under a legal disability), s 11 (which sets a general three year limitation period for personal injury actions), and s 29(2)(c) (which sets a three year limitation period for personal injury actions from when the legal disability ceased). Most other states and territories adopted a similar approach to suspension (*Limitation Act 1985* (ACT) s 30; *Limitation Act 1981* (NT) s 36) or had other provisions with this substantive effect (*Limitation of Actions Act 1936* (SA) s 45), or a similar effect sometimes giving less time (*Limitation Act 2005* (WA) ss 30–1). However, at various times, some states amended their legislative provisions so that time was not suspended during childhood if the child was in the care of a capable parent or guardian, and instead required the child's parent or guardian to commence a claim within three years: *Limitation Act 1969* (NSW) s 50F(2)(a); *Limitation Act 1974* (Tas) s 26A and s 5A(3); *Limitation of Actions Act 1958* (Vic) s 27J(1)(a). The nature, purpose and effect of the legislative provisions and extension provisions are further considered in Ben Mathews, 'Limitation Periods and Child Sexual Abuse Cases: Law, Psychology, Time and Justice' (2003) 11(3) *Torts Law Journal* 218 ('Limitation Periods').

21 Acts of child sexual abuse constitute trespass, and negligence or breach of duty: *Mason v Mason* [1997] 1 VR 325; *Wilson v Horne* (1999) 8 Tas R 363; *Stingel v Clark* (2006) 226 CLR 442; *W v Eaton* (2011) 20 Tas R 105. Civil claims against individual wrongdoers are normally brought in negligence. Claims against institutions are normally brought in negligence for breach of the duty of care owed to the individual, where the institution's management either knew or ought to have known of the wrongdoer's conduct and did not take reasonably practicable steps to prevent it, with this failure causing subsequent damage. Alternatively, an institution may be subject to vicarious liability, based not on its fault, but on its role. Vicarious liability promotes a policy principle that an employer who establishes an enterprise and profits from employees' activities should bear the duty to compensate individuals who are injured by such activities: *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2006] QB 510, 529 [57] (Rix LJ). Australian law on vicarious liability, especially concerning child sexual abuse in institutional settings, has been clarified with the judgment of the High Court of Australia in *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 ('*Prince Alfred College*'). This decision held that an employer may be vicariously liable for an employee's intentional criminal act if the act is sufficiently closely connected with the employment; moreover, the High Court held that this connection will be present if the employment provides 'the occasion' for the act, but is unlikely to be present if the employment merely provides an opportunity to commit the act. Expanding on this subtle distinction, it was explained that

> the role given to the employee and the nature of the employee's responsibilities may justify the conclusion that the employment not only provided an opportunity but also was the occasion for the commission of the wrongful act. By way of example, it may be sufficient to hold an employer vicariously liable for a criminal act committed by an employee where, in the commission of that act, the employee used or took advantage of the position in which the employment placed the employee vis-à-vis the victim. Consequently, in cases of this kind, the relevant approach is to consider any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim. In determining whether the apparent performance of such a role may be said to give the "occasion" for the wrongful act, particular features may be taken into account. They include authority, power, trust, control and the ability to achieve intimacy with the victim. The latter feature may be especially important. Where, in such circumstances, the employee takes advantage of his or her position with

note that when these conventional limitation periods were created, the phenomenon of child sexual abuse was barely recognised, there was no appreciation of the psychological injuries caused, and indeed several of the most salient injuries had not been identified even by medical authorities.[22]

Significantly, an important incursion into this traditional approach occurred in the early 2000s in four jurisdictions: New South Wales, Victoria, Western Australia, and Tasmania. These States made significant but constrained legislative amendments, allowing more time for civil proceedings arising from child sexual abuse where the wrongdoer was a parent or a 'close associate of the child's parent'.[23] This piecemeal reform was recommended by the *Ipp Report*,[24] which recognised that the nature of child sexual abuse and its health consequences, the effect of the power dynamic in these subsets of cases, and the policy reasons in these classes of case, warranted a more generous limitation period. This initial incursion into the general approach, while limited in nature and jurisdictional scope, and while clearly insufficient for the broader field of child sexual abuse claims,[25] demonstrated that the general state of awareness of child sexual abuse, and knowledge of its features and consequences, had developed to the point where several Australian legislatures had accepted the policy justifications for moderating the standard approach in at least some categories of case.

However, the effect of the general body of legal principle continued to cause clear difficulties for survivors of child sexual abuse. First, because of the symptomatology of PTSD and the natural inclination to delay disclosure, many plaintiffs were unable to bring a claim for injuries because they had not yet been able to tell anyone about their experience, let alone seek legal advice. Second, because their psychological injuries typically took a significant period of time to fully develop, many who had been able to relate their experience did not yet have full details of the nature and extent of their injuries, or of their connection with the abuse. Third, many who did choose to proceed were then faced with a defendant who threatened to plead the expiry of time, thereby deterring any further progress due to the cost and trauma of proceeding. Fourth, many

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> respect to the victim, that may suffice to determine that the wrongful act should be regarded as committed in the course or scope of employment and as such render the employer vicariously liable …

at 159–60 (French CJ, Kiefel, Bell, Keane, Nettle JJ, Gageler and Gordon JJ agreeing at 172).

22 See generally Mathews, 'Limitation Periods' (n 20). See also on the development of social awareness of child sexual abuse: Mathews, *New International Frontiers in Child Sexual Abuse* (n 2) ch 2.

23 In New South Wales and Victoria, the provisions stated that when a child was injured by the child's parent or guardian, or by a person who was a 'close associate' of the child's parent or guardian, the action was discoverable by the victim when he or she turned 25 years of age, or when the cause of action was actually discoverable, whichever was later: *Limitation Act 1969* (NSW) s 50E(1)(a); *Limitation of Actions Act 1958* (Vic) s 27I(1)(a). A longstop period of 12 years ran from when the victim turned 25, therefore ending when the victim turned 37. Reforms in Tasmania and Western Australia occurred in 2005 but were not as generous as those in New South Wales and Victoria. The effect of provisions in Tasmania was to give until age 28 in these cases (*Limitation Act 1974* (Tas) s 26(7), as at 1 January 2005), while in Western Australia a plaintiff had until age 25 (*Limitation Act 2005* (WA) s 33). All these reforms were prospective only, applying in New South Wales to injuries sustained on or after 6 December 2002, in Victoria to injuries sustained on or after 21 May 2003, in Western Australia to actions arising after 15 November 2005, and in Tasmania to injuries sustained on or after 1 January 2005.

24 *Review of the Law of Negligence* (Final Report, September 2002) 96–8 (Recommendation 25); Ben Mathews, 'Post-Ipp Special Limitation Periods for Cases of Injury to a Child by a Parent or Close Associate: New Jurisdictional Gulfs' (2004) 12(3) *Torts Law Journal* 239 ('Post-Ipp Special Limitation Periods').

25 See generally Mathews, 'Post-Ipp Special Limitation Periods' (n 24). As well as only potentially applying to these wrongdoers, there were problems in interpreting the 'close associate' provision, and the amendments neither abolished the limitation period nor were retrospective. In addition, there were no provisions enabling the setting aside of previously barred or settled claims.

who proceeded in spite of such a warning were faced with a formal plea of expiry of time and were blocked from proceeding. Fifth, some then chose to seek a court order extending the time period, as the legislation enabled such a request in circumstances of recent discovery of a material fact of a decisive nature.[26] However, as the case law shows, such applications constituted separate legal proceedings, were highly technical, were often themselves vigorously defended, and in sexual abuse cases were frequently unsuccessful, often because the plaintiff was unjustly deemed not to have taken 'reasonable steps' to ascertain the relevant facts despite their injuries preventing them from taking such steps.[27] These additional proceedings were also time-consuming, costly, and often psychologically traumatic for plaintiffs.

The overall result in many cases was that despite clear evidence of liability, plaintiffs could not proceed, and for many of those who could, defendants invoked the expiry of time to prevent access to the court.[28] The unconducive legal context was widely understood by counsel for plaintiffs and defendants, and defendants' insurers. For those who chose to proceed despite being out of time, a frequent outcome was the offering of a meagre sum to settle the claim, accompanied by a deed of release; or, in cases where an institutional defendant had established an ex gratia redress scheme, a similarly reduced offer of financial redress, made on condition of release from further liability. It is quite clear that a substantial number of deserving plaintiffs felt compelled to accept these offers, because of the defendant's actual or threatened reliance on the

26 Mathews, 'Limitation Periods' (n 20); Ben Mathews, 'Judicial Considerations of Reasonable Conduct by Survivors of Child Sexual Abuse' (2004) 27(3) *University of New South Wales Law Journal* 631 ('Judicial Consideration').

27 Mathews, 'Limitation Periods' (n 20); Mathews, 'Post-Ipp Special Limitation Periods' (n 24); Lisa Sarmas, 'Mixed Messages on Sexual Assault and the Statute of Limitations: *Stingel v Clark*, the Ipp "Reforms" and an Argument for Change' (2008) 32 *Melbourne University Law Review* 609. Scholars have criticised defendants' exploitation of the expiry of time in cases of clear liability, and the complexity of extension provisions and judicial interpretation of them: Mathews, 'Limitation Periods' (n 20); Mathews, 'Post-Ipp Special Limitation Periods' (n 24), Sarmas (n 27); Ben Mathews, 'Assessing the Scope of the Post-Ipp "Close Associate" Special Limitation Period for Child Abuse Cases' (2004) 11 *James Cook University Law Review* 63; Nicola Godden, 'Sexual Abuse and Claims in Tort: Limitation Periods after *A v Hoare (and Other Appeals)* [2008] and *AB and Others v Nugent Care Society; GR v Wirral MBC* [2009]' (2010) 18 *Feminist Legal Studies* 179; Joanne Manning, 'The Reasonable Sexual Abuse Victim: "A Grotesque Invention of the Law"?' (2000) 8(1) *Torts Law Journal* 6; Marci A Hamilton, 'Child Sex Abuse in Institutional Settings: What Is Next' (2012) 89(4) *University of Detroit Mercy Law Review* 421; Jocelyn B Lamm, 'Easing Access to the Courts for Incest Victims: Toward an Equitable Application of the Delayed Discovery Rule' (1991) 100(7) *Yale Law Journal* 2189; Jenna Miller, 'The Constitutionality of and Need for Retroactive Civil Legislation Relating to Child Sexual Abuse' (2011) 17(3) *Cardozo Journal of Law and Gender* 599; Janet Mosher, 'Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest' (1994) 44(2) *University of Toronto Law Journal* 169. There are exceptional cases where the application for an extension has been granted, but these proceedings involved time, cost, uncertainty and emotional trauma: see, eg, *GGG v YYY* [2011] VSC 429; *NF v Queensland* [2005] QCA 110; *Queensland v RAF* [2012] 2 Qd R 375; *Tusyn v Tasmania (No 3)* [2010] TASSC 55; *VMT v Synod of the Diocese of Brisbane* [2007] QSC 219; *Rundle v Salvation Army (South Australia Property Trust)* [2007] NSWSC 443 upheld in *Salvation Army (South Australia Property Trust) v Rundle* [2008] NSWCA 347.

28 In Australia, examples include *A, DC v Prince Alfred College* [2015] SASC 12; *Carter v Sisters of Mercy of the Diocese of Rockhampton* [2001] QCA 335; *Ellis v Pell* [2006] NSWSC 109; *Hopkins v Queensland* [2004] QDC 021; *HWC v Synod of the Diocese of Brisbane* [2009] QCA 168; *NF v Queensland* [2005] QCA 110; *Salvation Army (South Australia Property Trust) v Rundle* [2008] NSWCA 347; *Tusyn v Tasmania (No 3)* [2010] TASSC 55; *VMT v Synod of the Diocese of Brisbane* [2007] QSC 219. In some cases, defendants made a different argument, requesting the court to exercise its residual discretion to deny the extension based on the prejudice to the defendant's right to a fair trial. As seen in this article, the Court's power to stay proceedings on this ground is preserved by the new legislative schemes. In some cases, the defence also denied institutional liability for individuals' actions on technical grounds.

expiry of time. As will be seen below, these outcomes in both barred and settled claims would assume both jurisprudential and contextual significance in the post-reform era.

III THE NATURE OF THE REFORMS: AUSTRALIA'S REMOVAL OF TIME LIMITS FOR CIVIL CLAIMS FOR CHILD SEXUAL ABUSE

Since 2015, major reforms have been implemented in all states and territories. The Ipp reforms of the early 2000s may have helped to develop the public policy basis for revising limitation periods for sexual abuse claims, but the most influential impetus came from two major inquiries into child sexual abuse, first in Victoria, and then nationally.

A The First Reforms: Victoria, July 2015

Victoria was the first State to enact reform, introducing a bill on 23 February 2015, which commenced on 1 July 2015. Its reforms were influenced by the Victorian Government's *Betrayal of Trust Inquiry* which found widespread child sexual abuse in religious and other non-government institutions, and mishandling of abuse allegations. The *Betrayal of Trust Inquiry* acknowledged that survivors typically could not report their experience within the conventional time limitation period, and that defendants had unjustifiably relied on the expiry of time to block survivors from accessing civil courts.[29] The Inquiry also evaluated the policy reasons for limitation periods and considered their applicability in situations involving child abuse. It concluded that there was 'no public policy justification for applying limitation periods to civil cases relating to criminal child abuse', and recommended removal of the statutory time limit for civil claims regarding any situation that involved acts of criminal child abuse.[30]

Victoria's groundbreaking legislative reform had three components.[31] First, the limitation period was removed for personal injury claims arising from child sexual abuse, and from physical abuse, and from psychological abuse arising from those acts.[32] Second, the limitation period was removed with both retrospective and prospective effect,[33] allowing a plaintiff to bring an action regarding events that occurred either before or after commencement of the amending legislation. Third, the amendments preserved courts' powers, primarily to protect defendants' fair trial rights and to prevent abuse of process, such as through the power to summarily dismiss or permanently stay proceedings.[34]

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29 Family and Community Development Committee (Vic), *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-government Organisations* (Final Report No 2, November 2013) 537–43 (Finding 26.8) ('*Betrayal of Trust Inquiry*').

30 Ibid 541–2 (Finding 26.7). The Victorian developments were also noted in Mathews, *New International Frontiers in Child Sexual Abuse* (n 2) 227.

31 The *Limitation of Actions Amendment (Child Abuse) Act 2015* inserted into the *Limitation of Actions Act 1958* (Vic) pt IIA div 5 actions for personal injury resulting from child abuse: at ss 27O–27R.

32 Ibid ss 27O, 27P.

33 Ibid s 27P.

34 Ibid s 27R. Section 27R(a) identified the Supreme Court's powers being sourced in its 'inherent jurisdiction, implied jurisdiction or statutory jurisdiction'; s 27R(b) identified other courts' powers being within its 'implied jurisdiction or statutory jurisdiction'; and s 27R(c) also identified other sources of such power, including 'any other powers of a court arising or derived from the common law or under any other Act (including any Commonwealth Act), rule of court, practice note or practice direction'.

B The Royal Commission's Recommendations: September 2015

A second significant development then influenced reform in other states and territories. The Australian Royal Commission into Institutional Responses to Child Sexual Abuse gave detailed consideration to issues in the civil justice system in the context of child sexual abuse. This included the justifiability of applying limitation periods to child sexual abuse cases in religious, educational, welfare, sports, cultural and arts organisations, and was informed by revelations of defendants' reliance on the expiry of limitation periods to prevent plaintiffs bringing civil claims. It considered policy rationales for limitation periods generally, scholarly argument concerning their applicability in cases of child sexual abuse, social science evidence about non-disclosure, the lived experience of plaintiffs in these claims, and submissions by government and non-government stakeholders.

In September 2015, the Royal Commission published its findings about these issues in its *Redress and Civil Litigation Report*.[35] The Royal Commission concluded there were insufficient policy reasons to justify retention of a time limitation for civil claims in institutional child sexual abuse cases. It made several core recommendations: that all Australian states and territories should remove all time limit periods for these cases;[36] that such removal should apply retrospectively as well as prospectively;[37] that courts' powers to stay proceedings should be preserved;[38] and that reforms should occur immediately.[39] Because of its remit, the Royal Commission's recommendations were limited to cases of institutional sexual abuse, but broader reforms since made by Australian state and territory parliaments indicate the rationales for reform apply to all sexual abuse cases regardless of setting.

C Reform Spreads across Jurisdictions, but Inconsistencies Emerge: 2016–19

The Royal Commission's recommendations were decisive in influencing other Australian jurisdictions to implement change. However, in some important respects, the subsequent reforms would exceed the recommendations made by the Royal Commission. New South Wales was first to enact reform after Victoria, with its *Limitation Amendment (Child Abuse) Act 2016* commencing on 17 March 2016. Other reforms then gradually followed in other jurisdictions: Queensland on 1 March 2017; the Australian Capital Territory in May 2017; Northern Territory on 15 June 2017; Western Australia on 1 July 2018; Tasmania on 1 July 2018, and South Australia on 1 February 2019.[40]

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35 *Royal Commission into Institutional Responses to Child Sexual Abuse*: *Redress and Civil Litigation* (Report, September 2015) ch 14 ('*Redress and Civil Litigation Report*'). The Royal Commission's consideration of these issues is also noted in Mathews, *New International Frontiers in Child Sexual Abuse* (n 2) 224–6.

36 *Redress and Civil Litigation Report* (n 35) 459 (Recommendation 85).

37 Ibid (Recommendation 86).

38 Ibid (Recommendation 87).

39 Ibid (Recommendation 88).

40 The key provisions are: Australian Capital Territory: *Limitation Act 1985* (ACT) ss 21C, 30; New South Wales: *Limitation Act 1969* (NSW) s 6A, sch 5 cls 8–10; Northern Territory: *Limitation Act 1981* (NT) ss 5A, 53–5; Queensland: *Limitation of Actions Act 1974* (Qld) ss 11A, 48; South Australia: *Limitation of Actions Act 1936* (SA) s 3A, sch 1; Tasmania: *Limitation Act 1974* (Tas) ss 5B, 38; Victoria: *Limitation of Actions Act 1958* (Vic) ss 1, 4, 27O, 27P; Western Australia: *Limitation Act 2005* (WA) ss 6A(2), pt 7 div 1. Some jurisdictions limited reforms initially to institutional sexual abuse. The Australian Capital Territory removed the limitation period only for claims arising from sexual abuse in institutional contexts, although this was later extended to non-institutional settings. Similarly, in Queensland, the original reform bill was restricted to institutional child sexual

Several key provisions were substantially identical across all eight states and territories. All jurisdictions abolished the limitation period both retrospectively and prospectively.[41] All jurisdictions also preserved court powers to protect defendant's fair trial rights, including by enabling a claim to be stayed if it constituted an abuse of process. As in Victoria, through these provisions, courts retain the power to summarily dismiss, or permanently stay proceedings, where the lapse of time creates an overwhelming burden to defendant's fair trial rights. This power is preserved through the court's inherent, implied, statutory or other common law jurisdiction, or under a rule of court, practice note or practice direction.[42]

These reforms alone constitute historic jurisprudential developments. Removal of the time limitation prospectively is significant, but with additional retrospective effect constitutes an extremely substantial advance. The reforms are consistent with social science, medicine, and the rule of law, and directly implement recommendations made by the *Royal Commission into Institutional Responses to Child Sexual Abuse*. They are also consistent with the model litigant principle,[43] which requires a government defendant to act fairly, settle legitimate claims, resist reliance on superior resources to defeat plaintiffs, and not plead legal technicalities when liability is not in dispute.[44]

These reforms ushered in a new landscape of civil liability and social justice in child sexual abuse claims. However, to date, the states and territories have adopted different approaches to the nature and parameters of reform, creating a new situation of variance placing individual plaintiffs in different positions depending on where they live, and creating practical as well as technical challenges, often related to defendants' reliance on these inconsistencies and gaps. As well, some principles are complex in nature and application, and will likely require judicial consideration in statutory interpretation and policy analysis. Four key differences in the major dimensions of reform have emerged: the types of child abuse to which the reforms applied; the approach to revival of previously barred claims; the approach to revival of previously settled claims; and the identification of a proper defendant.[45]

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abuse and was only broadened to non-institutional cases after extensive debate. Queensland enacted further amendments in September 2019, extending the reforms to serious physical abuse and psychological abuse perpetrated in connection with sexual abuse or serious physical abuse: *Civil Liability and Other Legislation Amendment Act 2019* (Qld) s 11. The timing and broad nature of the legislative amendments as made until May 2018 were noted in Mathews, *New International Frontiers in Child Sexual Abuse* (n 2) 227–31.

41 See *Limitation Act 1985* (ACT) ss 21C, 30; *Limitation Act 1969* (NSW) s 6A, sch 5 cls 8–10; *Limitation Act 1981* (NT) ss 5A, 53–5; *Limitation of Actions Act 1974* (Qld) ss 11A, 48; *Limitation of Actions Act 1936* (SA) s 3A, sch 1; *Limitation Act 1974* (Tas) ss 5B, 38; *Limitation of Actions Act 1958* (Vic) ss 27O, 27P; *Limitation Act 2005* (WA) ss 6A(2), pt 7 div 1.

42 See *Limitation Act 1985* (ACT) s 21C(3); *Limitation Act 1969* (NSW) s 6A(6); *Limitation Act 1981* (NT) s 5A(5); *Limitation of Actions Act 1974* (Qld) s 11A(5); *Limitation of Actions Act 1936* (SA) s 3A(4); *Limitation Act 1974* (Tas) s 5B(3); *Limitation of Actions Act 1958* (Vic) s 27R; *Limitation Act 2005* (WA) s 6A(5).

43 *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342 (Griffith CJ). The model litigant principle is also embodied in government policy directives: see generally *Redress and Civil Litigation Report* (n 35) ch 17.

44 This is particularly relevant in this context since in many cases the defendant is a government agency.

45 Other connected reforms have also been made but are beyond the scope of this article. For example, in some jurisdictions, civil liability legislation has been amended to establish that a duty of care is owed by organisations providing services to children, and to reverse the onus of proof in relation to the discharge of this duty. The organisation must demonstrate it has fulfilled its duty by ensuring proper systems were in place and observed. If child abuse occurs, there is a presumption that the organisation failed in its duty of care unless it can prove that reasonable precautions were taken to prevent the abuse: see, eg, *Civil Liability Act 2002* (NSW) pt 1B div 2; *Wrongs Act 1958* (Vic) pt 13. The legislation also includes provisions clarifying the application of vicarious liability in these institutional cases: see, eg, *Civil Liability Act 2002* (NSW) ss 6G–6H.

IV REMAINING INCONSISTENCIES AND CHALLENGES

A The Types of Child Abuse to Which the Reforms Apply

The first area of inconsistency is that five of Australia's eight states and territories applied the reforms not only to child sexual abuse, but also to 'serious physical abuse' – or in the case of Victoria, simply to 'physical abuse' – and to related or connected 'psychological abuse' (Table 1).[46] This extension to other kinds of abuse has not been adopted by the Australian Capital Territory and Western Australia, meaning their provisions are significantly more restrictive than the rest of the country. While the primary goal of the reforms as influenced by the Royal Commission (and arguably the *Betrayal of Trust Inquiry* also) was to remove the limitation period for claims arising from sexual abuse, the *Betrayal of Trust Inquiry* recommended removal of the limitation period for any criminal child abuse on policy grounds, and six legislatures have clearly accepted this reasoning, or have accepted that child sexual abuse is typically inherently accompanied by psychological abuse, and often also by physical abuse. The first clear issue therefore is that the Australian Capital Territory and Western Australia need to remove this inconsistency by making appropriate legislative reforms to create equity of access to justice nationally.[47] This reform would also remove the opportunity for defendants in these jurisdictions to argue that, in cases where a survivor was victimised in multiple forms including sexual abuse, or simply in non-sexual forms, the non-sexual abuse caused the damage and is not actionable due to expiry of time.

These new provisions will also require judicial consideration of what acts constitute 'sexual abuse', 'serious physical abuse', and connected or related 'psychological abuse'. These terms are not defined in the legislation,[48] and judicial determination of the nature of these concepts will circumscribe the pool of potential claimants. It can be anticipated that in some situations, defendants may attempt to avoid liability on the basis that their acts do not fall within a sound conceptual model or operational definition of the relevant term. For example, a defendant sued for damages caused by non-contact sexual acts may assert they do not constitute 'sexual abuse'. In such a case – for example, where a child is subjected to repeated genital exposure, or is required to undress in front of others, or is the subject of recorded images that are distributed for others' consumption – a defendant may attempt to argue the acts are not 'sexual', do not constitute 'abuse', or do not constitute 'sexual abuse'. Similarly, a defendant sued for damages caused by acts of severe physical discipline may assert they fall within the scope of lawful corporal punishment and are insufficient to constitute 'serious physical

46 In New South Wales, the *Limitation Act 1969* (NSW) s 6A(2) defines 'child abuse' as: 'any of the following perpetrated against a person when the person is under 18 years of age: (a) sexual abuse, (b) serious physical abuse, (c) any other abuse (*connected abuse*) perpetrated in connection with sexual abuse or serious physical abuse of the person (whether or not the connected abuse was perpetrated by the person who perpetrated the sexual abuse or serious physical abuse)' (emphasis in original).

47 In the vast majority of cases, the applicable law will be that of the relevant state or territory within which all the relevant facts occurred, due to the lex loci delicti rule (that is, the law to be applied is the law of the place of the commission of the tort): *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503. In rare, complex cases where the relevant acts cross state or territory boundaries, this rule may effectively allow the plaintiff a choice of forum.

48 Except, where defined at all, in a circular and non-specific way: Western Australia's *Limitation Act 2005* (WA) s 6A(1) defines 'child sexual abuse' as follows: 'child sexual abuse, of a person, means an act or omission in relation to the person, when the person is a child, that is sexual abuse'.

abuse'.[49] To resolve such claims, courts will need to be cognisant of the social science literature, and judgments should be informed by reliable, authoritative conceptual models of sexual abuse,[50] physical abuse,[51] and psychological abuse.[52]

B Approach to Revival of Previously Barred Claims

The second area of inconsistency is that most but not all jurisdictions have enacted provisions to allow the revival of a previously barred cause of action. Consistent with the retrospective application of the general reform, the policy basis for the revival of previously barred claims is that there may be diverse circumstances where it is 'just and reasonable' for a previously barred claim to be revived, and where a plaintiff should be permitted to bring her or his claim. Some jurisdictions have expressly detailed a variety of categories where a prior claim may have been 'barred', including: where a limitation period had expired; where an action had been commenced but not finalised; where an action had been commenced but discontinued; where a court judgment had been given on the basis that the limitation period had expired; and where an action had been dismissed on the basis of the expiry of time.[53] Several of these categories apply to prior claims that were either never commenced, or commenced but not finalised. The category of revival where an action has been dismissed by a judgment on the basis of

49 Corporal punishment by parents remains lawful in Australia, under criminal codes and statutes in five jurisdictions: *Crimes Act 1900* (NSW) s 61AA; *Criminal Code Act 1983* (NT) s 27(p); *Criminal Code Act 1899* (Qld) s 280; *Criminal Code Act 1924* (Tas) s 50; *Criminal Code Act Compilation Act 1913* (WA) s 257. Where legislative provisions do not exist, it is lawful under the common law. To be lawful, such punishment must be reasonable in all the circumstances: *R v Hughes* [2015] VSC 312, [97]–[103] (Croucher J), citing *R v Terry* [1955] VLR 114, 116–18 (Sholl J); *Police (SA) v G, DM* (2016) 258 A Crim R 75. In the social science literature, a widely accepted definition of corporal punishment is that it is the 'use of physical force with the intention of causing a child to experience pain, but not injury, for the purpose of correcting or controlling the child's behavior': Murray A Straus and Michael Donnelly, 'Theoretical Approaches to Corporal Punishment' in Michael Donnelly and Murray A Straus (eds), *Corporal Punishment of Children in Theoretical Perspective* (Yale University Press, 2005) 3.

50 Debates about the nature of child sexual abuse have continued since the 1970s. A conceptual model recently published in the leading journal in its field concluded that the concept, as correctly understood, includes contact and non-contact sexual acts by any adult or child in a position of power over the victim, when the child either does not have full capacity to provide consent, or has capacity but does not provide consent. For further full detail of the conceptual model, and operational examples, see Ben Mathews and Delphine Collin-Vézina, 'Child Sexual Abuse: Toward a Conceptual Model and Definition' (2019) 20(2) *Trauma, Violence and Abuse* 131.

51 Conceptually, physical abuse is generally understood as involving intentional acts of physical force by a parent or caregiver that cause harm or have a high likelihood of causing 'harm [to] the child's health, survival, development or dignity': see World Health Organisation and International Society for Prevention of Child Abuse and Neglect, *Preventing Child Maltreatment: A Guide to Taking Action and Generating Evidence* (WHO Press, 2006) 10. Operationally, such acts will include 'hitting, beating, kicking, shaking, biting, strangling, scalding, burning, poisoning and suffocating': at 10. The World Health Organisation notes that a good deal of physical violence is inflicted with the object of punishing.

52 Psychological abuse is normally treated synonymously with emotional abuse. A well-established conceptual model of emotional abuse is that it involves acts and omissions by a parent or caregiver, constituted by categories of emotional unavailability, hostile interaction, developmentally inappropriate interaction, failure to acknowledge the child's individuality, and failure to integrate the child into the social world: see Danya Glaser, 'How to Deal with Emotional Abuse and Neglect: Further Development of a Conceptual Framework (FRAMEA)' (2011) 35(10) *Child Abuse and Neglect* 866, 869–70. Operational examples of each of these conceptual dimensions can be seen in Glaser's work. See also Danya Glaser, 'Emotional Abuse and Neglect (Psychological Maltreatment): A Conceptual Framework' (2002) 26(6) *Child Abuse and Neglect* 697.

53 See, eg, *Limitations of Actions Act 1974* (Qld) s 48(2).

time expiring constitutes a special yet limited incursion into the principle of *res judicata*: that one cannot re-litigate a claim that has been subject to a judgment.[54]

In New South Wales, the Northern Territory, Queensland, South Australia, and Western Australia, a combination of complex legislative provisions have this effect, with some listing the circumstances in which the action is barred in more detail than others.[55] In June 2019, Victoria's Attorney-General Jill Hennessy announced forthcoming amendments.[56] These were promptly passed, with amendments made by the *Children Legislation Amendment Act 2019* (Vic) commencing on 18 September 2019, and aligning Victoria's approach to previously barred claims with five other states and territories. The *Limitation of Actions Act 1958* (Vic) section 27QA(1) now enables the revival of these claims, and section 27QC confers a range of powers on the court when setting aside a barred claim.

However, these reforms have not been made in the Australian Capital Territory or Tasmania, creating a further significant difference in access to justice (Table 1). The first clear issue in this respect is therefore that the Australian Capital Territory and Tasmania need to remove this inconsistency by making appropriate reforms. The clear and detailed listing of the situations covered by claims deemed to be previously barred is also a dimension of the provisions justifying reform to harmonise the laws.

1 Court Discretion to Stay Proceedings as an Abuse of Process

A further key issue here is that the Court retains a discretion to permanently stay the proceedings if they would constitute an abuse of the court's process. There is significant Australian High Court jurisprudence on the nature and application of this power,[57] from

54 See *Jackson v Goldsmith* (1950) 81 CLR 446, 466, where Fullagar J stated:

> The rule as to *res judicata* can be stated sufficiently for present purposes by saying that, where an action has been brought and judgment has been entered in that action, no other proceedings can thereafter be maintained on the same cause of action. This rule is not, to my mind, correctly classified under the heading of estoppel at all. It is a broad rule of public policy based on the principles expressed in the maxims '*interest reipublicae ut sit finis litium*' and '*nemo debet bis vexari pro eadem causa*' …

(emphasis in original). These maxims translated are expressed respectively as that: in the interest of society as a whole, litigation must come to an end; and no one shall be twice vexed for the same cause. See generally *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589; and David P Currie, '*Res Judicata*: The Neglected Defense' (1978) 45(2) *University of Chicago Law Review* 317. As noted in Mathews, *New International Frontiers in Child Sexual Abuse* (n 2) 147–8, the United States Supreme Court confirmed the constitutionality of legislation to revive previously time-barred claims in *Chase Securities Corporation v Donaldson* (1945) 325 US 304, holding that limitation provisions are simply rules of procedure, not substantive rights. The Supreme Court in *Landgraf v USI Film Products* (1994) 511 US 244 confirmed this, and further held that retrospective legislation is valid if the statute expressly indicates this intended application.

55 See NSW: *Limitation Act 1969* (NSW) sch 5 cl 10; although cl 10(6) defines 'previously barred cause of action' broadly to include 'a cause of action to which section 6A applies that was not maintainable immediately before the commencement of that section', implying it extends to causes of action whose time limit had expired; NT: *Limitation Act 1981* (NT) ss 53(2), 54; Qld: *Limitation of Actions Act 1974* (Qld) ss 48(2)–(5); SA: *Limitation of Actions (Child Abuse) Amendment Act 2018* (SA) sch 1 cl 3, which commenced 1 February 2019, amending the *Limitation of Actions Act 1936* (SA); WA: *Limitation Act 2005* (WA) ss 91(1)(a)–(d).

56 Jill Hennessy (Victorian Attorney-General), 'Landmark Reforms to Better Support Abuse Victims' (Media Release, 14 June 2019) <https://www.premier.vic.gov.au/landmark-reforms-to-better-support-abuse-victims/>.

57 See especially *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 ('*Batistatos*'); but see *Jago v District Court of New South Wales* (1989) 168 CLR 23 ('*Jago*'); *Williams v Spautz* (1992) 174 CLR 509; *Walton v Gardiner* (1993) 177 CLR 378 ('*Walton*'); *Rogers v The Queen* (1994) 181 CLR 251; *R v Carroll* (2002) 213 CLR 635.

which several core propositions can be distilled.[58] These principles navigate the tension between bedrock policy principles: first, that a plaintiff has a fundamental right of access to courts so that they may exercise their jurisdiction and adjudicate the claim;[59] and second, that this right is qualified where the interests of justice require it.

First, a defendant bears the onus of proving a stay should be granted.[60] Second, this onus is 'a heavy one' when seeking a permanent stay, because the grant of a stay will terminate the plaintiff's fundamental right to have their claim adjudicated.[61] Third, accordingly, a stay will only be granted in 'exceptional circumstances'.[62] Fourth, a permanent stay may be ordered where the proceedings or their continuance would be manifestly unfair to a party, or would otherwise bring the administration of justice into disrepute among right-thinking people.[63] Fifth, a permanent stay may be ordered where the proceedings or their continuance would be oppressive.[64] Sixth, the categories of abuse of process are not closed, and are not confined to cases in which the defendant would not receive a fair trial if the action proceeded.[65]

(a) Successful Applications for a Permanent Stay

While a defendant must meet a very high threshold to show sufficient manifest unfairness to gain a permanent stay, some applications have been successful in claims involving child sexual abuse, and are instructive regarding the proper application of the court's discretion. In New South Wales, in *Moubarak by his tutor Coorey v Holt* ('*Moubarak*'),[66] the Court of Appeal granted a permanent stay in circumstances where the defendant had dementia, had never previously been placed on notice about the allegations, could not speak or understand or communicate, could not instruct counsel or give evidence, and there were no other circumstances indicating the abuse had occurred. These circumstances present quite clear exceptional circumstances characterised by manifest unfairness and oppressiveness had proceedings continued, since it was impossible for the defendant to participate in the trial process in any meaningful way. In *Lake v Trinity Grammar School* ('*Lake*'),[67] Balla DCJ granted the defendant a permanent stay in circumstances where the plaintiff had commenced proceedings against the school where the abuse by two employees had allegedly occurred, but where both employees had died, the principal at the time had also died, and one accused had formally denied the allegations. In particular, it was held that the

58 These principles were extensively detailed by Bell P in *Moubarak by his tutor Coorey v Holt* [2019] NSWCA 102, [162]–[171], discussed below.

59 *Williams v Spautz* (1992) 174 CLR 509, 519 (Mason CJ, Dawson, Toohey and McHugh JJ).

60 Ibid 529 (Mason CJ, Dawson, Toohey and McHugh JJ).

61 Ibid.

62 Ibid.

63 *Walton* (1993) 177 CLR 378, 395 (Mason CJ, Deane and Dawson JJ); *Batistatos* (2006) 226 CLR 256, 264 (Gleeson CJ, Gummow, Hayne and Crennan JJ). See also *Ridgeway v The Queen* (1995) 184 CLR 19, where Gaudron J stated the term 'abuse of the process of the court' included proceedings that were 'seriously and unfairly burdensome, prejudicial or damaging': at 75, quoting *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 247 (Deane J).

64 *Walton* (1993) 177 CLR 378, 393 (Mason CJ, Deane and Dawson JJ); *Jago* (1989) 168 CLR 23, 74 (Gaudron J). Proceedings can be oppressive where the effect is 'seriously and unfairly burdensome, prejudicial or damaging': *Batistatos* (2006) 226 CLR 256, 267 (Gleeson CJ, Gummow, Hayne and Crennan JJ), quoting *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 247 (Deane J).

65 *Walton* (1993) 177 CLR 378, 392–5 (Mason CJ, Deane and Dawson JJ); *Batistatos* (2006) 226 CLR 256, 264–5 (Gleeson CJ, Gummow, Hayne and Crennan JJ); *Jago* (1989) 168 CLR 23, 74 (Gaudron J).

66 [2019] NSWCA 102, [162]–[71] (Bell P) ('*Moubarak*').

67 (New South Wales District Court, Balla DCJ, 28 March 2018).

deaths of the two accused meant the school lacked any real means of placing before the Court any evidence to test the plaintiff's claims, compounded by a finding that relevant records would likely have been lost. The Court also rejected tendency evidence regarding one of the accused. While not as stark a case as *Moubarak*, this case presents some evidence suggestive of manifest unfairness, given the deaths of the two employees and the principal meant they could not participate in proceedings. However, the claimant was able to be cross-examined and challenged, together with other relevant witnesses. As well, other elements of the Court's reasoning are of concern, most notably the assertion of the 'likelihood that records have been lost' without proof of actual loss, and the reliance on a vague and nonspecific claim that 'issues also arise as to the reliability of the memory of the plaintiff'; this point will be revisited.[68] Given the fundamental right of access to the civil justice system to have one's claim adjudicated, it is not clear that *Lake* conclusively demonstrates such exceptional circumstances as to warrant a permanent stay.

Another complex case occurred in 2017, where the Victorian Court of Appeal examined these principles in *Connellan v Murphy* ('*Connellan*').[69] Specifically, the appeal involved interpretation and application of section 27R, which preserved courts' powers in their inherent, implied and statutory jurisdiction, and its example that '[t]his Division does not limit a court's power to summarily dismiss or permanently stay proceedings where the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible'.[70]

At first instance, the primary judge dismissed the defendant's application for a permanent stay, primarily on the basis that the key witnesses were still alive and so despite the passage of time the prejudice to the defendant was not so great as to preclude a fair trial.[71] However, the Court of Appeal unanimously allowed the appeal and ordered the proceedings permanently stayed. The Court concluded that the fact the witnesses were still alive, and could give evidence at any trial and accept or deny propositions put to them, was outweighed by the specific circumstances of this case. These were that the defendant was aged 62, and would be required to defend himself against allegations regarding conduct when he was 13 years of age, against a person he was familiar with for only one week; that the lapse of time was very substantial and affected both sides' ability to call evidence about relevant surrounding circumstances and to test recollections of these circumstances (such as the layout of the house); and that there were issues of causation and quantum. The Court held these factors constituted an unjustifiable burden which would make a trial plainly unjust.

The circumstances in *Connellan* said by the Court of Appeal to warrant a permanent stay are plainly not as decisive as those in *Moubarak* and do not reach the level even of those in *Lake*. Most significantly, the central parties were alive and unaffected by any mental impairment. The lapse of time was clearly substantial. However, the Court arguably relied too heavily on its assumption that memory would be so affected as to make the proceedings manifestly unfair or oppressive, and sufficient to discharge the

68 See Martin Slattery, 'Permanent Stay Applications Increase in Importance with Removal of Limitations Period for Child Abuse Claims', *Carroll & O'Dea Lawyers* (Blog Post, 30 November 2018) <https://www.codea.com.au/publication/permanent-stay-applications-increase-in-importance-with-removal-of-limitations-period-for-child-abuse-claims/>, quoting *Lake* (New South Wales District Court, Balla DCJ, 28 March 2018).

69 [2017] VSCA 116 (Priest, Beach and Kaye JJA).

70 Ibid [3].

71 *Murphy v Connellan* [2017] VCC 109 (Tsalamandris J).

defendant's heavy onus and terminate the plaintiff's right to have her claim adjudicated. The parties' memories could readily have been thoroughly tested in civil proceedings, as occurs in all such claims. In addition, issues of causation and quantum are present in virtually all such claims. These issues, and the length of time and purported effect on memory, should not have been judged sufficiently exceptional to warrant a permanent stay.

(b) Unsuccessful Applications for a Permanent Stay

In contrast, and reflecting the high threshold for a permanent stay, several applications in matters involving claims of child sexual abuse have been refused. These cases indicate that lapse of time alone will be insufficient to prove manifest unfairness, as is consistent with the legislative intent of the reforms, and with common law principles about the availability of evidence sufficient to enable a fair trial.[72] In New South Wales, in *Estate Judd v McKnight* ('*Estate Judd*'),[73] Garling J refused a stay in circumstances where three claimants had commenced proceedings for damages against the estate of a deceased man, the alleged wrongdoer. The three claimants alleged sexual abuse in the periods between June 1978 and late 1981, January 1981 and 1984, and 1993 respectively. The defendant estate argued a stay was warranted because the alleged wrongdoer had died, and because of the delay between the alleged events and the proceedings. Garling J refused the stay, finding the proceedings would not be manifestly unfair to the estate or would otherwise bring the administration of justice into disrepute among right-thinking people, for the reasons that:[74] each claimant was alive and able to be cross-examined and challenged; the credibility of each claimant was able to be challenged; the claimant's statements to medical practitioners, police or any other person could be examined for consistency and challenged; there was some material available about the alleged wrongdoer's account about his interactions with one of the claimants; some of the buildings at which the events were alleged to have occurred still existed, as did some documents from third parties against which claimants' accounts could be checked; and descriptions of motor vehicles owned by the alleged wrongdoer could be checked against government records. Moreover, while the delays were substantial, ranging from 25 to 40 years, they did not make a fair trial impossible.

Garling J's reasoning continued to further consider other factors relevant to granting a stay. The decision is notable for appropriately acknowledging and being informed by

72 While the passage of time is acknowledged as tending to affect the quality of evidence available and as therefore underpinning the general rationale for limitation periods (*Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, 566 (Kirby J)), the mere effluxion of time alone is insufficient to make a civil claim either unfair or prejudicial to a defendant. This is demonstrated by the fact that limitation provisions are not substantive but merely procedural, and must be pleaded to be activated (see above n 54); and moreover by Courts' long acceptance that a fair trial may still be had despite the absence of relevant witnesses and evidence: see authorities cited by Bell P in *Moubarak* [2019] NSWCA 102, [72]–[77], [82]–[93]; and see especially *R v Edwards* (2009) 255 ALR 399. Garling J encapsulated this by stating:

> the mere absence of documentary evidence, or the absence of a witness through death or incapacity, does not have the automatic consequence that a trial will be unfair, or that a permanent stay should be granted. Just because a court will be asked to determine proceedings with incomplete facts does not make the trial thereby unfair …

in *Estate Judd v McKnight [No 4]* [2018] NSWSC 1489 [124] ('*Estate Judd*'), citing *R v Edwards* (2009) 255 ALR 399; *R v McCarthy* (New South Wales Court of Criminal Appeal, Gleeson CJ, Carruthers and Hunter JJ, 12 August 1994), [11] (Gleeson CJ); *R v Stringer* (2000) 116 A Crim R 198, 200 (Grove J).

73 *Estate Judd* [2018] NSWSC 1489 (Garling J).

74 Ibid [127]–[133].

the policy basis for the legislative reforms; namely the public interest in allowing claims for damages for child sexual abuse to be brought at any time, as expressed by Parliament, with this interest of such gravity that the removal of the limitation period was applied retrospectively.[75] Garling J also implicitly alluded to the scientific evidence about survivors' normal responses to child sexual abuse; it was held that the claimants' delay was not due to intentional misconduct; rather, 'the claimants commenced proceedings at a time when they first reasonably felt able to do so. In those circumstances, their entitlement to have those claims heard and determined needs to be given real weight'.[76]

Two other cases indicate the circumstances in which courts are disinclined to grant a permanent stay. In *Anderson v The Council of Trinity Grammar School* ('*Anderson*'),[77] Rothman J refused a stay in circumstances where the key live issue was the liability of the Council due to the location where the abuse occurred and its responsibility for school employees' actions at that location and at activities arranged by the school. Rothman J refused the stay because the relevant parties were alive and available to give evidence, other witnesses were also available, several alleged assaults had already been admitted, and it had not been shown that documentation essential for a fair trial was either lost or absent. In Queensland in *SMN v WEM* ('*SMN*'),[78] the defendant did not dispute that sexual acts had been committed at the relevant time between December 1997 and May 1998, and he had pleaded guilty to serious criminal charges including maintaining an unlawful sexual relationship with a minor with a circumstance of aggravation; however, he contested the nature and extent of the acts pleaded in the plaintiff's civil claim. Davis J accepted principles established in the High Court,[79] and the application of these by the Victorian Court of Appeal.[80] It was accepted that civil proceedings should be stayed where continuance is unfair or would bring the administration of justice into disrepute, and referred to the fundamental test of 'whether, in the circumstances, the proceeding would be manifestly unfair to the defendant or would otherwise bring the administration of justice into disrepute among right-thinking people'.[81] However, in these circumstances, Davis J held the defendant could not demonstrate the plaintiff's action would be unjust, or otherwise establish such unfairness.[82]

All three of these cases appropriately refused to stay proceedings. *Anderson* and *SMN* were straightforward cases without compelling arguments by the applicants. In *Estate Judd*, Garling J delivered a nuanced judgment, appropriately informed by the broader legislative and policy context and scientific evidence. This, combined with a thorough analysis of the various ways in which the three claimants would have their claims thoroughly tested in the trial process, enabled a full and proper assessment of the issues to conclude there was not such manifest unfairness or oppression to constitute sufficiently exceptional circumstances to terminate their right of access to a court, despite the death of the alleged wrongdoer and the delays of 25 to 40 years between the

75 Ibid [134]–[137].
76 Ibid [138].
77 [2018] NSWSC 1633.
78 [2017] QSC 242.
79 Ibid 7 [19], citing *Jago* (1989) 168 CLR 23, 26 (Mason CJ), and *Batistatos* (2006) 226 CLR 256.
80 *Connellan v Murphy* [2017] VSCA 116.
81 *SMN v WEM* [2017] QSC 242, 7 [20], citing *Connellan v Murphy* [2017] VSCA 116, 19 [54] (Priest, Beach and Kaye JJA).
82 On slightly different grounds, albeit related to requirements in the interests of justice, proceedings were successfully reinstated in *Courtney v Ray* [2019] VSC 175, under Victoria's pre-reform legislative scheme.

alleged events and the proceedings. The appropriate application of the concept of manifest unfairness in child sexual abuse claims is of paramount importance. Defendants' rights against abuse of process deserve protection, but only in appropriate cases where the circumstances clearly show 'exceptional circumstances' sufficient to terminate a plaintiff's opportunity to be heard. Courts must not interpret this concept of unfairness so broadly as to dilute the standard of 'exceptional circumstances' and defeat the individual and public policy interests sought to be achieved by the reforms. The rule of law requires that adjudicative processes be fair; but it also demands that individuals must not be impeded from exercising legal rights, and access to courts should be unimpeded and protected as a basic right.[83] Importantly, nor should courts place inappropriate reliance on generic doubts regarding the plaintiff's memory, both for scientific reasons,[84] and practical reasons. The civil trial process will require any plaintiff to provide sufficiently compelling evidence beyond mere memory, including reliable medical evidence. This applies regarding the factual basis of a claim, liability,

83 Bingham, *The Rule of Law* (n 1) 37–47.

84 As detailed elsewhere (Mathews, *New International Frontiers in Child Sexual Abuse*, n 2) 232–3, it can be noted that debates occurred in the early 1990s regarding the reliability of memory and the significance of accurate recall for child sexual abuse cases, especially in criminal proceedings. Consideration of the accuracy of memory of distant events, or of memories that have not been continuous through life, need to be informed by the scientific literature about PTSD, dissociative disorders, and memory itself. Here, we can briefly note that the scientific evidence of the accuracy of memories of child sexual abuse, and of the reasons for and validity of newly recovered memories, supports the viability of the civil reforms. Scholarly analysis in the early 1990s concluded that claims about so-called 'false memories' were not supported by evidence: Josephine A Bulkley and Mark J Horwitz, 'Adults Sexually Abused as Children: Legal Actions and Issues' (1994) 12(1) *Behavioral Sciences and the Law* 65; Alan W Scheflin and Daniel Brown, 'Repressed Memory or Dissociative Amnesia: What the Science Says' (1996) 24(2) *Journal of Psychiatry and Law* 143. Studies have indicated that, as a natural defence mechanism, individuals are more likely to forget some details of abuse or to have periods of forgetting when they are abused by parents or caregivers: Jennifer J Freyd, Anne P DePrince and Eileen L Zurbriggen, 'Self-Reported Memory for Abuse Depends upon Victim-Perpetrator Relationship' (2001) 2(3) *Journal of Trauma and Dissociation* 5; Linda M Williams, 'Recovered Memories of Abuse in Women with Documented Child Sexual Victimization Histories' (1995) 8(4) *Journal of Traumatic Stress* 649. Freyd further concluded 'there is no research to date documenting a "false memory syndrome"' and that 'there is a large and growing body of evidence documenting the occurrence of essentially accurate recovered memories': Jennifer J Freyd, 'Science in the Memory Debate' (1998) 8(2) *Ethics and Behavior* 101, 103, 107. Freyd also concluded that new memories of child sexual abuse are neither more nor less likely to be inaccurate than continuously accessible memories of sexual abuse. Accordingly, lack of memory (caused, for example, by suppression or blocking), may be reliably retrieved. Subsequent research into the neuroscience of memory suppression confirms the normality of 'motivated forgetting': Michael C Anderson and Collin Green, 'Suppressing Unwanted Memories by Executive Control' (2001) 410 *Nature* 366; Michael C Anderson and Simon Hanslmayr, 'Neural Mechanisms of Motivated Forgetting' (2014) 18(6) *Trends in Cognitive Sciences* 279; Roland G Benoit and Michael C Anderson, 'Opposing Mechanisms Support the Voluntary Forgetting of Unwanted Memories' (2012) 76(2) *Neuron* 450; Saima Noreen and Malcolm D MacLeod, 'To Think or Not to Think, That Is the Question: Individual Differences in Suppression and Rebound Effects in Autobiographical Memory' (2014) 145 *Acta Psychologica* 84. Some literature has shown that, especially in some specific circumstances, improper therapeutic treatment has the potential to create invalid 'memories': Bette L Bottoms, Phillip R Shaver and Gail S Goodman, 'An Analysis of Ritualistic and Religion-Related Child Abuse Allegations' (1996) 20(1) *Law and Human Behavior* 1; Scott O Lilienfeld, 'Psychological Treatments That Cause Harm' (2007) 2(1) *Perspectives on Psychological Science* 53. However, there is very substantial literature regarding the validity of memory evidence regarding events that may have been lost or forgotten: see, eg, Deborah Goldfarb et al, 'Long-Term Memory in Adults Exposed to Childhood Violence: Remembering Genital Contact Nearly 20 Years Later' (2019) 7(2) *Clinical Psychological Science* 381; Christin M Ogle et al, 'Autobiographical Memory Specificity in Child Sexual Abuse Victims' (2013) 25(2) *Development and Psychopathology* 321; Simona Ghetti et al, 'What Can Subjective Forgetting Tell Us About Memory for Childhood Trauma?' (2006) 34(5) *Memory and Cognition* 1011; Kristen Weede Alexander et al, 'Traumatic Impact Predicts Long-Term Memory for Documented Child Sexual Abuse' (2005) 16(1) *Psychological Science* 33a.

causation, and quantum. Courts have the daily task and experience of weighing witnesses' credibility and testimony, and evaluating evidence – including where the evidence is not as complete as it might be. Permitting access to a court does not guarantee a plaintiff success, but simply secures the fundamental right to be heard. Legislative provisions, common law principles, judicial powers, the skills of legal advisors, and practical necessities, all combine to provide strong protection of defendants' fair trial rights in this context, in addition to the appropriate application of principles regarding abuse of the court's process.

C Approach to Revival of Previously Settled Claims

The third area of inconsistency is that several jurisdictions' reforms included a provision enabling a plaintiff to revive an action that had been settled by deed in cases where the court accepts 'it is just and reasonable to do so'. Queensland was the first jurisdiction to enact this reform.[85] This special exception to *res judicata* is consistent with the retrospective application of the abolition of the limitation period, and recognises that in the pre-reform era, some plaintiffs may not have not received a fair opportunity to have their claim for damages arising from child sexual abuse decided by a court, or by a fair settlement negotiation, and felt compelled to accept a settlement amount despite its clear inadequacy. These circumstances of injustice include those where there was no real dispute about the defendant's liability, but where the plaintiff felt compelled to accept a small offer of compensation in return for a defendant agreeing not to defeat the claim outright by relying on the expiry of time. They may include other cases where the plaintiff's agreement to accept a settlement offer was otherwise unduly influenced by an imbalance of power. The policy basis for the revival of previously settled claims is therefore that in such cases, it may be 'just and reasonable' to allow a plaintiff to commence the action again, so that a justifiable outcome may be obtained unaffected by the defendant's former unjust reliance on the expiry of time, other power imbalance, or other circumstance of injustice.

To date, these provisions have been enacted in Queensland, Victoria, Western Australia and the Northern Territory.[86] The most recent development occurred in Victoria. Reforms announced in June[87] to align Victoria's approach with several other states and territories were promptly enacted by the *Children Legislation Amendment Act 2019* (Vic) and commenced on 18 September 2019. The provisions require the plaintiff to seek leave from the Court, and empower the Court to grant leave to commence the action if it is shown to be 'just and reasonable'.[88] The prior settlement agreement and related agreements will be set aside to the extent necessary. On hearing the action, which

85 *Limitation of Actions Act 1974* (Qld) ss 48(5A)–(5C); these reforms commenced on 1 March 2017. The motion for this reform was initiated by Queensland Independent Rob Pyne MP.

86 See *Limitation Act 1981* (NT) ss 53(2), 54; *Limitation of Actions Act 1974* (Qld) ss 48(5A)–(5C); *Limitation of Actions Act 1958* (Vic) ss 27QA(2), 27QE; *Limitation Act 2005* (WA) s 92.

87 Hennessy (n 56). The Attorney-General stated: 'Many victim survivors were pushed into these agreements without proper legal advice so it's important we give them an avenue to overturn these often unfair compensation orders'. She also stated: 'Any legal agreement that a victim of child abuse has entered into with an institution that is unfair, the court will have the power to overturn and enable that person to seek real justice': 'Child Abuse Survivors "Ripped Off" by Agreements Given Chance to Sue Under Law Change' *ABC News* (online, 14 June 2019) <https://www.abc.net.au/news/2019-06-14/survivors-allowed-to-sue-their-abusers-under-law-reforms/11208686>.

88 *Children Legislation Amendment Act 2019* (Vic) s 27QE.

typically is likely to involve quantum only but may potentially extend to liability,[89] the Court will take into account any amount already paid under the original settlement agreement in arriving at a decision as to damages.

However, these reforms have not been made in the Australian Capital Territory, South Australia,[90] or Tasmania, and it is insufficiently clear that the New South Wales provisions apply to these situations.[91] Accordingly, this creates further substantial inequality in the legislative entitlements of plaintiffs across the nation. The first clear issue in this respect is therefore that the Australian Capital Territory, South Australia and Tasmania, and possibly New South Wales, need to remove this inconsistency by making appropriate reforms.

The second clear issue here pertains to the appropriate operation of these provisions through a sound interpretation of when it will be 'just and reasonable' to enable revival of a settled claim. The legislation does not define the concept, nor provide guidance or criteria about its nature and application. If interpreted too narrowly, the policy underpinning the provision will be defeated; if too broadly, defendants may be placed in an unfair position.

The meaning and application of this concept has already been the subject of judicial consideration. In Western Australia, in *JAS v Trustees, Christian Brothers* ('*JAS*'),[92] Sleight CJDC found it was just and reasonable to set aside a settlement agreement for $100,000 in damages, made in 2015, which had been the result of the plaintiff's claim regarding alleged sexual abuse by a number of Christian Brothers in two orphanages when he was aged 8 to 14, from 1962–68. The deed of settlement included provisions stating that the plaintiff agreed the settlement sum fully extinguished his rights against the defendant, was a full and final settlement of all loss and damage sustained, and would make no further claim for damages or compensation. The plaintiff sought leave to set aside this agreement, and to commence an action against the two orphanages.

In considering the application of the Court's power under section 92 of the *Limitation Act 2005* (WA) to grant leave where 'just and reasonable', Sleight CJDC first identified several broad principles of law, albeit from another legal context:[93] that the Court's discretionary power created is broad; that the onus is on the applicant to demonstrate that in the circumstances it would be just and reasonable to grant leave; and that what is just and reasonable depends on the facts in each case.

However, Sleight CJDC determined that in relation to applications under section 92, the central task for the Court is to consider the circumstances of the parties at the

89 The provisions empower the Court to hear and determine any action on a previously settled action, and do not exclude consideration of liability. See further *TRG v The Board of Trustees of the Brisbane Grammar School* [2019] QSC 157, below.

90 In South Australia, the *Limitation of Actions (Child Abuse) Amendment Act 2018* (SA) sch 1 cl 3 permits revival of a previously barred cause of action, but there is no mention of application to previously settled actions. However, on 19 June 2019, the Hon Connie Bonaros MLC introduced a private member's bill to enable revival of previously settled actions: Limitation of Actions (Actions for Child Abuse) Amendment Bill 2019 (SA) s 3B.

91 The New South Wales provisions in *Limitation Act 1969* (NSW) sch 5 do not clearly and expressly apply to matters that have been settled, although the definition of 'judgment' in sch 5 cl 8(2) as 'a judgment given extends to a judgment entered and also to an agreement entered into before and in connection with any such judgment' indicates it does. However, the second reading speech indicates the provisions are not intended to have this effect: New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 February 2016, 6399 (Gabrielle Upton, Attorney-General).

92 (2018) 96 SR(WA) 77 ('*JAS*').

93 Namely, the power to grant an extension of the statutory time limit: ibid 83 [19]–[21], citing *Gilmore v Quittner* [2011] NSWSC 809.

time the settlement was made, rather than the prospects of the action.[94] This was because the new legislative context allowed actions to be brought without any time limits, reflecting a clear acceptance that the orthodox reasons underpinning time limits did not apply to this class of case; and that even if leave was granted to commence an action, the defendant would not be disadvantaged because a court in awarding damages would take into consideration any amount already paid.

In interpreting the meaning and application of the 'just and reasonable' concept, Sleight CJDC drew on legislative and common law principles of statutory interpretation. His Honour considered the mischief that section 92 and associated provisions intended to remedy.[95] His Honour considered the legislative context of section 92, referring to the explanatory memorandum[96] which explained the prospective and retrospective removal of time limitations for actions for child sexual abuse; the connection between the amendments and the recommendations of the Royal Commission; the Commission's key finding about delayed disclosure and the effect of conventional limitation periods being to deny claims being heard on their merits; and the aim of section 92 as being 'to remedy some of the past injustice caused by the operation of strict time limitation periods to child sexual abuse actions by providing for the setting aside of previously barred and previously settled causes of action under certain conditions'.[97]

Sleight CJDC concluded that the evaluative judgment of whether it was 'just and reasonable' to allow commencement of a previously settled claim ought to consider these remedial principles. His Honour granted leave to commence the action and set aside the settlement agreement, citing six reasons supporting the conclusion it was 'just and reasonable' to do so.[98] First, as a general rule, there is no limitation period for these claims. Second, when the applicant entered the settlement agreement, his claim under existing law was barred, and this meant his 'bargaining position was severely curtailed and he was left with no real choice but to accept whatever amount was offered' by the defendant, without this amount necessarily reflecting his proper entitlement if successful in an action.[99] Third, the extent of this entitlement had never been fully tested on its merits. Fourth, the Court could consider any previous settlement payment, meaning the defendant would not be financially disadvantaged by having made that payment. Fifth, granting leave to commence was consistent with the broad legislative intention of the amending legislation, enacted after the settlement agreement, to remove barriers to claimants commencing an action and having the action heard on its merits. Sixth, the respondent did not oppose this application.

JAS was the first decision on revival of settled claims, and it is surprising that the Court's detailed reasoning was not referred to in the subsequent Queensland case of *TRG v The Board of Trustees of the Brisbane Grammar School* ('*TRG*').[100] Delivered

94 In obiter, Sleight CJDC remarked that he did not exclude the possibility that in an appropriate case, a respondent's argument that the applicant could not succeed at trial, or would be unlikely to receive a greater amount, may be relevant; although this point was not argued and His Honour made no decision on this issue: ibid 83–4.

95 Ibid 84, citing *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

96 Ibid, citing *Interpretation Act 1984* (WA) s 19.

97 Ibid.

98 Ibid 84–5.

99 Ibid 84 [27].

100 [2019] QSC 157 ('*TRG*').

six months after *JAS*, the decision of Davis J dismissed the application brought under Queensland's equivalent provisions[101] to set aside a previous settlement agreement, made in late 2002, on the basis it was just and reasonable to do so. The final settlement agreement was for $47,000, whereas the applicant had earlier offered to settle his claim for $150,399 plus costs. The abuse involved multiple incidents of contact sexual abuse by a school counsellor at Brisbane Grammar School in 1986 and 1987. The respondent did not contest the allegations of abuse.[102] There was evidence that in negotiations, the respondent had indicated it would rely on the expiry of time.[103]

There were substantial differences in *TRG* compared with *JAS*; in *TRG*, the factual matrix was complex, the respondent contested the application, and the parties made a variety of technical submissions requiring the Court's consideration in relation to statutory interpretation, and submissions in relation to the facts and their relevance to the exercise of the court's power.[104] However, ultimately, the Court's core task was to interpret the remedial provision and its central concept of 'just and reasonable', and apply it to the facts.

The key elements of Davis J's reasoning underpinning the conclusion were the findings regarding legal principle, and the facts. Regarding legal principle, Davis J considered the legislative history and parliamentary debates,[105] and principles of statutory interpretation.[106] His Honour arrived at several conclusions: first, 'the term "just and reasonable" is simple enough and its meaning and application is discerned from the context and purpose of the *Limitation Act*';[107] second, the purpose of section 48A(5) 'is to strike a balance' between two competing interests, being the defendant's interests in maintaining a settlement agreement and avoiding 'the costs and uncertainty of further litigation and the prospect of an adverse judgment', and a plaintiff's interest in 'commencing a new claim where the result may be more favourable than the settlement';[108] third, that in determining which interest prevails, many factors are relevant, including the newly created absence of a limitation period for child sexual abuse claims, and that unfair settlements may have been agreed.[109] Overarching these

101 *Limitation of Actions Act 1974* (Qld) ss 48(5A)–(5C). At the time of writing it is not known whether this decision is being appealed. In Queensland, the *Limitation of Actions Act 1974* (Qld) s 48(5A) states: 'An action may be brought on a previously settled right of action if a court, by order on application, sets aside the agreement effecting the settlement on the grounds it is just and reasonable to do so'. In Western Australia, the *Limitation Act 2005* (WA) s 92(3) states: 'The court may, if satisfied that it is just and reasonable to do so – (a) grant leave to commence the action, subject to conditions; and (b) to the extent necessary for that, set aside the settlement agreement and any judgment giving effect to the settlement'.

102 The respondent did not deny Lynch's criminal acts, and made public acknowledgments of it: *TRG* [2019] QSC 157, [169]–[170] (Davis J). The counsellor was Kevin Lynch, who was employed at Brisbane Grammar School from 1 January 1973, first as a teacher, and then from 1977 as its full-time counsellor. He resigned from the school in November 1988, and was then employed at St Paul's school. In 1997 he was charged with seven counts of indecently dealing with a student at St Paul's school, and he then committed suicide. By the time of the applicant's mediation with Brisbane Grammar School, there were 64 claimants including the applicant, who were being represented by the same law firm: at [34]. This is relevant since the school's approach to the mediation was to deal with all the claims.

103 Ibid [196]–[210], [220]–[221], [238] (Davis J).

104 The judgment comprehensively details the applicant's and respondent's arguments.

105 *TRG* [2019] QSC 157, [99]–[128].

106 Ibid [143]–[148].

107 Ibid [159].

108 Ibid [153]–[154].

109 Ibid [156].

conclusions was Davis J's understanding that the 'starting point is that there is a binding settlement agreement'.[110]

Ultimately, what underpinned the dismissal of the application in *TRG* were three key findings by Davis J. First, the expiry of the limitation period 'had no material impact upon the quantum of the settlement'.[111] Second, the settlement figure was a 'fair and reasonable reflection of the applicant's case as it appeared in 2002'.[112] Third, the settlement figure 'was the product of an arm's length bargain facilitated through a fair mediation process where the applicant was very ably represented'.[113] Davis J also considered the prospects of success and likely quantum of damages to be important factors when deciding whether it was just and reasonable to grant leave, and accepted the applicant had strong prospects;[114] it was also accepted that successful new proceedings would result in a higher award of damages.[115] Davis J also held that the potential for prejudice to the defendant through delay was relevant, even if it had limited application in these circumstances.[116]

These decisions indicate that as a matter of law, courts have to date construed the legislative context differently. In *JAS*, Sleight CJDC emphasised that the Court's central task was to consider the circumstances of the parties at the time the settlement was made, rather than the prospects of the action, and in doing so, recognised that where a claim was time barred, the plaintiff's bargaining position was so severely curtailed as to be left with no real choice but to accept the amount offered. *JAS* also placed weight on the fact that the claim had never been heard fully on its merits, and that the policy basis underpinning the new legislative context was to facilitate this, and that the defendant would not be financially disadvantaged. In contrast, Davis J in *TRG* relied on factors beyond those contemplated in *JAS*, gave different emphasis to aspects of the Court's power, and appeared to take a narrower view of the overall legislative context which was less favourable to plaintiffs. Despite clear evidence the respondent would rely on the expiry of time, Davis J found '[t]here is no direct evidence that the limitation issue was taken into account in the calculation of the final settlement figure'.[117] This comment contradicts the earlier findings, and seems inherently unlikely given the school's posture, course of conduct, scale of potential liability, and involvement of insurers, who, as Davis J pointed out, could insist on using the expiry of time as a defence. Davis J concluded that, rather than the limitation issue, the factor which

110 Ibid [153]. Davis J rejected the applicant's apparently broader submission that settlement agreements accepted when the time limitation period had expired were prima facie subject to being set aside, given the legislative context and purpose.

111 Ibid [246].

112 Ibid [245].

113 Ibid [245]. See, further, on the mediation process: [234]–[239], [277].

114 Ibid [272], and at length at [161]–[187]. This was considered in the context of the current state of the law of vicarious liability, which since the decision in *Prince Alfred College* (2016) 258 CLR 134 would place the applicant in a strong position in the circumstances of this case. In contrast, the situation in 2002 regarding vicarious liability would have been more tenuous. Note also that Davis J appeared to view the significance of the new legal climate being more favourable to the plaintiff not as directly bearing upon whether it was just and reasonable to grant leave, but as indicating the reasonableness of the settlement at the time it was made: at [265]. Note that in *JAS*, no arguments were raised about the issue of a plaintiff's prospects of success, and Sleight CJDC reserved his position on whether they would be a relevant consideration: (2018) 96 SR(WA) 77, 83–4.

115 *TRG* [2019] QSC 157, [194]–[195].

116 Ibid [247]–[256], [274]. In *JAS*, Sleight CJDC did not offer an opinion on the best approach to the matter of prejudice due to delay, given that the respondent produced no evidence of prejudice: (2018) 96 SR(WA) 77, 84 [23].

117 *TRG* [2019] QSC 157, [230].

reduced the settlement figure was the requirement to prove on the balance of probabilities that the principal was made aware of the abuse of students and failed to act.[118] At the time of writing, *TRG* remains under appeal.

Both decisions indicate that as a matter of application to factual contexts, what may be decisive is whether the Court finds the plaintiff's acceptance of the settlement offer was, or was not, influenced by the expiry of time and or the defendant's actual reliance on it, or its express or implied threat to so rely, in the course of negotiations. Future applications for leave to set aside a settlement agreement on the grounds that it is just and reasonable to do so will need to consider the different processes of judicial reasoning conducted in *JAS* and *TRG*. The effect on the plaintiff's acceptance of the sum offered of both the expiry of time, and the defendant's express and implied conduct, will likely be a central issue considered by counsel and courts alike. Judicial decisions on these applications will need to consider the legislative text, context and purpose,[119] the general principle of statutory interpretation that remedial provisions should be construed liberally,[120] and how to achieve the objects of the provisions as expressed therein and as supported by extrinsic materials.

In this regard, there is no dispute that fairness for defendants must be sufficiently protected to prevent unjust reactivation of fairly settled claims. The legislative provisions achieve this through multiple safeguards protecting defendants' fair trial rights. The legislation enables a court to consider whether it is both just and reasonable to set aside a settlement agreement, and to consider sums already paid in any new judgment. As suggested by the Explanatory Memorandum to the Victorian legislation, the court has discretion to determine what is just and reasonable according to the circumstances of each case, applying broad principles and considering all relevant factors including the relative strengths of the parties' bargaining positions, how the parties conducted themselves, and the settlement sum.[121] In addition, as recognised by the human rights compatibility statement regarding the right to a fair hearing under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) section 24, a defendant has

> the right to be heard and to respond to any allegations made in a proceeding. This will include the defendant's right to seek a summary dismissal or permanent stay of proceedings where the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible.[122]

Finally, the provisions do not automatically guarantee a plaintiff success. As indicated in the compatibility statement, a plaintiff who has a past judgment or settled cause of action set aside, and who pursues a new civil claim, will still have to prove the

118 Ibid [232].

119 See *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 where Kiefel CJ, Nettle and Gordon JJ stated:

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

120 *Bull v A-G (NSW)* (1913) 17 CLR 370, 384 (Isaacs J); *Deal v Father Pius Kodakkathanath* (2016) 258 CLR 281.

121 Explanatory Memorandum, Children Legislation Amendment Bill 2019 (Vic) 17.

122 Victoria, *Parliamentary Debates*, Legislative Assembly, 15 August 2019, 2691 (Luke Donnellan). It was also concluded that there was no breach of other rights, such as through arbitrary deprivation of property.

defendant is liable.[123] These multiple safeguards, together with the requirement that an applicant must satisfy the court that it is just and reasonable to set aside a settlement agreement, provide robust protection of defendants' rights.

What is also indisputable is that the legislative principles embed a justified primary policy value, underpinned by an understanding of the socio-legal context in cases of child sexual abuse, that where a plaintiff's agreement to settle was induced by the defendant's actual or implied threat to rely on expiry of time to defeat the claim, fundamental interests of justice require that the plaintiff be afforded the opportunity to revisit the agreement. Similarly, wherever an imbalanced power dynamic or inequality of bargaining power resulted in an initial settlement outcome clearly unfair to the plaintiff, the plaintiff should be afforded this opportunity. The primary policy value animating these provisions is to provide a deserving applicant with an opportunity to have a prior settlement revisited where it was agreed in unjust circumstances. This policy value is plainly manifest in the mischief sought to be remedied by the provisions, as further demonstrated by extrinsic materials including second reading speeches and explanatory memoranda, which support proper interpretation and application of the provisions.[124] An orthodox application of legislative principles of statutory interpretation requires a construction of the provisions that promotes their purpose rather than one that would not.[125] It is clear from second reading speeches[126] that the provision allowing the setting aside of agreements when it is 'just and reasonable' is intended to remedy the 'unjust product of previous time limits which led to survivors accepting inadequate settlements and releasing the institution from future liability'.[127] The shadow of the expiry of time would naturally operate to affect a plaintiff's decision to accept or reject an offered settlement in negotiations, no matter how well-represented by legal advisors, and this inclination would be magnified by a defendant's express or implied threat to rely on it to defeat, prolong or complicate proceedings.

Accordingly, from a normative perspective, the reasoning of Sleight CJDC in *JAS* regarding the function and interpretation of the provisions, the effect of the expiry of time on the plaintiff's acceptance of the initial settlement amount, and the claim never having been fully heard on its merits, is more consistent with the nature and purpose of the provisions than the more restrictive construction of both the facts and the legislative intention by Davis J in *TRG*. Davis J in *TRG* did not appear to afford the primary policy value its due weight, and the construction adopted defeated the legislative intention in circumstances where in settlement negotiations the defendant plainly relied on the expiry of time. Sleight CJDC's view of the broader legislative context and its effect in allowing civil claims for child sexual abuse without restriction, together with the nature and purpose of the specific provisions enabling revival of previously settled claims, informed an interpretation and application of the provisions promoting their intention and primary policy value.

123 Ibid 2692.

124 *Legislation Act 2001* (ACT) s 142; *Interpretation Act 1987* (NSW) s 34; *Acts Interpretation Act 1954* (Qld) s 14B; *Interpretation of Legislation Act 1984* (Vic) s 35(b); *Interpretation Act 1984* (WA) s 19.

125 *Legislation Act 2001* (ACT) s 139; *Interpretation Act 1987* (NSW) s 33; *Acts Interpretation Act 1954* (Qld) s 14A; *Interpretation of Legislation Act 1984* (Vic) s 35(a); *Interpretation Act 1984* (WA) s 18.

126 See, eg, Victoria, *Parliamentary Debates* (n 122) (Luke Donnellan) 2695–6 .

127 Ibid 2691.

D Identification of a Proper Defendant

The fourth area of inconsistency is that subsequent additional legislative reforms have been made to enable the bringing of actions against entities that previously had evaded liability due to their legal status and/or the manner in which assets were held. The intent of these reforms has been to remedy the problem faced by plaintiffs when a defendant, typically a religious entity, evaded liability by relying on its status as an unincorporated association, meaning it did not possess juridical status and could not be sued. This technical legal principle had been confirmed by the New South Wales Court of Appeal in *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis*.[128]

The reform enabling a plaintiff to identify a 'proper defendant' with legal personality such that they could be sued, was recommended by the Royal Commission.[129] Related to this, the legislative reforms enable proceedings to be brought against an unincorporated association, and allow the current office holders in such an entity to be held liable for the negligence or actions of their predecessors, on behalf of the entity. The provisions displace or create exceptions to orthodox principles of corporations law, allowing an action to be brought against the current office holder of an unincorporated association, and authorising the office holder to use assets held by the institution, including the assets of a trust, to satisfy its liability arising out of a settlement or a judgment. The organisation may appoint an entity as the proper defendant for the organisation, and a court is also empowered to appoint a proper defendant in designated circumstances, including where the organisation has not done so.

To date, these reforms have been made in the Australian Capital Territory, New South Wales, Victoria, and Western Australia, and Queensland.[130] They have not been

128 (2007) 70 NSWLR 565. The Court acknowledged that legislation may modify the common law principles, but accepted the soundness of the Church's argument that the Trustees could not be liable. The basis for this finding was that the Church was an unincorporated association, and

> [a]n unincorporated association that is not a partnership is a group of individuals associated together for some lawful purpose other than profit that may or may not have a rigid constitution or a fixed and finite membership. Procedurally, it cannot (at common law) sue or be sued in its own name because, among other reasons, it does not exist as a juridical entity …

at 576 [47] (Mason P). It was accepted that individuals holding a managerial role within an unincorporated association can be held liable individually as principals if the activity in which they exercise control creates a contractual or tortious claim, but that any such liability remained personal and not representative. A consequence of this was that liability remained with the members who formed the committee or other controlling body who were in office at the relevant time of the tort, and not their successors.

129 *Redress and Civil Litigation Report* (n 35) ch 16 generally, and recommendation 94 at 511.

130 The key provisions are: Australian Capital Territory: *Civil Law (Wrongs) Act 2002* (ACT) ch 8A, as amended by the *Civil Law (Wrongs) (Child Abuse Claims Against Unincorporated Bodies) Amendment Act 2018* (ACT), which commenced on 28 September 2018; New South Wales: *Civil Liability Act 2002* (NSW) pt 1B div 4, as amended by the *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018* (NSW), which commenced on 1 January 2019; Queensland: the *Civil Liability and Other Legislation Amendment Act 2019* amends the *Civil Liability Act 2003* (Qld), inserting a new ch 2 pt 2A; Victoria: *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic), which commenced on 1 July 2018; Western Australia: *Civil Liability Act 2002* (WA) ss 15A–15L as amended by the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* (WA), which commenced on 1 July 2018. Note also that the ACT provisions in the *Civil Law (Wrongs) Act 2002* (ACT) ch 8A are applied through s 114A to claims against institutional defendants regarding both sexual abuse and physical abuse, both retrospectively and prospectively. This can be contrasted with the *Limitation Act 1985* (ACT) s 21C allowing retrospective claims against both institutional and non-institutional defendants for sexual abuse, but not for physical abuse. These provisions are inconsistent and appear to result in several incoherent outcomes: for example, under s 21C an action cannot be brought

made in South Australia, Tasmania, or the Northern Territory.[131] The evident need in this regard is therefore that the South Australia, Tasmania, and the Northern Territory need to remove this inconsistency by making appropriate reforms, so that plaintiffs nationwide have an equal capacity to proceed against the same kinds of institutional defendants, and in some cases, ultimately the same defendant.

The only judicial consideration of these provisions to date occurred in *JCB v Bird*.[132] The plaintiff alleged that in April 1982 when he was aged nine, he was anally raped by Gerald Ridsdale, then parish priest at St Colman's Parish, Mortlake. The action alleged negligence by two bishops at the relevant times, who had allowed Ridsdale to be moved to the parish despite knowing of his prior sexual abuse of children, or that they ought to have so known; this included several instances of prior complaints in different parishes and multiple other complaints made about his offending while at Mortlake before April 1982.

In March 2019 the plaintiff sought to amend his earlier statement of claim dated 20 February 2018, so as to join as defendants a non-government organisation, namely the Catholic Diocese of Ballarat, and the Roman Catholic Trust Corporation for the Diocese of Ballarat. The defendants admitted that Ridsdale had abused the plaintiff, and did not plead the *Ellis* defence, but nevertheless opposed the joinder, primarily on the basis that the amending legislation did not permit such joinder if the proceeding was commenced before the date the Act commenced, which here was 1 July 2018.[133]

McDonald J rejected the defendants' argument, holding that the claim against the Diocese founded on Ridsdale's abuse was made after the commencement of the Act, and as such had no impermissible retrospective effect. The only manifestation of retrospective operation was that the claim applied to abuse that occurred before the commencement of the Act, and this was the intent of the application of the provisions as expressed in section 4(3),[134] and was consistent with the main purpose of the Act as expressed in section 1.[135]

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retrospectively for non-institutional physical abuse; but under ch 8A an action can be brought against an individual defendant (but ostensibly only where it is necessary to engage the provisions enabling identification of a proper defendant). These inconsistencies should arguably be amended to clearly enable equal opportunity to commence an action for physical abuse, applied retrospectively, against any relevant defendant.

131 In the Northern Territory, a consultation on civil litigation reforms including the identification of a proper defendants was undertaken from September to November 2018. The Department of Attorney-General and Justice's response is forthcoming: Department of Attorney-General and Justice, *Options for Implementing Civil Litigation Reforms in the Northern Territory as Recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse* (Web Page, 30 May 2019) <https://justice.nt.gov.au/attorney-general-and-justice/law-reform-reviews/published-reports-outcomes-and-historical-consultations/historical/2018/open-law-reform-consultation>.

132 (2019) VR 426. The judgment was delivered on 29 May 2019.

133 The defendants also contested the extent of Bishop Mulkearns' knowledge of Ridsdale's prior offending, and made other arguments about the inclusion of further particulars by the plaintiff and the burden placed on the defendants in preparing for trial if this were to be allowed: ibid [40]–[54] (McDonald J).

134 Ibid [10]–[16].

135 Ibid [6]–[28] generally, and at [25]. The defendants' challenge to the plaintiff's joinder attracted considerable criticism, given the circumstances of Ridsdale being known to be a prolific offender, the extensive findings made by the Royal Commission regarding Ridsdale, the Church's own admissions regarding the knowledge of Bishop O'Collins (here, the first defendant, deceased) and Bishop Mulkearns (here, the second defendant, deceased), and the clear wrongness of their acts and omissions in moving Ridsdale to other parishes despite knowing of his abuse of children: Tammy Mills and Andrew Thomson, '"They Have Not Changed": Anger at Catholic Church's Legal Tactics', *The Age* (online, 1 June 2019) <https://www.theage.com.au/national/victoria/they-have-not-changed-anger-at-catholic-church-s-legal-tactics-20190601-p51ti7.html>. Several months after this decision, the defendants accepted legal responsibility: Melissa

V CONCLUSION

Legislatures in Australia have considered scientific evidence, public policy factors, and pragmatic considerations, and have made historic changes in favour of plaintiffs in civil claims arising from child sexual abuse to enable access to justice. Overall, these advances are landmark reforms, relevant nationally and internationally, which are consistent with science, policy and the rule of law. While the reforms are substantial in effect, legislatures have preserved the judiciary's strong residual controls on the capacity to bring civil claims, especially through powers to stay civil proceedings where there is insuperable prejudice to a defendant's fair trial rights.

Further challenges remain. Unifying the legal principles across Australia's eight jurisdictions is required to achieve optimal legislative approaches nationwide, and avoid unjustifiable inequality in access to the civil justice system. Australia is a federated nation with each state and territory possessing constitutional legislative power to make laws regarding personal injury claims. However, there is no sound reason for any state or territory to provide substantially different and inferior access to civil remedies for personal injury from child sexual abuse based merely on geographical location. Such inequality would be the product of a policy choice, which, on a holistic view, offends rule of law principles that individuals are entitled to equal treatment by the law, and unimpeded access to the civil justice system. Without uniformity, a plaintiff in one state may lack access to a remedy held by another plaintiff elsewhere, for exactly the same kinds of acts and injuries. Other unjust and absurd results could ensue, including the possibility of the same defendant being liable for the same acts in one state or territory, but not in another. The imperative for uniform optimal approaches nationwide is further reinforced by the broader context of harmonised national reforms in this field being recommended by the Australian Government *Royal Commission into Institutional Responses to Child Sexual Abuse*.

Accordingly, reforms are required in the Australian Capital Territory and Western Australia to harmonise the legislation across jurisdictions regarding the types of abuse and neglect covered. Reforms are desirable to clarify and unify the position regarding the revival of previously barred claims, especially in Tasmania and the Australian Capital Territory. Reforms are urgently needed to equally enable the revival of previously settled claims, in the Australian Capital Territory, South Australia, and Tasmania, and New South Wales could amend its provisions to provide greater clarity and harmony. Finally, the Northern Territory, South Australia, and Tasmania should harmonise their legislation with other jurisdictions regarding the identification of a proper defendant.

In addition, courts will be required to scrutinise the legislative and policy intention underpinning these changes, especially when considering questions of justice and reasonableness in applications for permanent stays, and for the setting aside of prior settlement agreements. Ongoing research is also needed to understand the impact of the reforms, to consider whether there are unjustifiable burdens on defendants, and to assess

Cunningham and Andrew Thomson, 'Catholic Church Admits Liability for Paedophile Gerald Ridsdale's Crimes', *The Age* (online, 6 September 2019) <https://www.theage.com.au/national/victoria/compo-floodgates-open-as-church-admits-liability-for-ridsdale-s-crimes-20190906-p52ol0.html>.

whether even these historic developments adequately facilitate access to civil justice in practice for survivors of child sexual abuse.[136]

136 Various impediments and the adversarial system itself may still deter many survivors from accessing the civil justice system in its current form.

Table 1: Australian state and territory civil statute of limitations reforms for child sexual abuse claims (law current to 18 April 2020)

Jurisdiction	Categories of abuse to which the reforms apply	Enables revival of barred claims	Enables revival of settled claims	Enables identification of a proper defendant
Australian Capital Territory	• Sexual abuse	No	No	Yes
New South Wales	• Sexual abuse • Serious physical abuse • Any other connected abuse perpetrated in connection with the sexual abuse or serious physical abuse	Yes	No	Yes
Northern Territory	• Sexual abuse • Serious physical abuse • Psychological abuse that arises from that abuse	Yes	Yes	No
Queensland	• Sexual abuse • Serious physical abuse • Psychological abuse perpetrated in connection with sexual abuse or serious physical abuse	Yes	Yes	Yes
South Australia	• Sexual abuse • Serious physical abuse • Psychological abuse related to that abuse	Yes	No	No
Tasmania	• Sexual abuse • Serious physical abuse • Psychological abuse that arises from that abuse	No	No	No
Victoria	• Sexual abuse • Physical abuse • Psychological abuse arising out of that abuse	Yes	Yes	Yes
Western Australia	• Sexual abuse	Yes	Yes	Yes